UNETCHAC
UNIVERSITIES NETWORK FOR CHILDREN IN ARMED CONFLICT

Universities Network
for Children
in Armed Conflict

Analysis and Recommendations for a Renewal of the ICC Office of the Prosecutor 2016 Policy on Children

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The Universities Network for Children in Armed Conflict

The Universities Network for Children in Armed Conflict (UNETCHAC (uninetworkforchildren.org), was created in November 2020 with the support of the Italian Ministry of Foreign Affairs and International Cooperation. It is the first International Academic Network for the Protection of Children in Armed Conflict committed to enhance the role of Academic Community in promoting dialogue and synergies between different institutional and non-institutional actors aimed at the protection of children involved directly and indirectly in armed conflict. Currently, 50 Universities and Research Centres from different geographical areas, including Europe, Africa, the Middle East and the Americas are part of the Network. Some of these Universities and Research Centres are located in conflict zones. Since its creation, UNETCHAC has promoted a number of relevant international activities and events with the aim of:

- Fostering synergies and cooperation between the participating Universities and Research Centres and other institutional and non-institutional actors (organizing international conferences, high-level events, specialist programs and webinars);
- Developing shared initiatives and joint work experiences with multilevel approach in collaboration with several international institutions and organizations involved in the promotion and protection of children living in conflict zones;
- Organizing research activities, academic weeks, training courses and periodic awareness campaigns;
- Arising awareness on issues concerning the protection of children (and the most vulnerable groups) in armed conflicts also through the elaboration of documents and publication of reports and handbooks.

Universities Network for Children in Armed Conflict
Piazza Navona, 93, 00186 Rome, Italy
+39 06 62289624
+39 06 6879580
www.uninetworkforchildren.org

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Introduction

Children are recognised as victims of crimes falling under the jurisdiction of the International Criminal Court (the "ICC") and indeed they are amongst the most vulnerable categories of victims.

The Preamble of the Statute of the ICC (the "Rome Statute" or "RS") expressly refers to children as victims of the most serious crimes within its jurisdiction.[1] A number of provisions in the Rome Statute addresses children in relation to the legal framework governing the crimes against and affecting them, but also procedurally concerning their participation in the proceedings, their safety, dignity and well-being.[2] These legal provisions reflect the developments in human rights law to focus on children in judicial proceedings, both at the international and national level.[3]

Children are victimised alongside adults, as part of a civilian population or as part of groups targeted on discriminatory grounds. They 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. Children can also be deliberately targeted in the attempt to destroy – physically or culturally – their groups or communities. Children are also sometimes targeted specifically because of their vulnerability, becoming often victims of rape, exploitation or enslavement because they are weaker and cannot defend themselves as well as adults when faced with aggression and usually depend on adults for physical protection and provision of basic needs. Children may also be deliberately targeted because of their relative docility and malleability which make them particularly attractive to criminals who intend to exploit them.

Exposure to violence can harm children's development and children are likely to be disproportionately affected because of their physical and psychological vulnerability. Therefore, the consequences of the crimes children suffer from have more devastating impact on them and result in deeper trauma. The impact of international crimes on children is indeed dramatic in terms of the long-term physical and psychological consequences and traumatic effect.[4] Moreover, in many of the countries where international crimes are committed children constitute a very large percentage of the population (if not the majority).

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[1] The relevant part of the Preamble of the Rome Statute ("RS") reads as follows : "*Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity*".

[2] Article 68 RS provides for protection and participation of victims and witnesses in the proceedings. See also Articles 36(8)(b), 42(9) and 44(2) of the Rome Statute relating to the legal expertise of judges, advisers and staff including, *inter alia*, violence against children.

[3] UNICEF affirmed in a preparatory document for the Rome Conference that the "*legal safeguards recognized in international human rights law, particularly the CRC* [Convention on the Rights of the Child], *should be effectively secured*" in the ICC. UNICEF also stated that child witnesses and victims should benefit from "*legal and other appropriate assistance*" and that consideration should be given to the "*special needs of the child*", particularly making reference to the need to secure a "child-friendly" environment. See, *UNICEF and the Establishment of the International Criminal Court* (17 March 1998), ICC Preparatory Works, p. 5. Likewise, at the Rome Conference, the Special Representative of the United Nations Secretary General on Children and Armed Conflict at the time indicated that the ICC provisions should be consistent with international standards, including, among others, the CRC. See, *Message from Olara A. Qtunnu, Special Representative of the Secretary-General for Children and Armed Conflict to the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (17 June 1998), ICC Preparatory Works.

[4] BETANCOURT, T.S. and KHAN, K.T. (2008). *The mental health of children affected by armed conflict: Protective processes and pathways to resilience*, Rev. Psychiatry, 20(3), pp. 317-328. See also, Office of the UNSGSR on Violence against Children, *Hidden scars; how violence harms the mental health of children*, 2020.

International law – including international human rights law (IHRL) and international humanitarian law (IHL) – recognises that children's vulnerability entitles them to protection that goes above and beyond the rights and general protection afforded to them as human beings and civilians. However, children are often 'invisible' both in situations of armed conflict and in accountability processes. This indifference towards children's issues is linked in part to the mistaken assumption that they lack in agency and require protection.

It is essential to ensure that children are not rendered invisible by adult-centric approaches to accountability; that they are not seen as a homogenous group and that they are involved in accountability processes in a way which captures the full breadth of their experiences and victimization.

The issue of the protection of children in armed conflict raises a preliminary matter related to the definition of the persons who should be entitled to said protection. While international law is clearly moving towards a fixed age of eighteen years to define "children" - also as far as their involvement in armed conflict is concerned - the specificities of the different age stages need to be taken into account. A gender perspective, as well as the different situations and locations in which children may be during and by consequence of an armed conflict should also be carefully considered, particularly when the hostilities impose to flee from the conflict area as internal or international displacement expose children to trafficking and smuggling, and other serious violations of their human rights. Special consideration should be given to the question of education, one of the most important human rights of children as it directly affects their future. Accountability for crimes against and affecting children is therefore essential to ensure the closure of the gap between reality and impunity and guarantee the possibility for children affected by international crimes to have reparations for the harm suffered.

In this perspective, a review and update of the Policy on Children (the "Policy") - issued by the Office of the Prosecutor ("OTP") in 2016 - is essential to ensure that crimes against and affecting children are adequately and promptly investigated and prosecuted and that attention is paid in ensuring effective and child-friendly participation of children in the process of justice at the international level, also in light of the current development of international law – both IHL and IHRL, towards a more accentuated attention to children's rights and their protection. The updated Policy should also contribute – amongst its objectives – to creating a culture of children's rights in international justice.

Methodology

This Paper aims at contributing to update and improve the 2016 OTP Policy on Children. The general principles and strategies underpinning the Policy remain valid. However, the need for a special consideration of children's condition and protection has recently taken on particular importance at the international level, including in designing judicial and non-judicial mechanisms in which a child-friendly approach has to be integrated.

The Universities Network has involved in the reflection a number of professor and practitioners with experience in matters related to the involvement of children in armed conflict both at the national and international level some of whom reside in conflict zones.

The Paper does not aim to be exhaustive in the consideration of the issues to be covered by the updated Policy but only to underline some of the matters which in the opinion of the drafters should be either developed or included.

The Paper is divided in two Parts. The first one contains reflections on the regulatory framework and types of crimes against and affecting children, while the second one includes considerations on matters related to the proceedings. The recommendations are summarised at the beginning of the document.

The Network thanks the Working Group of Experts for their contribution to this Paper:

Team Leaders
Laura Guercio
Paolina Massidda
Working Group
Ahmed Al Fatlawi
Stefano Dominelli
Olena Krytska
Kito Masimango
Fausto Pocar
Domenico Rosani
Silvia Scarpa

Recommendations

This section presents a schematic summary of a set of recommendations stemming from the thematic analyses elaborated in this Paper. The recommendations must be read not as mutually exclusive, but rather as mutually reinforcing the interventions that the OTP could undertake in order to strengthen the Policy.

I. General

1. Include in the Objectives of the Policy : contributing to the creation of a culture of children's rights in international justice.
2. *Acknowledge all crimes against and affecting children.*
3. *Broaden the current interpretation of the regulatory framework to cover all types of conduct which may affect children.*
4. *Focus on child-victims rather than on victim-perpetrator dilemma.*
5. *Enhance determination to interpret the relevant law in light of intersectional dimensions of mass atrocities.*

II. Related to the Regulatory Framework

(i) Enlistment, conscription and use of children under the age of 15

6. Broaden the understanding of who is a "child-soldier" as to encompass as a large group of children associated with armed groups and forces as possible, [in turn extending the benefits afforded to child-combatants, such as demobilisation packages, training opportunities, compensation and access to reparation programmes, including court-ordered reparations].
7. Any difference between "conscription" and "enlistment", namely "voluntariness", should be made only to satisfy the legal requirements under Article 8 of the Rome Statute, but should certainly not serve as a legal basis to justify the perpetrator's conduct, or to diminish his or her sentence, or to diminish the victim's rights to reparation.
8. All dimensions of child recruitment should be considered when charging the crimes of enlistment, conscription and use of children under the age of 15 to participate actively in hostilities.
9. The notion of "use" should not only focus on the tasks performed by children within the armed group, but also on how other warring factions in armed conflict see that child who is associated with the armed group.

(ii) Attacks on building dedicated to education and health care

10. *Make sure that the evaluation of the gravity of conducts falling within the scope of application of Article 8(2)(b)(ix) of the Rome Statute also takes into account inter-generational aspects.*
11. *Ensure that the fundamental principle on interrelation between various crimes and education is clearly stated from the outset of the Policy.*
12. The evaluation of the 'gravity' of the conduct in cases under Article 8(2)(b)(ix) of the Rome Statute should clearly take into account inter-generational assessments, as well as their interrelations with other serious crimes.
13. *Consistently with other policies, extend the descriptive part related to the scope of application of Article 8(2)(b)(ix) of the Rome Statute, in order to give clearer guidance at any*

stage of the proceedings and contribute to the ongoing development of international jurisprudence regarding crimes against and affecting children.
14. *Include 'teachers' as persons that may be heard to determine the child's best interests in given cases*.
15. Ensure that the care and the attention in the Policy on Children are coordinated – from both a formalistic and a substantive point of view – with other OTP Policy Papers, and namely with the criteria for prioritisation of selection of situations and investigations in single cases.

(iii) Sexual and gender-based crimes (SGBC)

16. Adopt a more explicit language on the specific challenges faced by LGBTQI+ children.
17. Openly and vastly address the relevance of sexual orientation in the framework of SGBC, expressly using the acronym "LGBTQI+", or other acronyms deemed appropriate.
18. Better address the relevance of SGBC against child boys, offering guidance to OTP's staff to recognise patterns of violence, interact with alleged victims, and support abused children and child witnesses during and after their interaction with the Prosecution.
19. Better address the need for specialized staff as regards SGBC providing for specific training to ensure that staff knows how to facilitate victims' access to legal services and support, and is able to efficiently address the fear of stigma and discrimination that may prevent children, especially boys and LGBTQI+, from reporting crimes.
20. Enhance comprehensive and consistent data on SGBC, including those against boys and LGBTQI+ children in order to assess the scope and nature of these crimes and develop evidence-based strategies to address them effectively.
21. Provide specific guidance on how to investigate and prosecute SGBC committed against LGBTQI+ children.

(iv) Cultural heritage

22. Include the concept of cultural heritage as a crucial criterion in order to better understand the distinctive character of the children involved in the investigation phase.
23. Stress the value of children's cultural heritage and the fact that attacks on or harming cultural heritage may be a strong signal of the persecutory nature of said attack.

(v) Deportation and transfer of children

24. Specify that deportation and/or forcible transfer of children may fall within the scope of application of Articles 6, 7, and 8 of the Rome Statute.
25. Provide clear investigation criteria regarding the element of spontaneity.

(vi) The crime of ecocide and children

26. Provide for a special consideration of the protection of children enshrined in Article 8(23)(b)(iv) when an attack causes incidental "widespread, long-term and severe damage" to the natural environment.
27. In charging the crime, attention should be given to the principle of proportionality, bearing also having in mind that the general customary principle of precaution may also come into consideration.

III. Related to the proceedings

(i) Age

28. Explicitly recognise the different micro-age categories under the category of minors and outline the age ranges for each category.
29. Underline that the recognition of the various needs and protecting issues in the different age groups of children is a critical aspect to be taken into account in investigating and prosecuting crimes against and affecting children.
30. Include young adults between 18 to 21 years of age amongst the beneficiary of the Policy and the related additional safeguards and interview practices.

(ii) Proceedings in general

31. Ensure that crimes against and affecting children are considered since the early stages of the proceedings and as a priority.
32. Ensure that children are not rendered invisible by adult-centric approaches to accountability.
33. Ensure that throughout the proceedings the experiences and victimisation of the children are fully considered.
34. The best interests of the child should be the primary consideration throughout the proceedings.
35. Reinforce the concept of a child-centred and child-friendly process during investigations and prosecutions.
36. Develop child-friendly outreach material.
37. Develop and/or enhance staff capacity and competency as a key mean for ensuring that investigations are child-competent; and that a child-centred analysis of crimes and violations is systematically integrated into investigations and prosecutions.
38. Improve the recruitment of investigators and prosecutors with specific expertise on how to investigate crimes against children, including engaging in active efforts to recruit from national jurisdictions, in order to capitalise on domestic criminal investigators' formal training and up-to-date experience interviewing children; ensure that they are all equipped with the relevant legal and investigative skillset, to investigate crimes affecting children, and ensure that this expertise translates in child-competent approaches across all operational aspect of the OTP work.
39. Adopt operational guidelines on the different aspects and type of crimes against and affecting children.
40. Reinforce the existing structures providing for the protection, security and well-being of children interacting with the Prosecution (and the ICC).
41. Develop knowledge sharing channels among accountability mechanisms at the international level, national institutions and civil society organisations, including the creation of dedicated focal points to secure periodic meetings, foster exchange of knowledge and best practices between experts.

(iii) Meeting, interviews and questioning

42. Give specific attention to the selection of appropriate locations for meeting/interviewing children.
43. Give specific attention to the setting of the courtroom in case of children coming to testify.

44. Establish general guidelines on meeting, interviews and questioning applicable throughout the proceedings.
45. Questioning should preferably carried out in a conversation-like format rather than a one-sided examination.
46. Interviews/meetings should be kept to a minimum, their length should be adapted to the child's age and maturity.
47. Interviews should be prepared in a manner which maximizes the possibility of interviewing the child only once. When more meeting/interviews are necessary, they should be carried on by the same person.
48. Mechanisms should be put in place to ensure regular continuous contact between investigators/prosecutors and the child.

(iv) Preservation of evidence

49. Alternative mechanisms other than live testimony in court should be explored to preserve the child's testimony from the passing of time and avoid re-traumatisation.
50. The possibility to use Article 56 of the Rome Statute and/or Rule 68 of the Rules of Procedure and Evidence ('RPE") should be explored when considering testimony by a child.

"Children have an important and unique role in processes that seek truth, justice and reconciliation.
Adults can act on behalf of children and in the best interests of children,
but unless children themselves are consulted and engaged,
we will fall short and undermine the potential to pursue the most relevant and the most durable solutions."[5]

Part I - The Regulatory Framework

1. Acknowledging all crimes against and affecting children

The Policy focusses on crimes in the Rome Statute that expressly refer to children, and on several other "*crimes directed specifically against children or those that disproportionately affect them*".[6] The Policy thus emphasises the following crimes against or affecting children:

- conscription, enlistment and use of children under the age of 15 years to participate actively in hostilities, as war crimes in violation of the Rome Statute, Articles 8(2)(b)(xxvi) and 8(2)(e)(vii);
- forcible transfer of children and prevention of birth, as acts of genocide in violation of the Rome Statute, Articles 6(d) and 6(e);
- trafficking of children as a form of enslavement constituting a crime against humanity in violation of Rome Statute, Articles 7(1)(c) and 7(2)(c);
- attacks on buildings dedicated to education and health care, as war crimes in violation of the Rome Statute, Articles 8(2)(b)(ix) and 8(2)(e)(iv);
- torture and related war crimes and crimes against humanity, in violation of the Rome Statute, Articles 7(1)(f), 7(1)(k), 8(2)(a)(ii), 8(2)(a)(iii) and 8(2)(c)(ii);
- persecution as a crime against humanity, in violation of the Rome Statute, Article 7(1)(h); and
- sexual and gender-based crimes as war crimes and crimes against humanity, in violation of the Rome Statute, Articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi).

While the recognition of child-specific crimes is certainly important, children are also victims of all other international crimes, such as killings, pillaging, destruction of property, deprivation of liberty, inhuman treatment, etc. In fact, all crimes within the ICC jurisdiction are crimes which could affect children as direct or indirect victims. Children are generally victimised along with adults during armed conflict. As underlined in the Introduction, children may also be particularly targeted or may constitute a large part of the population affected by the crimes. Because of the vulnerability of children, especially the youngest, they may suffer disproportionately from certain international crimes. Children may also be comparatively more impacted than adults by the same crime (in case of rape, for instance, both the physical and mental health impact may be worse for a child than for an adult).

This illustrates *the importance of specifically acknowledging in the updated Policy all the crimes committed against and affecting children* – even when the latter are victimised alongside the rest of the civilian population.

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[5] MACHEL, G. (2010). Foreword, Children and Transitional Justice: Truth-telling, Accountability, and Reconciliation, edited by Sharanjeet Parmar *et al* (Cambridge: Human Rights Program at Harvard Law School), x–xi.
[6] Policy, para. 38.

2. Broadening the current interpretation of the regulatory framework to cover all types of conduct which may affect children

2.1 General considerations

Children are a central concern of international criminal justice. International crimes and other forms of violence and the abuse of children are disturbing daily realities in today's world. Children and young persons are increasingly being targeted for the purposes of murder, rape, abduction, mutilation, recruitment as child soldiers, trafficking, sexual exploitation and other abuses. It is therefore imperative that the regulatory framework of the Rome Statute is interpreted broadly and in a creative way in order to cover all types of conduct which may affect children.

To illustrate the point, four examples are used.

In the *Lubanga* case, the Prosecution focused exclusively on the crimes of enlistment, recruitment and use of children under the age of 15 to participate actively in hostilities. This choice ignored that one of the main component of the victimisation of former child soldiers during recruitment was being subject to sexual and gender-based crimes ("SGBC") (namely rape and sexual violence) and inhumane treatment. In a number of statements prior to and at the time of the opening of an investigation in the Democratic Republic of the Congo ("DRC") situation, the then Prosecutor made multiple references to the commission of gender-based crimes by militia groups under the command of Mr Lubanga. Nonetheless, no charges of SGBC were brought at the confirmation stage of the proceedings and therefore at trial. Despite the absence of SGBC charges, extensive evidence was heard throughout the trial concerning sexual violence committed against child soldiers by the members of the military movement lead by Mr Lubanga (the *Union de Patriotiques Congolaise*/*Forces patriotiques pour la libération du Congo* (UPC/FPLC)). On the basis of the testimony presented by Prosecution's witnesses, the Legal Representatives of the Victims participating in the proceedings made an attempt to have SGBC considered. In May 2009, they filed a joint submission requesting the Trial Chamber to trigger the procedure for legal characterisation of facts pursuant to Regulation 55 of the Regulations of the Court.[7] They pleaded that the facts of the case showed that crimes of inhumane treatment and sexual slavery were committed in the context of the charges confirmed. While the majority of the Judges found that Regulation 55 permitted the Trial Chamber to modify the legal characterisation of facts to include facts and circumstances not originally contained in the charges,[8] the Appeals Chamber reversed the decision on procedural grounds[9]. In fact, for the victims, these 'other' crimes – namely rape, sexual slavery and inhumane and cruel treatment – caused them even more suffering than the crimes for which Mr Lubanga was tried; and for the girl-victims had a much longer negative impact. The Legal Representatives of Victims attempted to broaden the interpretation of the crime of recruitment arguing that the facts of the case showed that crimes of inhuman and/or cruel treatment and sexual slavery were committed in the context of the charges confirmed. Indeed, it can be argued

[7] The Prosecutor v. Thomas Lubanga Dyilo, *Joint Application of the Legal Representatives of the Victims for the Implementation of the Procedure under Regulation 55 of the Regulations of the Court*, ICC-01/04-01/06-1891-tENG, 22 May 2009.

[8] The Prosecutor v. Thomas Lubanga Dyilo, *Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court*, ICC-01/04-01/06-2049, 14 July 2009.

[9] The Prosecutor v. Thomas Lubanga Dyilo, *Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change"*, ICC-01/04-01/06-2205, 17 December 2009.

that the very act of forcibly recruiting child soldiers under the age of 15 years into the UPC/FPLC to undergo military training and/or using them to participate actively in hostilities constitutes *per se* inhuman and/or cruel treatment under Articles 8(2)(a)(ii) and 8(2)(c)(i) of the Rome Statute. Ultimately, the Trial Chamber in its judgment acknowledged that sexual violence was perpetrated[10] and Judge Odio Benito appended a separate and dissenting opinion arguing that sexual violence should be included within the legal concept of "use to participate actively in the hostilities".[11]

In the *Ntaganda* case, in an unprecedented decision, the Appeals Chamber accepted the Prosecution's position according to which the war crimes of sexual slavery and rape does not require the victims be "protected persons" in terms of the Geneva Conventions ("GC") or "persons taking no active part in the hostilities" in terms of Common Article 3 GC. This interpretation allowed the Trial Chamber to unanimously confirm that rape and sexual slavery by members of an armed group against members of that same armed group may be charged as war crimes.[12] This decision represents an important contribution to international criminal law, triggered by the Prosecution's pioneering charges that reflected the multifaceted use of sexualized violence in armed conflict.

In the *Ongwen* case, the Prosecution brought the charge of forced marriage as an inhumane act, amounting to crimes against humanity, although the Rome Statute does not explicitly include this crime. The Trial Chamber correctly convicted Mr Ongwen for forced marriage as another inhuman act under Article 7(1)(k) of the Rome Statute, recognising that forcing another person to serve as a conjugal partner may *per se* amount to an act of a similar character to those explicitly enumerated by Article 7(1) of the Statute, intentionally causing great suffering or serious injury to body or to mental or physical health; and that the crime of forced marriage is not subsumed by the crime of sexual slavery.[13]

In the *Al Hassan* case, the Prosecution's charges include several sexual and gender-based crimes, including the crime against humanity of persecution on gender grounds – an unprecedented charge before the ICC. The Pre-Trial Chamber confirmed said charge.[14] The trial has concluded in May 2023 and the judgement will be rendered in due course.

These examples show that the current regulatory framework can be interpreted in a broaden way. Consequently, the updated Policy should include reference to said possibility, indicating that *efforts should be made since the preliminary stages of the investigation to identify ways to cover in the charges all types of conduct which may affect children*.

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[10] The Prosecutor v. Thomas Lubanga Dyilo, *Judgment pursuant to Article 74 of the Statute*, ICC-01/04-01/06-2842, 5 April 2012, paras. 890 *et seq*..

[11] The Separate and Dissenting Opinion of Judge Odio Benito is attached at the end of the judgment. See *supra* footnote 10.

[12] The Prosecutor v. Bosco Ntaganda, *Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9"*, ICC-01/04-02/06-1962, 15 June 2017, paras. 57, 70, p. 3.

[13] The Prosecutor v. Dominic Ongwen, *Trial Judgment*, ICC-02/04-01/15-1762-Red, 4 February 2021, paras. 2742 *et seq*. The decision was confirmed on appeal. See the *Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of4 February 2021 entitled "Trial Judgment"*, ICC-02/04-01/15-2022-Red, 15 December 2022, paras. 978 *et seq*..

[14] The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, *Rectificatif à la Décision relative à la confirmation des charges portées contre Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18-461-Corr-Red, 13 November 2019, paras. 662 *et seq*..

In this regard, a number of provisions of the Convention on the Rights of the Child (the "CRC")[15] and of the Optional Protocol on the involvement of children in armed conflict[16] may be relevant. Articles 2, 3, 6 and 12 of the CRC are the core and basic general principles that should be read in combination with other CRC provisions and in general any other applicable law in cases involving children. Any international criminal procedure in which children are either participating as witnesses or victims is bound by these basic principles: non-discrimination, best interests of the child, child's right to life, survival and development and respect for the views of the child in all matters affecting her or him.

Article 2 of the CRC provides a definition of the principle of non-discrimination particularly relevant to children. Although the principle of non-discrimination is provided for in Article 21(3) of the Rome Statute, the CRC definition could be helpful in order to apply the Statute's principle to the particular conditions of children appearing before the ICC. In this regard, in addition to the grounds of discrimination included in the Rome Statute, grounds such as the "parent's or legal guardian's race" and "disability", included in Article 2 of the CRC, could be used.

Article 3 of the CRC is without any doubt the guiding principle of all interpretation and application of law involving a child, and thus is applicable to situations in which a child is a victim or witness before the ICC. The CRC Committee has stated that the child's best interests is a threefold concept. Firstly, it is a substantive right of the child to have her or his best interests assessed and taken as primary consideration when different interests are at stake. It is also a fundamental interpretative legal principle, meaning that if a legal provision is open to more than one interpretation, the one which most effectively serves the child's best interests should be chosen. Thirdly, it is a rule of procedure that establishes that, whenever a decision is to be made that will affect a specific child or a group of children or children in general, the decision-making process must include an evaluation of the possible impact of the decision on the child or children concerned.[17]

The Optional Protocol to the CRC on the sale of children, child prostitution and child pornography, could be of use to define existing crimes under the Rome Statute. For example, the concept of "child prostitution" could be used to define the crime against humanity of "enforced prostitution" (Article 7(1)(g) of the Rome Statute) when committed particularly against children. Similarly, under Article 7(1)(g) of the Rome Statute the concept of "child pornography" could encompass a crime against humanity under the wider conduct of "any other form of sexual violence of comparable gravity". The concept of "sale of children" could be of use to define the crime of enslavement and sexual slavery included in Article 7(1)(c) and 7(1)(g) of the Rome Statute. Furthermore, the ICC could adopt measures such as the ones included in Article 8 of said Optional Protocol, aiming at protecting the rights and interests of children at all stages of a criminal justice process.[18]

[15] Convention on the Right of the Child, 20 November 1989 (the "CRC").
[16] Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000.
[17] CRC Committee, General comment No. 14 (2013): The right of the child to have his or her best interests taken as a primary consideration, CRC/C/GC/14, para. 6.
[18] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 25 May 2000.

2.2. Broadening the legal interpretation for specific crimes

(i) Enlistment and conscription and the controversial element of 'voluntariness'

The Rome Statute is the first international treaty which explicitly refers to the recruitment and use in hostilities of children under the age of 15 as an international crime. Article 8(2)(b)(xxvi) criminalises conscripting or enlisting children under the age of 15 into the national armed forces or using them to participate actively in hostilities during international armed conflicts. Article 8(2)(e)(vii) sanctions the same conduct in the course of armed conflicts not of an international character.

The highest level of protection for children is the interpretation that individuals under the age of 15 cannot legally give consent to join an armed group. This interpretation seems to go one step beyond the level of protection provided for in Article 8 of the Rome Statute, which foresees the crime of "enlistment" involving some kind of consent.[19] It could be argued that, although consent is practically impossible, it is legally foreseen under ICC standards. However, if the crime of enlistment, conscription and use is considered on a case-by-case basis, taking into consideration the environment of violence in which children could be immersed, one could conclude that consent is not legally possible, as children under 15, even if they appear to consent, do not necessarily fully understand the negative consequences of their enlistment (i.e. danger to their lives, punishments, sexual violence, etc.) or do not have the possibility to do so freely (i.e. hunger, domestic violence, civilian insecurity, etc.).[20] One could also argue that, although there is consent at the beginning of the crime (when the child is enlisted), the child will later not have the possibility to stop the crime (i.e. by leaving the armed group). Furthermore, as noted by Judge Odio Benito in her dissenting opinion in the *Lubanga* case, no matter how the crime of recruitment is initiated (by force or "voluntarily"), children indistinctly suffer harm as a result of their involvement with the armed group or force.[21] Accordingly, although consent of children under the age of 15 is foreseen in the Rome Statute, it may be difficult to determine, because many of the "voluntary" child soldiers who decide to join an armed group face some kind of physical, psychological or socio-economic circumstances that force them towards that choice such as violence, starvation, revenge for the killing or abuses committed against the child or her or his family and community, etc.

Considering that Article 8 of the Rome Statute includes the crime of "enlistment" (as opposed to "conscription") which could imply voluntary recruitment, the Prosecution could in the future shift its strategy and *bring charges against the defendant only for the conduct of conscription and use, thus leaving out the conduct of enlistment*. Similarly, in cases in which the crime of enlistment is charged, victims participating in the case could bring the factors that lead to their recruitment to the attention of the Chamber. This could give the Chamber the basis to refer to lack of consent of victims (i.e. extreme hunger, violence, loss of parents, displacement, etc.) and thus re-characterise the charges so as to only include conscription and use. Another option would be, not to drop the charges of enlistment, but make a determination

[19] The Prosecutor v. Thomas Lubanga Dyilo, *Judgment pursuant to Article 74 of the Statute*, ICC-01/04-01/06-2842, 5 April 2012, paras. 246-248. The Prosecutor v. Bosco Ntaganda, *Judgment*, ICC-01/04-02/06-2359, 8 July 2019, paras. 1105–1107.
[20] ABBOTT, A. B. (2000). Child Soldiers – The Use of Children as Instruments of War, *Suffolk Transnational Law Review*, 516-518. FUJIO, C. (2008). Invisible soldiers: how and why post-conflict processes ignore the needs of excombatant girls, *Journal of Law and Social Challenges*, 2 and 5.
[21] See *supra* note 11.

in the sense that although enlistment occurs when the child seems to accept her or his recruitment, this consent is only temporary (and apparent), as the crime is continuous in nature and children under the age of 15 in armed conflict situations could not possibly consent to the harms suffered as a consequence of said crimes. The bottom line is that, although the reality in the field is that many children "consent" to enlist in order to have food or obtain what in their view is safety, this should not be legally relevant, particularly considering that the ICC sets international standards that are often followed by other international and national jurisdictions. It is important to acknowledge *that, regardless of how the recruitment of a child is initiated (with or without consent, either real or apparent, with or without physical force or other means of coercion), harm suffered by the child will be equally serious and devastating for her or his childhood and her or his future life as an adult*. As mentioned by the UN Special Representative of the Secretary General for Children and Armed Conflict, there is no "best interests of the child defence" and recruitment *per s*e is against the best interests of the child.[22] Therefore, any difference between "conscription" and "enlistment" based on "voluntariness" should be made only to satisfy the legal requirements under Article 8 of the Rome Statute, but should certainly not serve as a legal basis to justify the perpetrator's conduct, or to diminish his or her sentence, or to diminish the victim's rights for reparation.

(ii) Use of children under the age of 15 to participate actively in hostilities

The provision is often narrowly interpreted in relation to what 'active participation' means. The criteria normally adopted (including by ICC Chambers)[23] includes the direct and indirect participation of children but not all the dimensions of child recruitment, for instance the work performed by girls who are used for domestic and sexual purposes. In this regard, instead of focussing on the nature of the tasks and the link between said tasks and the military objectives of the armed group or force, a criterion which focuses on the risk and the fact that children lose their civilian status offers great protection to them. It is essential to interpret and apply the law in order to adopt a more comprehensive definition that encompasses other activities connected with hostilities and that are part of today's armed conflicts. *A broader notion of "use" should not only focus on the tasks performed by children within the armed group, but also on how other warring factions in armed conflict see that child who is associated with the armed group*. Attention should not only be given to the internal tasks children perform within the armed group, but also on external considerations, namely that the child will be perceived as a combatant, regardless of the nature of the task she or he performs within the armed group.

Under IHL, children associated with armed groups are seen as military targets and thus are equally unprotected and vulnerable. In fact, one could even argue that children who are used for "non-military" purposes such as domestic or sexual servants, are even more vulnerable

[22] The Prosecutor v. Thomas Lubanga Dyilo, *Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict pursuant to Rule 103 of the Rules of Procedure and Evidence*, ICC-01/04 01/06-1229- AnxA, 18 March 2008, para. 11.

[23] The Zutphen Draft of the Rome Statute has been referred to by ICC Chambers, as a document which reflects the drafters' intention as to the meaning of the words "using" and "participate". The Zutphen Draft indicates that the words cover both direct participation in combat and active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. The Draft excludes activities which are described as clearly unrelated to hostilities, such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. The Draft did not include many of the tasks usually performed by girls (although not exclusively), such as domestic work and sexual slavery, within the concept of "use". PrepCom, Report of the Inter-sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands (4 February 1998) A/AC.249/1998/L.13, Article 20(E), at 23 n. 12.

as they are not necessarily armed. Likewise, girls suffering goes beyond their recruitment, as they often face new obstacles and prejudices as they attempt to reintegrate into society, having been exposed to sexual violence, unwanted pregnancies and sexually transmitted diseases. *Children who are associated with an armed group and witness atrocities can be equally harmed as those being forced to take part in combat and commit atrocities*. A definition of child recruitment that ignores this reality is incomplete, as it ignores the gender-specific harms and other prejudice suffered by children as a result of the crime. A broader concept would thus satisfy the main object of the prohibition of child recruitment - which is to keep children safe from violence, abuse and exploitation - taking into account risks for their physical and psychological well-being resulting from such involvement with an armed group, regardless of whether this involvement occurred in the battlefield or in the armed group's kitchen or sleeping quarters. If one considers that the criminalisation of child recruitment aims to limit the exposure of children to violent acts, any child associated with an armed group could be seen as a combatant by the enemy, and lose *de facto* the protective status of civilian becoming a legitimate military target under the GC and their Additional Protocols ("AP"), regardless of whether that child is a boy soldier or a girl "married" to a commander. In fact, the UN Special Representative of the Secretary General for Children and Armed Conflict, who testified as an expert in the *Lubanga* case, rejected any definition that excludes a great number of children in current armed conflicts in some way or another associated with armed groups.[24] She identified withing the roles and activities that child soldier may perform cooks, porters, nurses, spies, messengers, administrators, translators, radio operators, medical assistants, public information workers, youth camp leaders, and girls or boys used for sexual purposes.[25] Moreover, the Prosecution could rely for its interpretation of the concept of "use", on the Paris Principles,[26] which refer to a broader concept of "*children associated with armed forces or armed groups*" including girls recruited for sexual purposes.

(iii) Attacks on building dedicated to education and health care

The Policy already highlights the relevance both of "education" and of "schools" in the context of international criminal justice, accountability, and need to adequately protect the rights of children that are affected by armed conflicts.[27] The very word "education"

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[24] Submission of the Observations of the Special Representative of the Secretary General of the United Nations for Children and Armed Conflict, *supra* note 22, para. 20 : "*The Zutphen text and the Confirmation of Charges Decision purport to establish a bright-line rule to determine which activities qualify under the "participate actively" standard. The Special Representative submits that this effort is ill-conceived and threatens to exclude a great number of child soldiers - particularly girl soldiers – from coverage under the using crime*".

[25] *Idem*, para. 23.

[26] Paris Principles – Principles and Guidelines on Children associated with Armed Forces or Armed Groups, February 2007.

[27] On "education" and "schools" during armed conflicts, see *inter alia*, MOUSOURAKIS, G. (1998). Applying Humanitarian Law to Non-International Armed Conflicts. *Anuario de Derecho Internacional* 14, pp. 293-319. THOMPOSON HOROWITZ, J. (2004). The Right to Education in Occupied Territories: Making more Room for Human Rights in Occupation Law. *Yearbook of International Humanitarian Law* 7:233-277; RICHARDS, T. A. (2004). The War is Over but the Battle has Just Begun: Enforcing a Child's Right to Education in the Wake of Armed Conflict, *Penn State International Law Review* 23(1), pp. 203-226; HAMPSON, F. J. (2008). The Relationship between International Humanitarian Law and Human Rights. *International Review of the Red Cross* 90, pp. 549-572; BART, G. R. (2008). The Ambiguous Protection of Schools under the Law of War: Time for Parity with Hospitals and Religious Buildings, *Georgetown Journal of International Law* 40, pp. 405-446; ANDERSON, A., HYLL-LARSEN, P. and HOFMANN, J. (2011). The Right to Education for Children in Emergencies, *Journal of International Humanitarian Legal Studies* 2(1), pp. 84-126, 2011; BALTA, A. (2015). Protection of Schools During Armed Conflicts, *International Crimes Database*; BAKARE, S. S. (2018), Boko Haram and the Child's Right to Education in Africa, Examining the Accountability of Non-State Armed Groups. *African Human Rights Law Journal* (18), pp. 146-170; LUNDY, L. and O'LYNN, P. (2019). The Education

appears 17 times in the document; "educational" appears once, and "school(s)" appears 7 times. Moreover, the matter of "education" appears from the very beginning of the Policy as a relevant theme, as this is already mentioned in its second paragraph. This (mere) quantitative data seems of particular importance if compared with the OTP 2019-2021 Strategic Plan, where the term "education" appears only once, and "school(s)" never appears. In other words, in the Policy, *education as a value, as a component for peaceful transition after a conflict, as a benchmark for the interests of children*, already receives adequate attention. Nonetheless, in an effort to implement a "meaningful survival-centred approach" and to give children "greater agency"[28] few suggestions are discussed *infra*.

Taking into consideration para. 9 of the Preamble to the Rome Statute and the aim of creating the ICC also for the "sake of present and future generations", the updated Policy could stress in a stronger an clearer way the fact that the crime of intentionally directing attacks against buildings dedicated to religion, education, art, science or [others] (Article 8(2)(b)(ix) has intergenerational consequences, thus its effects are likely to affect the future population in broader terms.

To some extent, the 'individual' relevance of the crime at hand seems to emerge from para. 58 of the Policy. The section, devoted to Preliminary examinations and the evaluation of the gravity of the conduct does mention "education" as a ground which impedes the child development, but it does not explicitly clarify if intergenerational assessments are included. In particular, the text paves the way to some doubts as per its wording and construction. Current para. 58 reads: "[...] suffering or witnessing serious crimes [has an] impact on children [that] is especially devastating. Such experiences impede their development and ability to reach their true potential, as, for example, in the case of [...] attacks against buildings dedicated to education [...]. There is also serious harm caused to children's families and communities, extending to future generations. The effect of the loss of parents, caregivers or other family members on children is also extremely severe […]". It is unclear whether the sentence "There is also serious harm caused to children's families and communities, *extending to future generations*" relates to the preceding scenarios (attacks on educational building) or only to the subsequent phrase (loss of parents, etc).

Whereas its seems reasonable and coherent with the goal of protection, as well as noting that the general 'intergenerational' perspective may be derived from the Rome Statute itself, it would seem advisable to *rephrase current para. 58* of the Policy so as to *make sure* the *evaluation of the gravity* of conducts falling within the scope of application of Article 8(2)(b)(ix) of the Rome Statute *also takes into account inter-generational aspects*.

The updated Policy should also build upon the already existing cross-field analysis, and implement it. *Current para. 87* correctly *stresses* that *several crimes* against or affecting children are inter-related, in as much as it includes that "Crimes such as attacks on educational facilities, child recruitment or use, or rape resulting in pregnancy deprive children of the opportunity to gain an education". *From a systematic perspective, it would seem advisable to make sure that such a fundamental principle is clearly stated from the outset of the document*, rather than being almost a closing guideline on the 'selection of charges' section. By necessity, and consequently, this additional consideration and the "extended gravity evaluation" would

Rights of Children. Kilkelly U. and Liefaard T. (eds), International Human Rights of Children. Springer, Singapore, pp. 259-276; LEMMENS, D. and DE BOER, F. (2020). The Protection of Schools under International Humanitarian Law. Online publication of the Dutch Ministry of Defence.

[28] Statement by the Prosecutor in launching the public consultation to renew the Policy, 9 March 2023.

have to find a parallel in current para. 57 of the Policy, addressing the matter of "gravity" *as one of the factors determining whether to open an investigation into a situation*.

Another concern relates to the definition of conducts falling within the scope of application of Article 8(2)(b)(ix) of the Rome Statute. In this regard, the Policy at Section III, contains, amongst other, a description of the relevant regulatory framework where some crimes are more thoroughly described in comparison to others. Whereas the crimes of conscription, enlistment and use of children are – to some extent – explained in paras. 39 *et seq.*, the crime of attacks on building devoted to education is not sufficiently dealt with and resolves in the understanding that "Such attacks contribute to the multi-layered effect on the lives of children, and deprive them of the basic right to life, survival and development".[29] Considering that, as stated in para. 9 of the Policy, the aim of the instrument is to, amongst others, "provide clarity and direction to staff in the interpretation and application of the Statute and the Rules, at all stages of the [OTP] work, in order to effectively address crimes against or affecting children", and to "contribute, through the implementation of this Policy, to the ongoing development of international jurisprudence regarding crimes against or affecting children", it would seem advisable to *sensitively extend current para. 49 of the Policy, so as to give clearer guidance of the understanding of the crime at hand.* In particular, questions such as non-intentional attacks on educational building, or – in other words – severe 'collateral damages'[30]; the possible use of school buildings as a shield; and active use of school buildings for military offence could be taken into account for defining the scope of application of Article 8(2)(b)(ix).

Related to the assessment about the child's specific situation, Section III contains the approaches of the Prosecution concerning the evaluation of crimes affecting children, as well as its institutional interaction with children. Current paras. 29 *et seq.* underline the approach with children, assuming their determination of bests interest(s) as a fundamental guiding principle and method. When turning to the practical way to determine the best interests of a child in a given case, para. 31 indicates that "In addition to the input of children, the Office will seek the views of parents or caregivers, and also experts, if necessary [...]". Assuming that "experts" does not include "*teachers*", and considering that such persons may in given cases contribute in determine the child's best interests, *it would seem advisable to include teachers in the list of those persons and categories the OTP may resort to in order to assess the child's specific situation.*

Similar considerations may be developed as per current para. 66, according to which "The Office will seek and consider the views of children and their parents or caregivers on matters affecting them, as appropriate, in the course of its investigations [...]". Again, teachers may be included, with parents and care-givers, amongst those who might be consulted to determine the situation of a child.

[29] Policy, para. 49.

[30] Cf AP I, arts 51(5)(b), 57. In State practice, see Canada. Dept. of National Defence 2001, ("The fact that an attack on a legitimate target may cause civilian casualties or damage to civilian objects does not necessarily make the attack unlawful under the LOAC. However, such collateral civilian damage must not be disproportionate to the concrete and direct military advantage anticipated from the attack. The proportionality test is as follows: Is the attack expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof ("collateral civilian damage") which would be excessive in relation to the concrete and direct military advantage anticipated? If the answer is "yes", the attack must be cancelled or suspended. The proportionality test must be used in the selection of any target").

Finally, Section IV, devoted to the phase of investigation, does not contain any indication on prioritisation of actions, either in terms of 'situations' for the purposes of starting investigations, or between single cases in a single situation. This comes with little surprise, as the matter of prioritisation is already dealt with by the Policy on case selection and prioritisation, which is still deemed to be applicable by the OTP Strategic Plan 2019-2021. According to said Policy, the OTP "will pay particular attention to crimes that have been traditionally under-prosecuted, such as crimes against or affecting children as well as rape and other sexual and gender-based crimes".[31] Even though the matter of prioritisation is thus dealt with, for matters of systematic coherence, *it would seem advisable at least to include in the updated Policy an express reference to the rules on case selection and prioritisation*.

(iv) Sexual and gender-based crimes (SGBC), in particular against LGBTQI+ children

The Policy acknowledges the particular vulnerability of children to SGBC.[32] Sexual and gender-based crimes can take many forms, including rape, sexual slavery, forced marriage, torture, and other forms of gender-based violence in the scope of ICC jurisdiction.[33]

In addressing SGBC, the Policy follows the guidance offered by the OTP's Strategic Plans 2012-2015, 2016-2018, and 2019-2021. These Plans committed the Office to:

- enhance the integration of a gender perspective in all areas of [the Office's] work and continue to pay particular attention to sexual and gender-based crimes and crimes against children;[34]
- integrate a gender perspective in all areas of the Office's work and to pay particular attention to sexual and gender-based crimes and crimes against and affecting children;[35]
- genuine respect for diversity and for gender in particular, as well as to refine and reinforce [the Office's] approach to victims, in particular for victims of sexual and gender-based crimes and crimes against or affecting children.[36]

This attention to SGBC is in line with the strategic goals of the ICC itself, which requires the Court to "further develop mainstreaming of a gender perspective in all aspects of the Court's judicial and prosecutorial work".[37]

The focus on SGBC is further emphasised by two other Policy Papers released by the OTP. The *2014 Policy Paper on Sexual and Gender-Based Crimes* aiming at strengthening the investigation and prosecution of SGBC committed in the scope of the ICC jurisdiction.[38] It recognizes that these crimes are among the gravest under the Rome Statute and offers guidance for efficiently investigating and prosecuting them while upholding victims' rights. The *2022 Policy on the Crime of Gender Persecution* addresses SGBC in the framework of the crime of

[31] OTP, Policy on case selection and prioritisation, 15 September 2016, p. 15.
[32] Policy, paras. 2, 18, 52. See, OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR CHILDREN AND ARMED CONFLICT, *The Six Grave Violations Against Children During Armed Conflict: The Legal Foundation*, 2013, p. 16 *et seq.*.
[33] Policy, paras. 19, 43, 52, 86.
[34] OTP, *Strategic Plan. June 2012-2015*, 2013, p. 27.
[35] OTP, *Strategic Plan. 2016-2018*, 2015, p. 19.
[36] OTP, *Strategic Plan. 2019-2021*, 2019, p. 9.
[37] ICC, *Strategic Plan. 2019-2021*, 2019, p. 11.
[38] OTP, Policy Paper on Sexual and Gender-Based Crimes, June 2014.

persecution as a crime against humanity.[39] As specified in Article 7(2)(g) of the Rome Statute, "persecution" means the "intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity". The Policy vastly addresses the gender components of this crime, which may affect women, men, children, and LGBTQI+ persons, on the basis of their gender or sexual orientation.

Considering that ample material is available on SGBC issues, this part will deal with the specific issue of LGBTQI+ persons, whose category is still under-covered by investigations and prosecutions.

In this regard, there is not yet a binding international treaty addressing the situation of LGBTQI+ persons. However, the *Yogyakarta Principles*[40] - developed in 2006 by a group of human rights experts and revised in 2017 - are an important international reference, recognized by international and regional human rights bodies. They are a set of principles on the application of IHRL in relation to sexual orientation and gender identity. The Yogyakarta Principles affirm that sexual orientation and gender identity are integral parts of human diversity. The Principles emphasize that discrimination and violence based on sexual orientation and gender identity are violations of human rights and that States have an obligation to protect individuals from such abuses (Principle 5). The Principles call for the repeal of laws that criminalize homosexuality and transgender identity and for the establishment of legal frameworks that protect individuals from discrimination based on their sexual orientation and gender identity. Furthermore, the Principles stress the importance of ensuring that victims of SGBC have access to justice, reparations, and support services (Principle 33). The Principles also call for the inclusion of sexual orientation and gender identity in the training of law enforcement officials, judges, and other relevant actors to ensure that they are able to effectively address cases of SGBC (Principles 7 *et seq.*, 30 and 33).

Despite the progress made in recent years in recognizing and addressing SGBC, there are still significant challenges and gaps in the current framework. The Policy already provides important guidance on how to investigate and prosecute these crimes when committed against children, however, there are several areas where it could be improved. One area of concern is the lack of specific guidance on how to investigate and prosecute SGBC committed against LGBTQI+ children. While the Policy recognizes the vulnerability of LGBTQI+ children to said crimes, it does not provide specific guidance on how to address the unique challenges that arise in investigating and prosecuting said crimes for that specific category of victims. The updated Policy could develop specific guidance addressing how to take a child-sensitive approach to this kind of investigations and prosecutions. It also should provide guidance on how to ensure that LGBTQI+ children are able to access legal services and support, and how to address the fear of stigma and discrimination that may prevent them from reporting crimes. In turn, the updated Policy could also raise awareness on SGBC against LGBTQI+ children among ICC staff, local communities, and civil society organizations.

In this regard, the updated Policy could benefit from *a more explicit language on the specific challenges faced by LGBTQI+ children*. Following other policy papers, the revised Policy should openly and vastly address the relevance of sexual orientation in the framework of SGBC.[41] In doing this, it should expressly *make use of the acronym* "LGBTIQ+", or other acronyms deemed appropriate.

[39] OTP, Policy on the Crime of Gender Persecution, December 2022.
[40] The Yogyakarta Principles, available at https://yogyakartaprinciples.org/
[41] See for instance, OTP, Policy on the Crime of Gender Persecution, *supra* note 39, p. 3.

While SGBC disproportionately affects women and girls, *the needs of boys are not well understood or addressed in international policies*. Also services for boy victims are inadequate or not available. If existent, support services are likely not to be designed specifically for them.[42] The updated Policy should address this gap. In this regard, the Policy on Gender Persecution has noted that perpetrators may target boys through sexual violence as a strategy to "feminise" them or to invoke the "indignity" of being treated as a woman or a "homosexual".[43] In turn, the cultural stigma attached to sexual abuse and negative social attitudes against homosexuality might compel abused boys to choose silence and thereby not seek help.[44] This gravely hinders support for victims, prosecution of the perpetrators, and reparation of the effects of the crime. The revised Policy should *better address the relevance of SGBC against child boys*, offering guidance to OTP's staff to recognise patterns of violence, interact with alleged victims, and support abused children and child witnesses during and after their interaction with the Prosecution.

Children who experience SGBC face important barriers to accessing justice, such as social stigma, absent support from family members, concern to be prosecuted for one's sexual orientation, fear of retribution, and lack of trust in authorities. To improve this situation, safety and confidentiality of the Prosecution's action is essential. Especially fear that confidentiality might not be guaranteed seems to prevent children to report crime and seek help.[45] This aspect is particularly apparent for LGBTQI+ children, or boys sexually abused. In fact, many countries around the world still criminalize same-sex relationships and impose harsh penalties, including the death penalty, for same-sex acts. Even in countries where same-sex relationships are not criminalized, LGBTQI+ children and boys victims of sexual violence may face discrimination and further violence due to deeply ingrained societal prejudices and stereotypes. It is, therefore, essential that the update Policy ensures confidentiality and safety for children of SGBC. The Policy already requires to not expose children to undue risks, and to be responsive to the child's safety after her or his interaction with the Prosecution. These requirements need to be specified further as regards SGBC, taking into account the unique challenges arising in this context for girls, boys, and LGBTQI+ children.

An important barrier to accessing justice for women, children, and LGBTQI+ individuals seems the lack of awareness and sensitivity among law enforcement and judicial officials. As a consequence, also in the context of international criminal law, SGBC (including those against LGBTQI+ persons) are often underreported, under-investigated, and under-prosecuted.[46] The updated Policy should better address *the need for specialized staff as regards SGBC*. Specific training should ensure that staff knows how to facilitate victims to access legal services and support, and is able to efficiently address the fear of stigma and discrimination that may prevent children, especially boys and LGBTQI+ children, from reporting crimes.

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[42] OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR CHILDREN AND ARMED CONFLICT, *Responding to Conflict-Related Sexual Violence Against Boys Associated with Armed Forces and Armed Groups*, 2022, p. 10; *Strengthening Responses To Conflict-Related Sexual Violence Against Boys Deprived of Their Liberty in Situations of Armed Conflict*, 2022, p. 6.

[43] OTP, Policy on the Crime of Gender Persecution, *supra* note 39, paras. 51, 91 (iii).

[44] *Responding to Conflict-Related Sexual Violence Against Boys Associated with Armed Forces and Armed Groups in Reintegration Programmes*, *supra* note 42, p. 10.

[45] *Ibid.*

[46] *Ibid.*

The updated Policy could also benefit from *a greater focus on intersectionality*,[47] better recognizing that children who are members of multiple marginalized groups, including girls, LGBTQI+ children, or children with disabilities, may face compounded forms of violence.

The updated Policy could also offer *guidance on how to assess the gravity of a crime* in light of its long-lasting impact on the social situation of affected marginalized groups, such as girls, LGBTQI+ children, or children belonging to minority groups. Moreover, further guidance on how to engage with civil society actors, such as organizations of victims of sexual or gender-based violence, or children's and LGBTQI+ advocacy groups could be provided. These groups can give critical support to victims and their families, including legal and psychosocial support, and can contribute to the necessary cultural changes to protect individuals from discrimination and violence. In this context ensuring that civil society's and children's voices are heard and incorporated into investigations and prosecutions is essential. The decision-making process should also transparently give account to what extent these voices were followed. This could help to build trust and confidence among women and LGBTQI+ communities, which may be wary of engaging with legal institutions due to past experiences of discrimination and violence.

Another area of concern is the *collection and analysis of data*. There is a lack of comprehensive and consistent data on SGBC, including those against boys and LGBTQI+ children.[48] This gap in knowledge makes it difficult to assess the scope and nature of these crimes and develop evidence-based strategies to address them effectively. This lack of data also hampers efforts to hold perpetrators accountable and provide reparations to victims, including children. This can lead to a culture of impunity for perpetrators and a lack of accountability for these crimes. The updated Policy should provide guidance on how to collect and analyse comprehensive and consistent data on SGBC, including on how to ensure that data collection is conducted in a manner that is sensitive to the needs and rights of children.

(v) Crimes against cultural heritage

The Policy refers to cultural sensitivity in dealing with Institutional Development and in particular training, "to foster cultural sensitivity, increase sensitisation to the effects of trauma and enhance techniques to interview children and examine them in court".[49] It also refers to the child's social and cultural context. No reference is provided in relation to the concept of cultural heritage.[50]

The definition of the term "cultural heritage" has changed over time. Both the words "heritage" and "culture" have undergone alteration. The idea of cultural heritage has increasingly expanded to include new categories of material and immaterial goods. Indeed, the contrast between materialism and immateriality was subsequently introduced in an effort to extend this concept to intangible heritage. As a result, the concept of culture legacy can be understood as a 'fluid concept' or a dynamic process that reflects all facets of life in both the present and the past and in which every person, every group, and every social behaviour is a result of culture in all of its manifestations.[51] Therefore, there is a connection between social

[47] See also point 4 *infra*.
[48] *Responding to Conflict-Related Sexual Violence Against Boys Associated with Armed Forces and Armed Groups in Reintegration Programmes*, *supra* note 42, p. 9 (as regards boys).
[49] Policy, para. 118.
[50] *Idem*, para. 30.
[51] DEWEY, J. (1961). How we think. Chicago: Quid Pro.LLC.

practises and the development of identities, which have a complex of many traits and futures, as well as many connections to history, heritage, culture, language, and awareness. In this sense, social structure and individual identity work in symbiosis. Identity, in fact, is not something that belongs to a single person; rather, it is the framework of a social order in which culture is primarily seen as a construct describing the entire body of beliefs, behaviours, knowledge, sanctions, values, and goals that characterizes how people live, what they have, do, and think. This concept of culture results from the continuous practises of human beings within groups, through which individuals build the character and identity of a community and the specific patterns of behaviour that distinguish one community from all others. In this regard, it is crucial to protect cultural heritage because it is an integral element of an individual's identity from a young age. This enables a broad interpretation of Article 8 of the CRC, which states that: " States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference". Having an identity is a fundamental human right that allows each individual the ability to enjoy all her or his rights. Identity encompasses the family name, surname, date of birth, gender and nationality of the individual. Each person has a family history – genetic, gestational, social and legal – that contributes to her or his identity, having a lifetime impact on the child and future generations. Children are at greatest risk of having this specific right contravened, as decisions about their identity often occur on their behalf with lifelong impact. This is particularly true for children born out of rape in situations of conflict.

The updated Policy should *include the concept of cultural heritage* for at least two reasons. First, it is crucial to consider a child's cultural heritage during the investigation for a better comprehension of the cultural context in which the minor lives. Understanding this dimension allows for better measurement of investigations while paying closer regard to the unique individuality of the minor involved. Second, a crime against cultural heritage can represent an attack against a community. In this regard, it is worth noting that crimes against or harming cultural heritage are frequently perpetrated as part of a persecutory campaign on political, religious, ethnic, or other grounds, such as gender, age, birth, given the significance of cultural heritage to the identity of a whole group. In this regard, paragraph 47 of the Policy on Cultural Heritage states "Shared cultural heritage will usually include at least one defining feature of a persecuted group and can be used by the perpetrators to identify that group, which may include elderly individuals, the disabled, women and children. Attacks against or affecting cultural heritage can be considered a strong indicator of the persecutory nature of an attack, and, when supported by the facts, will be highlighted as such by the Office in charging instruments".[52] Moreover, crimes against or affecting cultural heritage frequently occur in connection with genocide, as they may also be aggravating factors for genocide convictions on their own if they cause severe mental harm, which would increase the gravity of the crimes charged as genocide under Articles 6(b) to (d) of the Rome Statute.

(vi) Deportation and transfer of children

The Policy analyses the crime of deportation and transfer of children[53] and underlines that, when evidence exist, the Prosecution will seek to include charges of crimes directed specifically against children, such as, forcibly transferring of children from one group to another as an act of genocide and trafficking in children as a form of slavery or sexual slavery.[54]

[52] OTP, Policy on Cultural Heritage, June 2021.
[53] Policy, para. 44.
[54] Policy, para. 85.

Taking into account recent events and practice, the updated Policy should more clearly specify that single conducts may amount to diverse crimes under Article 6, 7, and 8 of the Rome Statute.

According to Article 6(e) of the Rome Statute and to Article II(e) of the 1948 Genocide Convention "forcibly transferring children of [a national, ethical, racial or religious group] to another group" with the intention to destroy "in whole or in part" the above-mentioned group may constitute a genocide. *This provision is to be interpreted as including any form of transfer or deportation of children, both internally or across borders*. The transfer, however, is to be conducted from one group to another, so that cases in which the transfer happens within the same group would be considered outside of the scope of this provision. It is interesting to note that, contrary to the above-mentioned relevant definitions of crimes against humanity and war crimes included in the Rome Statute, Article 6 does not generally refer to the deportation or transfer of population. Indeed, deportations and removals of civilians are often perpetrated as part of ethnic cleansing (which may, consequently, be considered part of an international crime under the jurisdiction of the ICC if the relevant elements for these crimes are met). Moreover, both the acts of "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" and "causing serious bodily or mental harm to members of the group" may include among their material elements forcible transfers and deportations of the relevant group.

According to Article 7(1)(d) of the Rome Statute, deportation or transfer of children as a crime against humanity does not need to be committed in the framework of an armed conflict, so that it may also happen in time of peace. Moreover, Article 7(2)(d) of the Rome Statute provides a definition of "deportation or forcible transfer of population" by claiming that it includes "forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law". The above-mentioned definition contains three cumulative conditions that are to be met for a deportation or transfer to amount to a crime against humanity, namely: 1) that the displacement is 'forced'; 2) that the displaced individuals were lawfully present in the territory; and 3) that the displacement was not permitted on the grounds of any international law rule (including, for instance, international human rights and refugee law standards).

Concerning Article 8, the updated Policy should take into due account the differences between Article 8(2)(a)(vii) and Article 8(2)(b)(viii) of the Rome Statute. The prohibition in Article 8(2)(b)(viii) applies to international armed conflicts, while the one in Article 8(2)(a)(vii) presupposes territorial occupation. Whilst during international armed conflicts even the deportation or transfer of one person could potentially constitute a war crime, in a situation of occupation the deportation or transfer shall involve a group of persons. In non-international armed conflicts, Article 8(2)(e)(viii) affirms that "[o]rdering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand" is a war crime. The element of whether this provision would require evidence of a precise order to displace the civilian population has generated discussion among scholars. The conclusion reached by Brown in terms of the evolutive interpretation of the Rome Statute would, however, confirm that civilian displacements shall be prohibited even in the absence of an order.[55]

[55] BROWN, M. (2019). The Evacuation of Eastern Aleppo: Forced Displacement Under International Law, pp. 11-12.

In all circumstances, for the criminal offence of transfer or deportation to amount to a war crime a necessary nexus must be present with the relevant international armed conflict or non-international armed conflict. This is particularly true when the crimes are committed by civilians, both against soldiers or other civilians.[56] This is also clarified by the relevant Elements of Crimes, which provide that for the three above-mentioned war crimes, "the conduct took place in the context of an was associated with" an international armed conflict or non-international armed conflict. Moreover, Article 8(1) of provides "a jurisdictional threshold"[57] by claiming that 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". It is to be noted, however, that in cases in which there are compelling security reasons, Article 24 GC IV, Article 78(1) AP I and Article 4(3) AP II provide for the possibility of the Parties to the conflict to temporarily evacuate children from the areas affected by the hostilities. In international armed conflict, Article 78(1) AP I provides that the evacuations of children should not be conducted towards a foreign State, unless this is done by the Party to the conflict of which they possess the nationality. According to Article 4(3)(e) AP II, in non-international armed conflict consent by parents, legal guardians or those who by law or custom are responsible for the children is to be collected whenever possible. More stringent rules are provided for international armed conflict by Article 78(1) AP I, which requires the collection of the written consent by parents, legal guardians or those who by law or custom are responsible for the evacuation of the minors; moreover, the latter must be supervised by the Protecting Power, in agreement with all the Parties concerned. All appropriate steps shall be taken to facilitate the reunion of temporarily separated families.[58] Finally, according to Article 78(1) AP I, all Parties to the conflict shall avoid endangering the evacuation of children.[59]

Relevant provisions on spontaneous or forcible movements of children are scattered in multiple branches of international law, including *inter alia* IHL, IHRL, international criminal law (ICL), international migration law (IML) transnational trafficking and smuggling norms and international refugee law (IRL). Considering the fragmentation of international law[60] on this point, *the updated Policy should clearly promote a multi-sectorial approach*[61] during investigations and prosecutions, thus ensuring that principles such as the best interests of the child are incorporated and guaranteed for the outset of the OTP activities, methodologies, and approaches.

Evidently, in the context of deportation and transfer, a proper, albeit uneasy, distinction from migrants (extensively interpreted)[62] is necessary, and should properly take into account whether children are accompanied, unaccompanied, or separated from their families.[63] It is

[56] CASSESE, A. (2008). *International Criminal Law* (Oxford University Press) p. 83.
[57] GAETA, P., VUNUALES, E. and ZAPPALÀ, S. (2020). *Cassese's International Law* (Oxford University Press) p. 430.
[58] GC IV, art 26; AP I, art 74; AP II, art 4(3)(b).
[59] GC IV, art 26; AP I, arts 74, 78; AP II, art 4(3)(b).
[60] International Law Commission Study Group on the Fragmentation of International Law, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law* (United Nations, 2006).
[61] The applicability of IHRL, IHL and IRL has also been reaffirmed, among others, by the UN Security Council. UNSC Resolution 2427 (2018), UN Doc. S/RES/2427.
[62] International Organization for Migration, *Glossary on Migration* (IOM, 2019) p. 141-142; United Nations High Commissioner for Refugees, *The 10-Point Action Plan in Action: 2016 – Glossary* (UNHCR, 2016) p. 282.
[63] Unaccompanied children are generally defined as those "who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so"; conversely, separated children are those "who have been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children

difficult in practice to determine the degree of 'spontaneousness' or lack thereof. In this regard, during the investigations the Prosecution could *identify criteria necessary to understand when the transfer of minors is spontaneous,* however taking into account the psychological maturity of the latter.

Particular care should be given to the specific terminology: in IHL the term "movement" is used for spontaneous cases, while "displacement", "removal", "transfer", "evacuation" and "deportation" are relevant in forced movement cases. In addition, "deportation" is the only one used to refer to a forced population movement across borders. This is in line with the use of the two terms "transfer" and "deportation" in ICL. Indeed, the Commentary to Article 18 of crimes against humanity included in the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind clarifies the distinction: "Whereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same State."[64] This distinction was supported by the Pre-Trial Chamber I in its Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute".[65]

Furthermore, the determination of child agency in partaking the movement may also be problematic and certain definitional frameworks contain different approaches to the issue. For instance, according to Article 3(c) of the United Nations Protocol against Trafficking in Persons, in Particular Women and Children ("Trafficking Protocol")[66] supplementing the UN Convention against Transnational Organized Crime adopted in in Palermo (Italy) in 2000, child trafficking only comprises two elements: the action, including "the recruitment, transportation, transfer, harbouring or receipt of a child", and the purpose of exploitation such as, *inter alia*, "the exploitation of the prostitution of others and other forms of sexual exploitation, forced labour or services, slavery and practices similar to slavery, servitude or the removal of organs" so that the eventual (vitiated) consent of the minor involved in the trafficking process – which is instead a main element in the definition of trafficking in adults – is irrelevant. On the contrary, the Protocol against the Smuggling of Migrants by Land, Sea and Air ("Smuggling Protocol"),[67] supplementing the 2000 UN Convention against Transnational Organized, portrays smuggled persons as migrants who freely decide to buy an illegal transportation service from a smuggler to reach their desired destination through irregular border crossings and it doesn't contain any differential, more protective, approach for cases of 'child smuggling' a part from a vague reference in Article 16.4 to children's special protection and assistance needs and a final saving clause included in Article 19.1 promoting the respect of international human rights law, humanitarian law and refugee standards, including the principle of *non-refoulement*. In practice the two phenomena of child trafficking and child smuggling may well overlap, as there is a considerable grey area between them. Additionally, overlaps may also certainly exist with the category of child asylum seekers and refugees, so that authorities are often confronted with complex mixed migratory movements, often comprising vulnerable children.

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accompanied by other adult family members". IOM, *Glossary on Migration*, *supra* note 62, p. 223 and 195.

[64] International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind with commentaries* (United Nations, 1996), p. 49.

[65] Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18, 6 September 2018, para. 55.

[66] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, November 2000.

[67] Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United nations Convention against Transnational organized Crime, 2000.

(vii) The crime of ecocide and children

In the Policy not all the provisions of the Rome Statute concerning war crimes are mentioned, possibly because it was felt that they have no direct impact on children's rights and interests. Among them this part refers to Article 8(2)(b)(iv) which includes among the "serious violations of the laws and customs if applicable in international armed conflict" the act of "intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated".

The abovementioned provision reflects the general obligation imposed on belligerents to apply the principle of proportionality, i.e. one of the basic principles recognized in the customary law of armed conflict, in launching an attack, and it is obvious that its violation must constitute a crime. It goes without saying that if the violation of that principle affects civilians, it constitutes a crime also when the civilians affected in concrete terms are children. No further comment is necessary about this, except for mentioning that although the provision only focuses on the principle of proportionality, the general principle of precaution may also come into play.

The provision also refers to civilian objects like schools and other objects whose loss may affect children, and those objects are included in the violation. However, it also expressly considers that an attack may concern the "natural environment" and may cause incidental damage which is "widespread, long-term and severe", and specifies that when such damage is clearly excessive in relation to the anticipated military advantage, the principle of proportionality is also violated and a crime is committed. This is the only provision dealing with environmental damage in the Rome Statute and may be consider superfluous because the natural environment is in fact a civilian object and therefore it is included in the provision according to the rule concerning civilian objects. *Yet, the specific mention of the natural environment may play an important role* per se *and for the protection of children.* It is well known that attacks to the environment are particularly dangerous for children. If projectiles remain on the ground without exploding the first person to be affected are children, who will not recognize the danger of walking or playing on that ground and inadvertently cause such weapons to explode. The practice is full of cases of these kind, with children being killed or mutilated by weapons that remain unexploded on the ground. *The damage children are exposed too is immediate but may have long-term consequences depriving them of the regular future life to which they are entitled*.

It is therefore particularly important that Article 8(2)(b)(iv) of the Rome Statute is strictly applied in the case of incidental damage to the environment, bearing in mind the consequences that such damage may have on the physical and psychological life of children, immediately and in the future. The provision, which only refers to attacks in international armed conflict, also applies to attacks launched in non-international armed conflict, because the distinction has lost its weight, as of the Tadic ICTY 1995 Judgment,[68] with respect to the application of international criminal law.

[68] ICTY, The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

3. Focusing on child-victims rather than on 'victim-perpetrator' dilemma

In the first cases before the ICC, the main focus of investigations and prosecutions has been on crimes of enlistment, recruitment and use of children under the age of 15. Said proceedings have not fully and systematically exposed the broader suffering of child-soldiers, especially girl-soldiers, who are often victims of many other related international crimes in addition to being used in hostilities.

While investigation and prosecution of crimes related to child-soldiers remain an imperative, the main focus on child-soldiers may risk further eclipsing the widespread victimisation of children for other crimes. There is another unintended consequence of this focus : the relative obsession of many observers with what has been labelled the "child-soldier dilemma" or the "victim-perpetrator dilemma".[69] Many child-soldiers are innocent victims, some of them participated in atrocities. This has entertained an ambivalence concerning the victim status of these children, who may be not only victims but also perpetrators. This ambiguous status of child-soldiers seems to create a morbid fascination and has generated much attention in academic and policy circles, sometimes syphoning attention away from other important debates relating to child protection and justice for children.[70]

This is not only challenging but potentially dangerous for the broader child protection agenda – especially because in the last few years the debate has taken a new turn as many of the children recruited and used by armed groups are in the hands of terrorist groups, such as the Taliban, Daesh, the Islamic State and Boko Haram. Moreover, the recent judgement in the *Ongwen* case has dealt with the issue.[71]

It is, therefore, crucial that the Prosecution *looks beyond child-soldiers to embrace the larger scope of crimes committed against children*.

4. Reinforcing the adoption of an intersectionality approach

The OTP Policy Paper on Sexual and Gender-Based Crimes adopted in 2014[72] incorporates the intersectionality perspective as an important analytical tool in considering crimes against women and girls or disproportionally affecting them. By promoting interpretation aligned with intersectional approach to underlying inequalities, the policy paper pursues a more intersectionality-oriented treatment of SGBC within the ICC legal and policy framework. It focuses on possible interaction of gender with ethnic, national, religious, political and economic factors or reasons for discrimination. Moreover, it highlights a critical interconnection and interplay that exist among such multiple factors and forms of discrimination and social inequalities in respect of mass atrocities.

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[69] ZIA-MANSOOR, F. (2005). The Dilemma of Child Soldiers: Who is Responsible?, *King's Law Journal*, vol. 16, no 2, pp. 388–399; DELRUYN, I., VANDENHOLE, W., PARMETNER, S. and MELS, C. (2015). Victims and/or perpetrators? Towards an interdisciplinary dialogue on child soldiers *BMC International Health and Human Rights*, volume 15, Article number: 28.

[70] DRUMBL, M. (2012). Reimagining Child Soldiers in International Law and Policy (Oxford: Oxford University Press); GROVER, S. (2012). Child Soldier Victims of Genocidal Forcible Transfer: Exonerating Child Soldiers Charged with Grave Conflict-related International Crimes (Berlin: Springer); ROMERO, J. A. (2004). The Special Court for Sierra Leone and the Juvenile Soldier Dilemma, *Northwestern University Journal of International Human Rights*, vol. 2, 2; ROSEN, M. D. (2005). Armies of the Young: Child Soldiers in War and Terrorism (New Brunswick: Rutgers University Press).

[71] The Prosecutor v. Dominic Ongwen, Sentence, ICC-02/04-01/15-1819-Red, 6 May 2021, para. 65 *et seq*..

[72] OTP, Policy Paper on Sexual and Gender-Based Crimes, *supra* note 38, pp. 13, 16.

This explicit and concrete commitment to properly address and engage with the phenomena of intersectionality when investigating and prosecuting complex situations and cases of discriminatory violence and abuse was reaffirmed in Policy in which the Prosecution committed itself to "Take steps to understand the significance of attributes like age and birth, and the degree to which they may give rise to multiple forms of discrimination and social inequalities, either alone or as they intersect with other factors, like race, ability or disability; religion or belief; political or other opinion; national, ethnic or social origin; gender, sex, sexual orientation; or other status or identity".[73]

However, so far the practice of the ICC shows that complex issues of multiple and intersectional discrimination in the context of international crimes are approached inconsistently and sporadically just recognizing them or addressing them only superficially. This is true of decisions taken by both the Prosecutor and the judges. In the *Lubanga* case, for example, the judges failed to take an intersectional approach to sexual violence perpetrated against young girls. The sexual abuses the young girls suffered were based on both gender and age discrimination. However, the lack of gender analysis and its intersection with young age of victims by the Prosecution also prevented the judges to fully understand and appreciate the gravity of these sexual crimes in the context of particular vulnerability of girls in armed conflicts. It was a missed opportunity to explicitly recognize and take into consideration the fact that young female victims in this particular case faced a unique kind of violation and abuses resulting from the intersection of their gender and age.

Correctly defining the term "intersectional" discrimination as a special type of multiple discrimination is not only desirable, but also necessary for ICL to address it accordingly within the core international crimes. Mass atrocities such as genocide, apartheid, persecution on protected grounds, SGBC and other crimes of similar gravity directed at protected groups (usually, but not exclusively, committed in armed conflicts), often have their origin in ethnic tensions, persistent discriminatory practices, as well as associated hate towards and suppression of targeted groups. There is a critical linkage between mass atrocities against certain groups and their members because of their protected identities and unlawful discrimination and victimization they regularly face. Furthermore, certain more vulnerable members within the specifically protected groups of population (such as children, women, elderly, Christians, Muslims, homosexuals, etc.) and communities who are politically, economically or socially most marginalized are particularly targeted and victimized in such situations.

Mass abuses against vulnerable groups of population cannot be treated in isolation, but require a rights-based approach that recognizes the indivisibility and interdependence of rights. Such a *rights-based approach* is *focused on upholding the dignity and integrity of the individual, whereby the concept of dignity requires that every person is recognized, respected and protected as a rights holder*. By interpreting and applying ICL through the lens of intersectionality, the Prosecution can contribute to important jurisprudential developments. Intersectional approach to international crimes of discrimination allows for the consideration of the diverse needs and interests of women and other particularly vulnerable groups (including children, elderly, homosexuals and people of minority religions), as well as for a better understanding of the difficulties they face. Therefore, *the Prosecution should strongly use an intersectional approach in applying and interpreting ICL during investigations and prosecutions*.

[73] Policy, para. 37 (third bullet point).

Part II – Matters related to the proceedings

1. Reinforcing the importance of considering the diverse age phases inside the macro-area of minors

The Policy considers the importance of distinguishing between young children and adolescents.[74] However, it seems important to better specified the concepts. Who are young children? Who are adolescents? Are these the only groups inside the macro group of minors?

The terms "girls", "boys", "teenagers" and "young people" tend to be used interchangeably in international regulatory documents, except for few legal texts, or comments, in which international institutions seem to distinguish the different stages of development within the category of children. The issue relates to the fact that it is not specified precisely which age groups are included in said categories, even when micro age categories are distinguished within the macro category of children. The updated Policy should *explicitly recognise the different micro-age categories under the category of minors, as well as , outline the age ranges for each category*. This would imply two positive outcomes: (i) it would improve linguistic correctness within the literature, making clear some specific terms which tend to be used interchangeably; and (ii) it would create more adequate and *ad hoc* responses to the specific protection needed by each category.[75]

The issue of the lack of clarity on the different age groups in the macro-category of minors has been neglected by the international legal system for a long time. Many legal instruments show how childhood is essentially defined by its reference to adulthood.[76] The CRC adopted the broadest definition of childhood, stating that a "child means every human being below the age of eighteen years".[77] The extension of the childhood status from birth to the attainment of legal age is used to clearly separate childhood from adulthood; however, no consideration is given to the various stages of development within the category of childhood. The Rome Statute contains no definition of "child". The only provision that refers to age is Article 26 which limits the ICC jurisdiction to persons who are above 18 years old. On the other hand, Articles 8(2)(b)(xxvi) and (e)(vii) define the crime of child recruitment and establishes the age limit of 15 years. In this sense, Article 1 of the CRC provides a clear definition of the child that should be applicable when interpreting the ICC provisions that refer to children. Article 5 of the CRC recognises the "evolving capacities" of children, and Article 12 establishes that the view of children should be considered in accordance with child's "age and maturity".

The long-held adult-centred view of childhood, which is not based on an understanding of children's experiences, is reflected in international legal language. In this regard, the absence of any mention of children in the Universal Declaration of Human Rights is suggestive: children are only mentioned in the framework of assistance and protection which should be provided to them (Articles 25 and 26).[78] Children are treated similarly in the International Covenant on Economic, Social and Cultural Rights, which indicates that: "The States Parties

[74] Policy, para. 65.
[75] GUERCIO, L. (2022). Establishing the Social and Legal Categories of Girls and Girl Children, *Violence Against Women (SAGE)*, Vol. 28(8), pp. 1842–1857
[76] AAPOLA, K. (2002). Exploring Dimensions of Age in Young People's Lives A discourse analytical approach. *Time & Society* 11(2-3), pp. 295-314.
[77] CRC art. 1.
[78] Universal Declaration of Human Rights, 1948.

[...] recognize that [...] special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation" (Article 10).[79] This text, however, clearly distinguishes between the term "children" and "young persons", which constitute two different categories.

On the issue, it is critical to examine the text of Agenda 21 - a comprehensive plan of action adopted in 1992 to be implemented internationally, nationally, and locally by UN organisations, governments, and civil society. Paragraph 25.8 of the Agenda specifies: "Each country should combat human rights abuses against young people, particularly young women and girls, and should consider providing all youth with legal protection […]".[80]

The judgment of the person's adequacy in relation to the abilities and skills acquired justifies the various age thresholds established for the recognition of the exercise of one's rights. Regrettably, international legal instruments do not consider the various age ranges between birth and the attainment of the legal age of 18 years, which mark different psycho-physical developments. As a result, the CRC includes all people from birth to 18 years of age in the macro-category of children indifferently. This situation persists despite the Committee on the Rights of the Child's repeated requests for disaggregated data "by sex, age group, and, where possible, ethnic group, urban and rural area".[81] The same Committee recommends that "Collection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realization of rights, is an essential part of implementation. The Committee reminds States parties that data collection needs to extend over the whole period of childhood, up to the age of 18 years".[82] From these opinions, it can be concluded that *recognising the various needs and protecting the various age groups of children within the macro-category of minors is a critical aspect to be taken into account in investigating and prosecuting crimes against and affecting children*. A 6-year-old, for example, has different needs than a 16-year-old, even though they are both classified as children in the CRC.

As definition of childhood also depends on the different criteria adopted by each society, age-based attribution, although is not an objective indicator, can be used to approximate a person's maturity.[83] Developmental psychology divides childhood into three different stages: early childhood (preschool age), middle childhood (school age), and adolescence (puberty to legal adulthood).[84] Following the child stage, there are several phases of adolescence: early adolescence (10-13 years), characterised by a growth spurt and the development of secondary sexual characteristics; mid-adolescence (14-15 years), characterised by the formation of new relationships with the opposite sex and peer groups, as well as the development of a separate identity from parents; and late adolescence (16-18 years), during which adolescents begin to behave similarly.[85]

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[79] International Covenant on Economic, Social and Cultural Rights, 16 December 1966.
[80] Agenda 21, UNCED, 1992.
[81] See for example CRC Thirty-ninth Session Pre-sessional Working Group 31 January – 4 February 2005, point.8.; CRC Forty-eighth session 19 May – 6 June 2008, Part. 1, let. A.
[82] CRC Committee, General Comment No. 5 (2003) - General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, para.48.
[83] See also *supra* the part on cultural heritage.
[84] PIAGET, J .(1970). Science of education and the psychology of the child. Viking, New York; PIAGET J (1977). Epistemology and psychology of functions, D. Reidel Publishing Company, Netherlands.
[85] MARCDANTE, K. J. and KLIEGMAN, R. (2019). Essentials of paediatrics. Elsevier, Philadelphia, PA.

The international criminal judicial system is not insensitive to the different stages of psychological development that characterise the phases of childhood. In fact, the statutes of international courts, distinguish children by age. As indicated *supra*, in accordance with Article 26 of the Rome Statute someone who was, at the time of the alleged commission of a crime, "under the age of 18" shall not be prosecuted. Only for the crime of conscription, enlistment and use of children in hostilities, the age of children has relevance for the Rome Statute. In all other cases, the Statute does not make any difference by age, but rather aligns itself to the meaning of "children" given by the CRC.

Despite this gap, the Policy recognises that: "owing to their physical and emotional development and their specific needs, treatment, potentially amounting to torture and related crimes, may cause greater pain and suffering to children than to adults. It will bear this in mind when considering whether such treatment against children may amount to a crime under the Statute" and for this reason during its investigations the Prosecution "will also assess the capacity, expertise and availability of local entities as potential sources of support for children, bearing in mind that the nature of support services needed and the availability of or access thereto may differ significantly between boys and girls, and between young children and adolescents".[86]

The need to better clarify the micro-categories of age inside the macro-category of minors is vital, considering that this distinction is not included in any international criminal law tools. The distinction can certainly be inferred from international provisions such as those contained in the Statutes of the *ad hoc* International Tribunals, like the Statute of the Special Court for Sierra Leone ("SCSL"). However, a clear distinction of ages could have positive effects not only on legal definitions, but also on the means and practices of investigation to be used.

The updated Policy could *better and clearly define who is considered young children and who is considered adolescents or even young adults*. These distinctions would make it possible to provide juridical and psychological instruments more tailored for each age group. Moreover, the clear categorization of different age stages, based on medical and psychological studies, should be accompanied by the provision of diverse teams of experts according to the age group in the Gender and Children Unit ("GCU").

The issue of age is important also because it is linked to the consent of the child and her or his ability to participate autonomously in the investigation, prosecution and generally in the process of justice. The issue of consent may be relevant for instance for disclosure of medical records. The clarification of the different age could make it possible to draw a line of when consent by guardians of the minor is necessary and when the minor herself/himself is consider apt to take the decision.[87] This also in light of the fact that the evolving capacities of a child are considered to be dynamic and the progression of a child from an immature to a mature legal person calls for a child-specific treatment.

Finally, the updated Policy should also consider *including young adults between 18 to 21 years of age amongst the beneficiary of the Policy* and the related additional safeguards and interview practices.

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[86] Policy, paras. 50 and 65.

[87] UNICEF, Principles for child protection and participation in transitional justice ("[c]hildren have the right to participate in decisions affecting their lives. The Participation of children should be voluntary, with the informed consent of the child and a parent or guardian").

2. Ensuring that crimes against and affecting children are considered since the very early stages of the proceedings and as a priority

A crucial factor that is likely to have played a role in the absence of focus on children by international criminal courts, is that they were operating in contexts where children's perspectives were far from being systematically recognised as important and children were possibly not even deemed to be stakeholders. This does not mean that children were completely ignored; but rather that criminal accountability matters were – and probably still are – largely perceived as not being concerned with children. As a consequence, crimes against and affecting children are not made particularly visible. This relative unawareness of crimes affecting children is also found in reports documenting violations of human rights and international humanitarian law, such as UN reports which only recently have started to more systematically document child rights violations and crimes against children.

The most commonly identified barriers to the effective documentation, investigation and prosecution of crimes against and affecting children includes the fact that children are 'invisible' both during armed conflict and in accountability processes. The indifference towards children's issues is linked in part to the mistaken misconception that children lack in agency and require. *It is essential to ensure that children are not rendered invisible by adult-centric approaches to accountability; that they are not seen as a homogenous group and that they are involved in accountability processes in a way which captures the full extent of their experiences and victimization*.

In accordance with article 54(1) of the Rome Statute: "The Prosecutor shall […] take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, […] take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence *against children*" (emphasis added). However, so far, investigations have mainly focussed on the child-specific crime of enlistment, recruitment and use of children under the age of 15, and only partially exposing the impact of generic international crimes on children, often in broad undefined terms.

The selectivity of international prosecutions may not take into account or prioritise crimes against and affecting children. It is therefore important *to state clearly in the updated Policy that crimes against and affecting children have to be considered since the early stages of the proceedings (and already during the preliminary examination) and as a priority*. Indeed, decisions taken since the early stage of the proceedings narrow subsequent decisions, potentially progressively limiting the scope of crimes that fall within the horizon of the ICC – and hence of the access of victims to justice. This is particularly significant for crimes against children because, at each of the stages where decisions are made, these crimes and their victims can be excluded or eclipsed by others. For example, Mr Al Mahdi was tried and convicted of attacking historic monuments and buildings dedicated to religion in Timbuktu (Mali). The very narrow focus of the Prosecution in this case did not provide an opportunity to bring justice to the many Malian children, particularly girls, who were reportedly victimised during the occupation of Timbuktu by Ansar Eddine – a movement associated with Al Qaeda in the Islamic Maghreb. Considering that Al Mahdi reportedly headed the Hisbah – a body set up to uphold public morals and prevent vices – and was associated with the work of the Islamic Court of Timbuktu and participated in executing its decisions during the occupation, it would not have been unreasonable for the Prosecution to pursue this line of investigation and seek to document crimes that affected children in general, and girls in particular.

3. Reinforcing the concept of a child-centred and child-friendly process during investigations and prosecutions

A child-friendly procedure ensures that the rights of children are respected, their needs are considered; the trauma and harm associated with participating in an investigation and testifying (or otherwise interact with the ICC) are minimised; and that they understand the process in which they are involved and can fully contribute to it. Said procedure should conform to relevant international standards[88] and the overarching guiding principles defined by the CRC, including the best interests of the child;[89] the rights to life, survival and development;[90] non-discrimination;[91] and the right to participation.[92]

The Policy indicates that the Prosecution will adopt a child-sensitive approach in all aspects of its work involving children.[93] In this regard, the updated Policy should *reinforce the requirement that staff with expertise in children's rights and crimes against children shall be included in each team at each stage of the proceedings.* The inclusion of such requirements creates conditions that incentivise attention to the suffering of children and to collect, analyse and preserve information and evidence pertaining to the crimes they have suffered.[94] This will also contribute to create a culture of children's rights throughout the entirety of the ICC proceedings.

Another improvement would be to include in the Policy the reference to *the development of more child-friendly outreach material*. Successful investigations start with sustained communication efforts. Victims and witnesses (including children) and their communities should be informed so they understand the ICC mandate, procedures and objectives in general and the Prosecution's investigation in particular. Outreach is critical to inform children (and their parents/guardians), build their trust and secure their cooperation. Child-friendly materials and processes should be designed and used, especially when the investigation concerns crimes committed against children. Detailed child-friendly explanations are particularly important when conducting forensic examinations.[95] These can facilitate the task of investigators in earning the trust and cooperation of child-witnesses. Child-friendly materials can also help to

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[88] ECOSOC Res 1997/30 (21 July 1997) - Guidelines for Action on Children in the Criminal Justice System, Recommended by Economic and Social Council; UNGA Res 65/228 (31 March 2011) UN Doc A/RES/65/228 - Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice.
[89] CRC art 3.
[90] *Idem*, art. 6.
[91] *Idem*, art. 2.
[92] *Idem*, art.12.
[93] Policy, paras. 22-23.
[94] See, in this regard, the inclusion, in the terms of reference of the international, impartial and independent UN mechanisms mandated to assist in the investigation and prosecution of those responsible for international crimes in Syria and Myanmar, of requirements that their secretariats include staff with expertise in children's rights and crimes against children. UNGA, Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, UN Doc A/71/755, (19 January 2017), paras. 32, 40, 41; UNGA, Letter dated 16 January 2019 from the Secretary-General addressed to the President of the General Assembly, UN Doc A/73/716, (21 January 2019), para. 25.
[95] On the specific requirements of forensic interviews conducted with children, see, *inter alia*, CRONCH, L. E., VILIJOEN, J. L. and HANSEN, D. J. (2006). 'Forensic Interviewing in Child Sexual Abuse Cases: Current Techniques and Future Directions', *Aggression and Violent Behaviour*, vol. 11, no 3, pp. 195–207; LAMB, M. E. *et al.* (2007). Structured Forensic Interview Protocols Improve the Quality and Informativeness of Investigative Interviews with Children: A Review of Research Using the NICHD Investigative Interview Protocol, *Child Abuse Neglect NIH*, vol. 31, no 11–12, pp. 1201–1231.

tackle challenging issues related to the risks of traumatisation or re-traumatisation – for instance, to explain questioning and cross-examination to children. This latter aspect is particularly sensitive because under cross-examination, children may feel that they are being ignored, discounted, disbelieved or even treated as a liar. In turn, this may undermine their confidence and sense of worth, be overwhelming or even cause deep re-traumatisation.

4. Reinforcing the structures providing for the security, safety and well-being of children involved in the proceedings

Among the reasons often adduced to explain why courts in general, and international courts in particular, do not adequately cover crimes against children primarily relate to security and safety issues. These are indeed important concerns, considering children's vulnerabilities. Logistical and security concerns increase when dealing with younger witnesses and victims, which also usually requires the assent and participation of parents and guardians in the process.

Investigators and prosecutors must carefully weigh the risks they may pose to children when directly or indirectly interacting with them; and must balance these risks with the potential benefits for children, including the satisfaction of their rights – notably to reparation. Preferably, it should be for children, supported by their parents and guardians (depending on the age and maturity), to make such choices.

Moreover, children themselves are easily intimidated by someone they do not know or an environment which is extraneous to their usual one. Investigators and prosecutors are usually foreigners and may not speak the child's language. The judges, lawyers and courtroom are all unfamiliar. Appearing before an international court involves travelling – often across international borders – and the use of languages different from the child's own, among other aspects. Testifying against persons of authority who have caused terrible suffering to children is obviously intimidating, if not destabilising. Children are asked to recall traumatic events and describe them in detail. This can exacerbate existing trauma or create new trauma. Disclosing painful experiences can make children feel ashamed and guilty, and can have long-term negative impacts. Indeed, studies pertaining to the involvement of children of different ages in criminal investigations and proceedings have shown that important questions remain regarding the impact of trauma on children's memory and on the recollection of traumatic childhood events.[96]

In this framework, it is essential to reinforce the structures in place which provide for the security, safety and well-being of children involved in the proceedings. Children should *have access to psychosocial assistance throughout the process*: before, during and after any interaction with the ICC; and provision should also be made to guarantee their physical safety and long-term community support. And in all cases, an individual determination based on the best interests of the child must be made on a case-by-case basis as soon as possible and well before the time to appear in court, and after consulting the child and child's parents or guardians (depending on the age and maturity), as well as child protection experts.

It is also crucial to initiate the protection of potential witnesses, particularly children, as early as possible – at least as soon as a child has been in contact with investigators. This

[96] GOODMAN, G. S., GONZALVES, L. and WOLPE, S. (2019). False Memories and True Memories of Childhood Trauma: Balancing the Risks, *Clinical Psychological Science*, Volume 7, Issue 1, January 2019, pp. 29-31. SCHAUER, E. and ELBERT, T. (2010). The Psychological Impact of Child Soldiering, E. Martz (ed.), Trauma Rehabilitation After War and Conflict, Springer Science+Business Media.

protection should continue for as long as necessary – usually well beyond the closing of a case. *Children must be and should feel safe and secure*: fear of retaliation can harm them, especially when they live in a volatile or ongoing conflict situation, where those responsible for the crimes or their supporters may still be in a position of threatening them, their family or their community.

During the proceedings, if a child is called to testify, the Prosecution should give specific attention to *the setting of the courtroom and request specific measures to minimize the impact of the testimony on the person*. As a psychologist stated, witnesses older than 18 years who were children when the crimes were committed should still be considered child witnesses at the time they testify. This decision responds firstly to the reality that the exact age of many former child-soldiers cannot be established. Furthermore, former child-soldiers who spent years fighting during a crucial time of their development may show a significant difference between their mental age and their biological age.[97]

The first trial before the ICC (the *Lubanga* case) highlighted the difficulties of holding a proceeding in which many of the Prosecution witnesses were children or had witnessed the events when they were children. In said case, ten former child soldiers testified. Although most of them were already young adults by the time of their testimony, they were still children when ICC investigators first contacted them. The first witness called by the Prosecution was just over 18 when he entered the courtroom on 28 January 2009. As a former child-soldier in Lubanga's armed group, he was called to testify on crimes that he had suffered as a child. Once in the courtroom, he appeared concerned and frightened, and ultimately recanted his testimony. The judges considered that the witness was not fit to continue testifying and suspended the hearing. The witness appeared again about two weeks later, on 10 February 2009, after a determination that he was fit to testify and subject to specific protective measures. In this regard, fewer persons were present in the courtroom and public gallery; the witness was allowed to testify without any prompting or interruptions by the Prosecution or the Defence; and, most critically, the witness was shielded from the direct view of the accused.[98] This incident shows the importance for children and persons testifying on crimes they experienced as children and other vulnerable witnesses should be duly informed of the aims, objectives and limitations of the process; and should be provided with culturally appropriate psycho-social support. Children cannot be heard effectively (either as victims or witnesses) when the environment is intimidating, hostile, insensitive or inappropriate for their age. The proceedings should be accessible and child appropriate, and measures must be adopted, such as child-friendly design of courtrooms, clothing of judges and lawyers, sight screens and separate waiting rooms.[99]

The CRC Committee has established that the child should be informed about issues such as the availability of health, psychological and social services and there should be a support

[97] MICHELS, A. (2010). Protecting and supporting children as witnesses: lessons learned from the Special Court of Sierra Leone; cited in Cecile Aptel, Children and Accountability for International Crimes: The Contribution of International Criminal Courts (Innocenti Working Paper, UNICEF Innocenti Research Centre), p. 32.

[98] UNICEF underlined that, "[…] particular attention should be paid to *the likely effect on children of testifying in front of the person accused of causing them harm*. Thus measures designed to shield the child from seeing the accused could be employed, such as sight-screens to separate child witnesses and the accused, or using closed-circuit television or video links that allow children to testify from outside the courtroom. In addition, while the right to a fair trial dictates that testimony must be tested to ensure it is as accurate as possible, children should never be exposed to the aggressive forms of questioning that may otherwise be employed during cross-examination" (emphasis added).

[99] CRC Committee, General Comment No. 12 (2009) - The right of the child to be heard, CRC/C/GC/12, para. 34.

mechanism in place and protective measures available.[100] The Committee has also recommended that children be provided with clear explanations as to how, when and where the hearing will take place and who the participants will be.[101] The UN Special Representative of the Secretary General for Children and Armed Conflict has also stated that expectations of children must be managed as many potential child witnesses or victims may have an erroneous idea as to what they can obtain for being witnesses.[102]

In this regard, Rule 17 of the RPE foresees that the Victims and Witnesses Unit (VWU) may appoint a child-support person to assist child witness through all stages of the proceedings. This support person should accompany the child from her or his initial interaction with the ICC (i.e. first interview with an investigator) until the end of the judicial process (i.e. trial and eventual reparations process). The *support person* should not only provide emotional support, but also act as a liaison between the child and his or her family. If a *lawyer representing the child* is already appointed (a legal representative), her or his involvement in contacting the child is advisable in light of the trust relationship already built which could facilitate exchanges with investigators and prosecutors.

Related to the protection of the child is the risk of self-incrimination. Appearing as a witness in relation to the crime of recruitment might lead to self-incrimination or threat of national criminal proceedings against the child if domestic law allows for the criminal prosecution of minors. A prior assessment before in-court testimony of the best interests of the witness in the light of her or his other rights, such as the right to "object to making any statement that might tend to incriminate"[103] should be performed. If the child is likely to incriminate her or himself, involvement in proceedings before the ICC cannot straightforwardly be considered to be in the best interests of the child since national criminal prosecutions could be opened on the basis of the statement given before the Court.

5. Rethinking the investigative and prosecutorial strategies

The successful investigation and prosecution of crimes against and affecting children often depend on the testimony of children. Children may possess the best and sometimes only evidence available of certain crimes – notably those committed against themselves or other children. However, factors such as the relatively long time needed to gain the trust of a child, reliability, security and safety concerns, may contribute to cases concerning children being deprioritised.

Involvement in judicial procedures is challenging for everyone, particularly for children. Concerns have been raised pertaining to the "suggestibility" of children or their capacity to resist false suggestions that certain events occurred, linked with apprehension that children could easily be led into making false reports of crimes.[104] Scientific studies have demonstrated that the completeness and accuracy of a child's testimony and capacity to resist false

[100] *Idem*, para. 64.
[101] *Idem*, para. 41.
[102] OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR CHILDREN AND ARMED CONFLICT, Children and Justice During and in the Aftermath of Armed Conflict (September 2011), p. 13.
[103] Rule 74(3)(a) RPE.
[104] DUCKER, J. N. *et al.* (2009). Children as Victims, Witnesses and Offenders, An Introduction through Legal Cases, Children as Victims, Witnesses and Offenders, Psychological Science and the Law edited by Bette L. Bottoms, Cynthia J Najdowski and Gail S Goodman (New York: Guilford Publications), 1.

suggestions is usually related to her or his age.[105] Ample research and publications based on national experience have discussed some of the numerous factors to be considered when children are involved in judicial proceedings, including their specific emotional needs; their ability to navigate the legal system; the accuracy of their memory and related capacity to testify.[106] Importantly, however, these studies have also enabled the identification of specific factors, including language ability and quality of attachment, which may moderate inaccuracies and increase the potential for reliable testimonies of children.

(i) Interviewing children

An investigator interviewing a potential child witness should first and foremost gain the trust of the child. Only then can it be expected that the child will give a sincere and trustworthy account. Early actions from the Prosecution could avoid multiple subsequent contacts and interviews which could eventually result in conflicting and contradictory statements that ultimately undermine the child's credibility.

In ICC proceedings child witnesses have been interviewed on various occasions and after long periods of time. This practice should be avoided, in order to prevent re-victimisation. In this regard, the CRC Committee has recommended that questioning be made in a conversation-like format rather than a one-sided examination.[107] The UN Special Representative of the Secretary General for Children and Armed Conflict in the Working Paper on Children and Justice states that it is rarely in the child's best interests to be interviewed on repeated occasions; that interviews should be kept to a minimum and should be conducted only by trained professionals.[108] This is also recommended by the UN Guidelines that state that the number of interviews should be limited and special procedures should be established in order to collect evidence from child victims and witnesses and in order to reduce "unnecessary contact with the justice process".[109] Lengthy examination and cross-examination should also be avoided.

Investigators and prosecutors should be clear about the purpose of meeting or interviewing the child and should focus on information required for said purpose only. Questions should be formulated in a child-suitable manner, in a clear and straight forward way. The pace of the child should be respected at all times, leaving her or him the time necessary to elaborate the question. Open account should be encouraged in order for the child to gain confidence in speaking and for the investigator to understand what is of importance for the child. The place for the meeting/interview should be carefully selected not only for security and safety reason but mostly for the comfort of the child.

Continuity in the contact between the child and investigators and prosecutors to develop the trust relationship and keep her or him involved in the process. If there is a long period of time between the initial interview and the actual trial in which the child will testify, the

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[105] *Ibid.*
[106] *Ibid.*
[107] CRC Committee, General Comment No. 12, *supra* note 99 , para. 43.
[108] OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL FOR CHILDREN AND ARMED CONFLICT, Children and Justice During and in the Aftermath of Armed Conflict (September 2011) 15. See also BEIJER, A. and LIEFAARD, T. (2011). A Bermuda Triangle? Balancing protection, participation and proof in criminal proceedings affecting child victims and witnesses, *Utrecht Law Review*, Volume 7, Issue 3, p. 76.
[109] ECOSOC Resolution 2005/20 – Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, para. 31(a). See also Paris Principles, *supra* note 26, Principle 7.28.

continuity of any relationship may be difficult if not impossible. Thus, passing of time is critical when referring to child witnesses and it is perhaps the most patent risk against their reliability.[110] Although an adult's memory deteriorates, the deterioration of a child's memory is more profound. Furthermore, depending on their age and own individual development, young children may not have a sufficiently developed understanding of the concepts of truth and lies, which form the basis of criminal justice. For example, children may face difficulties in distinguishing between reality and fantasy, especially when recounting traumatic events.[111] If child-friendly measures are not taken, testimonies of children could simply become unreliable and thus disregarded by the Chambers. It would be regrettable to have children endure a judicial process before the ICC in vain, simply because the special circumstances of their age, development and maturity were not taken into consideration. This was in fact the regrettable result in the *Lubanga* case, in which witnesses former child soldiers were found to be unreliable by the Trial Chamber. In this regard, reliance on intermediaries should be avoided and intermediaries used only for establishing the first contact with the child (as for other witnesses).[112] After, designated investigator (and trial lawyer) should directly interact with the child to preserve the trust relationship and the evidence.

The Policy already develop number of criteria to be taken into account for initial contact and interview with children during investigations[113] and interaction with children and testimony during the proceedings.[114] However, it may be useful to consider *having only one section in the updated Policy establishing guidelines applicable throughout the proceedings*. The European Council Guidelines regarding evidence and statements by child witnesses may be relevant in this regard.[115] In particular, said Guidelines establish:

> "64. Interviews of and the gathering of statements from children should, as far as possible, be carried out by trained professionals. Every effort should be made for children to give evidence in the most favourable settings and under the most suitable conditions, having regard to their age, maturity and level of understanding and any communication difficulties they may have.
> 65. Audio-visual statements from children who are victims or witnesses should be encouraged, while respecting the right of other parties to contest the content of such statements.
> 66. When more than one interview is necessary, they should preferably be carried out by the same person, in order to ensure coherence of approach in the best interests of the child.
> 67. The number of interviews should be as limited as possible and their length should be adapted to the child's age and attention span.

[110] BEIJER, A. and LIEFARRD, T. Bermuda Triangle? Balancing protection, participation and proof in criminal proceedings affecting child victims and witnesses, *supra* note 108, p. 94.
[111] BERESFORD, S. (2005). Child Witnesses and the International Criminal Justice System: Does the ICC Protect the Most Vulnerable?, *Journal of International Criminal Justice*, 737, 740.
[112] In the *Lubanga* Trial Judgment, the Trial Chamber indicated "given the pattern of unreliability as regards the witnesses introduced by Intermediary 143 and called to give evidence during the trial (P-0007, P-0008, P0010 and P-0011), the Chamber accepts that there is a real risk that he played a role in the markedly flawed evidence that these witnesses provided to the OTP and to the Court. […] it is likely that as the common point of contact he persuaded, encouraged or assisted some of all of them to give false statement". See The Prosecutor v. Thomas Lubanga Dyilo, *Judgment pursuant to Article 74 of the Statute*, see *supra* note 10, para. 291.
[113] Policy, paras. 71 *et seq*..
[114] Policy, paras. 89 *et seq*..
[115] Council of Europe: Committee of Ministers, Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice, 17 November 2010.

68. Direct contact, confrontation or interaction between a child victim or witness with alleged perpetrators should, as far as possible, be avoided unless at the request of the child victim.
69. Children should have the opportunity to give evidence in criminal cases without the presence of the alleged perpetrator.
70. The existence of less strict rules on giving evidence such as absence of the requirement for oath or other similar declarations, or other child-friendly procedural measures, should not in itself diminish the value given to a child's testimony or evidence.
71. Interview protocols that take into account different stages of the child's development should be designed and implemented to underpin the validity of children's evidence. These should avoid leading questions and thereby enhance reliability.
72. With regard to the best interests and well-being of children, it should be possible for a judge to allow a child not to testify.
73. A child's statements and evidence should never be presumed invalid or untrustworthy by reason only of the child's age.
74. The possibility of taking statements of child victims and witnesses in specially designed child-friendly facilities and a child-friendly environment should be examined."

Measures enhancing the child's well-being are not only beneficial to her or him but ultimately to a fair trial, as it also helps to preserve the evidence so that children's testimonies are credible and reliable.

(ii) Preserving the evidence of children

The result in the *Lubanga* trial, in which witnesses were found unreliable and in the end lost their victims' status, prove that urgent measures must be taken to preserve the evidence of children in ICC proceedings.

Alternative mechanisms other than live testimony in court should be used, whenever possible, in order to preserve the child's testimony from the passing of time. Pursuant to Article 56 of the Rome Statute and/or Rule 68 of the RPE, taking adequate safeguards to secure the rights of the defence, statements of child witnesses could be taken soon after the commission of the crimes, to be presented later in trial. Otherwise, the evidence of children - even the most reliable and trustworthy - may not endure the prolonged judicial proceedings before the Court. If one considers the developmental changes, both physical and mental, that a child undergoes while the proceedings are on-going, it would in reality be surprising to "preserve" the evidence unless measures are taken to actually safeguard the testimony from the passing of time, the loss of memory and changes in the mind of a child or an adolescent, who very often will move on to adult life while ICC proceedings are pending.

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