NPWJ Submission on the Draft OTP Policy on Children

5 August 2016

Introduction

1. No Peace Without Justice (NPWJ) welcomes the consultations undertaken by the Office of the Prosecutor (OTP) on its draft Policy on Children, both prior to and after the production of the draft, and the opportunity to provide written comments on the draft policy. We have participated in these consultations and others relating to different OTP policies and continue to believe such consultations are important not just in terms of the content of submissions the OTP may receive, but also in terms of a concrete expression of the OTP’s commitment to transparency and cooperation, including with civil society.

2. NPWJ is an international non-profit organisation founded by Emma Bonino and born of a 1993 campaign of the Transnational Radical Party that works for the protection and promotion of human rights, democracy, the rule of law and international justice. NPWJ’s International Criminal Justice program focuses both on international and national efforts to restore the rule of law and provide accountability and redress for the victims of crimes under international law, be they through the International Criminal Court, or through ad hoc Courts or Tribunals, national prosecutions or other accountability processes. The overall objective of the International Criminal Justice Program is to ensure that whatever solution is adopted, it is shaped and implemented so that it can contribute to the restoration of the rule of law, it is responsive to the needs of stakeholders and it adheres to the strictest human rights standards. NPWJ has been working on the ICC since its
inception; NPWJ participated in the Rome Conference and all subsequent Preparatory Committees and Assembly of States Parties sessions and works with stakeholders around the world, including with the ICC itself, to promote the principles of universality, effectiveness, efficiency and impact of the ICC.

3. This submission is divided into three parts. The first part concerns elements of the draft that NPWJ particularly welcomes and supports ("Positive elements"). This part highlights those elements and concepts that NPWJ believes should be retained and for which reasons. The second part concerns elements of the draft that NPWJ believes could usefully be clarified, amended or expanded ("Suggestions on specific elements"). This part focuses both on language and concepts, including some aspects that may seem less significant, but which could cause confusion. The third part concerns elements that NPWJ believes should be included in the draft policy that are currently absent ("Suggestions for additions"). This part contains specific recommendations and the reasoning behind the suggestions.

Positive elements

4. NPWJ has appreciated references in prior OTP policy documents, including the Strategic Plans, to the focus the OTP places on crimes against children, which have often been under-prosecuted in other fora. This policy is a very important step forward from that, both for the work of the OTP and for promoting the recognition and implementation of children’s rights and a child-sensitive approach by national and international justice institutions more broadly. Not only its content, but also the very fact of its being drafted and its eventual adoption, send an important message that crimes against and affecting children and the promotion and protection of children’s rights are policy priorities of the ICC, which NPWJ hopes will prompt a range of other actors to adopt similar priorities in their work. The explicit commitment of the Office in paragraph 102 of the draft policy
to working towards this end within its broader external relations strategy will be an important element in achieving this goal.

5. NPWJ welcomes the recognition running as a thread throughout the paper of the child as a human being with rights, rather than merely an object of protection, and their potential interest and role in the work of the International Criminal Court and the Office of the Prosecutor in particular. While often overlooked in international courts and tribunals, children are important members of society; and the children of today’s transitions are also the adults of tomorrow, inheriting the results of transition and the work of bodies like the ICC. Furthermore, children and young people far outnumber adults in many countries in which the ICC works; excluding them may exclude the majority of the affected population. Thus the assumption of “how” rather than “whether” to engage with and involve children is a much-needed development for the work of the OTP that can have far-reaching consequences for accountability and transitional justice in general.

6. As noted above, NPWJ welcomes the consultative approach taken by the Office in developing and drafting this policy, including this call for written submissions. NPWJ has been honoured to take part in prior in-person consultations and notes with particular appreciation the commitment of the Office to hearing the voices of children and in organising several consultations with children and young persons, as referred to in paragraph 12 of the draft policy, for which NPWJ is a vocal advocate.

Suggestions on specific elements

7. All States Parties of the Rome Statute are also parties to the Convention on the Rights of the Child (CRC), most of the provisions of which reflect customary international law. States cannot agree to do together what they are not allowed to do individually – that is, they cannot circumvent their existing treaty and customary international obligations by creating a treaty body that is not subject to the same principles. Therefore, as with other
treaty bodies, the ICC – even as it possesses independent legal personality – is bound by the same public international human rights law obligations applicable to its State Parties, specifically in respect of definitions and provisions in the CRC, particularly when the Rome Statute is silent. Article 3 of the CRC, on the best interests of the child, is the guiding principle through which the rest of the Convention must be implemented. Article 3 of the CRC requires that the framework for realising the rights enumerated in the CRC is premised on actions being undertaken in the best interests of the child. Likewise, the framework within which the ICC, including the OTP, addresses issues relating to children must also be based on the same premise. The best interests of the child has to guide decision-making in respect of children (both collectively and individually) and the burden would be on those seeking another a result to show that, under the circumstances, “other feasible and acceptable alternatives do not exist”.1 This could be stated more clearly in the policy, including by introducing the concept of the “best interests of the child” at the outset, in the beginning of this policy.

8. The description of the child-sensitive approach in paragraph 16 of the draft policy is a good statement on what it means and how the Office intends to implement it, which is elaborated on throughout the draft policy in a helpful way. It may be useful to incorporate in this paragraph in particular, and perhaps in other sections as well, the idea of a child’s evolving capacities.2 This concept, which was enshrined in the Convention on the Rights of the Child, recognises that as children acquire enhanced competencies, there is a diminishing need for protection and a greater capacity for them to take responsibility for decisions affecting their lives. It is reflected throughout the draft policy and an explicit reference to the term could be beneficial also for situating the policy within the broader child rights landscape and making it more accessible to those who work on child rights and child protection but not necessarily on international criminal law, such as child protection actors who are referred to in paragraph 17 below.

9. In the discussion on the definition of a “child”, the draft policy is clear that for the Office, this means someone who has not yet reached their eighteenth birthday, an approach with which NPWJ fully agrees. The discussion seems to be unnecessarily complicated by the reference to the war crime of conscription, enlistment or use as it is currently included, since it suggests an element of uncertainty for the ICC, as if there were some question mark over defining a child as anyone under 18. It is simpler than that: anybody under the age of 18 is a child; those whose conscription, enlistment or use in hostilities is a crime are also children. Additionally, it may be beneficial here, for example in paragraph 15 of the draft policy, and in other places referring to this war crime, such as paragraphs 35-7 of the draft policy, to refer to the Optional Protocol to the CRC on the Involvement of Children in Armed Conflict, which raises the age at which conscription, enlistment or use is prohibited to 18. While not yet reflecting customary international law, there are 165 States Parties to the Optional Protocol, the majority of whom have set 18 as the age for any kind of recruitment to their armed forces, which provides further support for the OTP’s approach on this issue.

10. The separation of the three parts of the crime of child recruitment is very important, as it underscores that each of these three acts may constitute the crime. Conscription or enlistment are prohibited irrespective of whether the child is intended for or is in fact subsequently used to participate actively in hostilities; for example, the elements of the crime are met if a child is conscripted for sexual purposes. Similarly, using a child to participate actively in hostilities is prohibited whether or not a child has been conscripted or enlisted. To make things clear, it would be useful to delete “and” in the heading and replace it with “or”, so the heading reads “Conscription, enlistment or use” which also reflects more accurately the wording of the Rome Statute. It is irrelevant whether the conscription, enlistment or use to participate actively in hostilities is forced or voluntary.3 Whether a child volunteers or not, whether they are willing to participate or not, this crime prohibits the conscription, enlistment or use to participate actively in hostilities of all children under fifteen in all circumstances. In paragraph 36 of the draft policy, it may

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3 See, e.g., ICRC Commentary to Protocol II, para 4557.
be useful to spell out that the consent of the child is irrelevant in respect of enlistment, otherwise the detailed discussion on what constitutes “compulsion” may suggest that “consent” could be a defence to this particular crime. It should be clear in the policy that whoever may or may not have given what consent, the crime covers all manners by which a child becomes a member of an armed force or group or is otherwise used to participate in hostilities. Similarly, in paragraph 37 of the draft policy, it would be important to remove the word “combat” and instead use the term “hostilities”. “Hostilities” refers to acts of war that by their nature or purpose are likely to cause actual harm to personnel or equipment of the enemy. This may or may not constitute combat and it is important to underline that taking part in hostilities does not necessarily mean a combat or fighting role, but includes other functions that are by their nature or purpose linked with damage to the enemy, even if they are not linked to combat, as reflected both in the law and in the actual experiences of children.

11. NPWJ agrees that if a child is a victim of a measure intended to prevent births, as referred to in paragraph 39 of the draft policy, it would disproportionately affect that child. It is unclear, however, who is considered to be a victim of this crime: a child on whom such a measure is imposed as a parent, or (controversially) a child who might have been born had the measures not been imposed. With the current phrasing, if the latter is implied by those reading this policy, the OTP – and the ICC as a whole – may unwittingly find itself drawn into or instrumentalised in a broader debate on whether foetuses and embryos are rights holders and on reproductive rights more broadly. NPWJ therefore respectfully suggests a reconsideration either of the inclusion of this crime or in the way it is presented within this section.

12. NPWJ fully agrees with the concept underpinning paragraph 50 of the draft policy that crimes against or affecting children are particularly grave and can have lasting implications for the child, first and foremost, but also for communities and future generations. It may, however, be more sensitive to separate “killing” from the other

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4 See for example Rutaganda judgment, ICTR-96-3-T, Trial Chamber, 6 December 1999, para 100.
crimes when describing their impact; for example: “It impedes their development and ability to reach their true potential, as, for example, in the case of mutilation, child recruitment or use, torture, enslavement, forced transfer, attacks against buildings dedicated to religion, education and healthcare, pillaging and sexual and gender-based crimes affecting children, while killings put a premature end to what may otherwise be long and fruitful lives”.

13. NPWJ welcomes the references throughout the policy to paying particular attention to experience working with and interviewing children during its recruitment processes. It may also be useful to add experience in dealing with trauma in children, particularly in paragraph 59 of the draft policy, much as article 43(6) of the Rome Statute already refers to the need for the Victims and Witnesses Unit to include staff experienced in trauma for sexual violence. Most if not all child victims or witnesses will undoubtedly suffer from some form of trauma to greater and lesser degrees, given the nature of the crimes under investigation and this kind of expertise would be important for the Office to fulfil its mandate and adhere to this policy.

14. Prioritising crimes against or affecting children during the selection of charges, as reflected in paragraphs 74-78 of the draft policy, is an important aspect of recognising the seriousness of these crimes and providing redress for the victims. It would be useful to clarify that this would apply consistently with other OTP Policies, especially the policy on Case Selection and Prioritisation. As noted in our comments on that draft policy, the charging policy of the OTP should focus on their being representative of the crimes suffered during the conflict. As such, crimes against or affecting children – when they are committed, which is often – should be an integral part of ICC investigations and prosecutions. This includes both crimes which are “child-specific” and “generic” crimes, of which children have been targets and victims, including in particular those crimes that disproportionately affect children, as discussed in the draft policy. This is important for three reasons. First, it reflects the realities on the ground. Second, it sends a signal that crimes against or affecting children will not be tolerated. Third, it enables children to see
that crimes against them are taken seriously within the overall crimes committed against the communities in which they live.

15. NPWJ underscores the importance of the stated intent of keeping child witnesses informed about developments in the case, as is particularly referred to in paragraphs 80 and 86-7 of the draft policy. This is an important element of the child’s engagement in the process and their right to participate. One element that appears to be lacking is how the Office views its responsibilities towards children who are interviewed but not selected to testify, for example if their testimony is not necessary to prove the case, or the results of the psycho-social assessment suggest it is not in their best interests, or they elect not to testify. It also raises broader questions about the responsibilities of the OTP and indeed the ICC as a whole vis-à-vis children with whom it engages in whatever capacity, including what kind of responsibility and for how long it subsists, depending on the nature of the engagement. While the issue of the ICC’s responsibilities is outside the scope of this paper, it may be useful to include some reflections on the responsibilities of the OTP, especially given the potential impact a child’s involvement may have on their current and future life.

16. NPWJ fully supports the reference in paragraph 90 to the introduction of evidence on the impact of crimes on children, which can help understand the elements of the crimes and can be extremely relevant to sentencing. Adducing expert testimony on trauma and expert or other testimony on impact, for example assessments from psychologists or results of group sessions with children, could also be a way of ensuring those voices are heard where it is determined that it not in the best interests of the child to provide that testimony in court themselves. It may be useful here to introduce also the concept of inter-generational trauma, which is referred to in paragraph 50 of the draft policy and on which the Court may benefit from expert testimony.

17. The development of good networks and good relationships with States and other stakeholders as mentioned in paragraph 98 of the draft policy is an important aspect of ensuring the OTP’s ability to do its job and in supporting the promotion of the
recognition and implementation of children’s rights and a child-sensitive approach by national and international justice institutions more broadly, as noted in paragraph 4 above. It may be useful to add an explicit reference to child protection actors, both as implementation partners or intermediaries and as a potential source of important support for the work of the OTP in broader terms. While this can be difficult to achieve, experiences at the Special Court for Sierra Leone show that when it is possible, it can be of tremendous benefit, not least for potential and selected child witnesses.  

Suggestions for additions

18. The draft policy refers to how the OTP will engage with child witnesses in some detail and the approach that the OTP, and by extension its staff, are expected to take when dealing with children. This reflects some aspects of the “Child Safeguarding” approach, which relates to the action taken to promote the welfare of children and protect them from harm. The typical Child Safeguarding Policy sets out a range of issues relating to children including specific ways in which staff and other partners are expected to interact with children and consequences for the failure to do so. While some aspects of what might be expected to be seen in such a policy are reflected here, others are not addressed explicitly such as vetting of staff, what constitutes child abuse/exploitation, the approach of the Office when faced with such a situation and other matters. It may be that these kinds of issues are dealt with more comprehensively in the ICC or OTP’s Codes of Conduct, or in other human resource documents. It would be helpful to refer to these other documents and how they interact with this policy, especially in overlapping areas.

19. The section on implementation, in paragraphs 111-3 of the draft policy, could usefully add the concept of consultations as part of any review process, especially with children.

5 See the Outcome Document from the Expert Discussion on Transitional Justice and Children organised by UNICEF-Innocenti Research Centre on 10-12 November 2005.

who have interacted as witnesses or potential witnesses with the OTP, in order to obtain their perspective as the main beneficiary of the policy.

20. NPWJ strongly agrees that it is important that children understand the work of the Office and the Court and to that end welcomes the intention to cooperate with the Registry on its outreach to children in paragraph 104 of this draft policy. The draft policy, however, contains no information on how the Office intends to communicate issues surrounding this policy and its implementation to victims and affected communities, particularly children. Aside from the many varied reasons why it is important for the Office to undertake this kind of communication and outreach, it is from within these groups that witnesses can be found. To promote their willingness to cooperate with the Office, it is important that they understand how the Office deals with crimes against and affecting children and how the Office intends to interact with, support and protect children who may be willing to testify. As such, it is important that the Office has a clear strategy for how to communicate information on the policy and its implementation with victims and affected communities, especially children, and that this strategy is clearly reflected within the draft policy paper.

**Conclusion**

21. NPWJ remains committed to supporting the work of the International Criminal Court, and the Office of the Prosecutor, including through participating in consultations such as these. We would find it very useful to receive feedback on this submission, so we can tailor our contribution to future consultations to be as beneficial as possible. NPWJ stands ready to provide any further information or clarifications.  

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8 Please contact Alison Smith, NPWJ Director for International Criminal Justice, on asmith@npwj.org.
22. We conclude as we began, by thanking you again for this opportunity and for your willingness to consult with civil society on these issues of mutual importance and concern.