



NON C'È PACE SENZA GIUSTIZIA NO PEACE WITHOUT JUSTICE

Via Costanza Baduana Vaccolini 5; I-00153 Roma
Rue Ducale 41; B-1000 Bruxelles

www.npwj.org

NPWJ Submissions on the OTP Renewal of its Policy on Children

31 May 2023

Introduction

1. No Peace Without Justice (NPWJ) welcomes the consultations undertaken by the Office of the Prosecutor (OTP) for the renewal of its Policy on Children and the opportunity to provide written comments. We have participated in these consultations and others relating to different OTP policies, including on the Policy on Children itself, 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 that works for the protection and promotion of human rights, democracy, the rule of law and international justice. NPWJ's International Criminal Justice work 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. Our overall objective 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.
3. 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. NPWJ



N O P E A C E W I T H O U T J U S T I C E

has been working on the intersection between the rights of the child and international justice processes and international criminal law since 2002.

4. This submission is divided into three parts. The first part concerns elements of the Policy that NPWJ particularly welcomes and supports (“Key existing elements”). This part highlights those elements and concepts that NPWJ believes should be safeguarded during the renewal process and for which reasons. The second part concerns elements of the Policy 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 Policy that are currently absent (“Suggestions for additions”). This part contains specific recommendations on additional elements to include in the Policy and the reasoning behind those suggestions.

Key existing elements

5. NPWJ deeply appreciates the focus the Office has put on children, in its policy and strategic documents and in public statements by the Prosecutor and OTP staff. We believe this has not only demonstrated a true commitment to children and the protection and promotion of their rights, it has also prompted other actors to adopt similar priorities in their work, such as the International, Impartial and Independent Mechanism for Syria, as we had mentioned we hoped would happen in our submission on the draft policy in 2016.¹ This focus has been given real meaning in the first arrest warrants issued in respect of the situation in Ukraine. It is significant that these cases centre on children and on a situation that is not only a crime in itself but also violates many other rights of the child, including the right to family life and the right not to be separated from their parents against their will.

¹ NPWJ Submission on the draft OTP Policy on Children, 5 August 2016, available from http://www.npwj.org/sites/default/files/ressources/NPWJ_Submission_OTPChildPolicyAUG16_0.pdf.



N O P E A C E W I T H O U T J U S T I C E

6. There are several elements that make the OTP's Policy on Children a critical document with ongoing great potential both to enhance the work of the Office and to contribute to the promotion and protection of children's rights, particularly as they intersect with justice processes. These elements should be retained; indeed, great care should be taken to ensure they are not unwittingly diluted during the revision process. In some of these areas, we have suggestions where the Policy could be strengthened, which are addressed in the following section.
7. In this section, we would like to highlight the following elements that, at a minimum, should be safeguarded during the renewal process:
 - The emphasis on the best interests of the child as a primary consideration in the work of the OTP. As we noted in our 2016 submission, all States Parties to the Rome Statute are also parties to the Convention on the Rights of the Child. Given that States cannot circumvent their existing treaty and customary international obligations by creating a treaty body that is not subject to the same principles, 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.² 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. The OTP Policy on Children approaches this in an exemplary way, through its recognition that implementing this principle entails consideration of the specific situation of the child, the child's views and the specific rights at issue, which are broad and often intersecting.

² See also article 21 of the Rome Statute, authorising the Court to apply applicable treaties and the principles and rules of international law (article 21(1)(b)) and requiring that the application and interpretation of law, including the Rome Statute itself, be consistent with internationally recognised human rights and be without any adverse distinction founded on various grounds, including age (article 21(3)).



N O P E A C E W I T H O U T J U S T I C E

- The recognition that children can be resilient, capable and vulnerable all at the same time, based on a range of individual factors including their sex, gender, social, cultural or other status or identities, as well as their specific circumstances. This is important because it recognises the intersectionality of a child’s experiences and situation, as well as their rights. It must always be borne in mind that the balance of a child’s resilience, capabilities and vulnerabilities can constantly shift, depending on the time and specific circumstance (such as during an investigative interview or during testimony) and will vary over time as their capacities evolve.
 - The recognition that children are capable of giving credible evidence. As will be discussed later, children are still far too often viewed as vulnerable people who are in need of protection, rather than rights holders with specific perspectives and capacities. Thus the first instinct of many involved in the investigation and prosecution of crime, and particularly crimes under international law, is to prioritise protection by limiting children’s participation in formal processes. By making the explicit statement that children are capable of giving credible evidence, the OTP Policy on Children makes the implicit recognition that children can and should participate in judicial processes affecting them, if they want to do so.
 - The commitment to disseminate the policy in a format and language that is accessible to children. This is extremely important because it recognises that in order for children to exercise their rights to participate and to have access to justice, children need to understand what precisely they might be participating in and what justice at the ICC might look like. It also contains the implicit recognition that children may need extra efforts to help them realise those and other rights.
8. We note that part of the renewal of the Policy will no doubt include updating the policy with respect to the OTP’s institutional capacity, particularly as it relates to the reorganisation of the OTP initiated in 2021, including reorganisation of the Gender and Children’s Unit (GCU),



N O P E A C E W I T H O U T J U S T I C E

mainstreaming of the rights of the child within the office and coordination with other parts of the Court that intersect with the work of the OTP, such as the Victims and Witnesses Section. We reviewed with great interest the OTP's 2022 Annual Report and are encouraged by the description therein of the various ways in which the GCU in particular and the Office in general are deepening their understanding of issues related to children. We believe this will help contribute to the Office's overall goal of crimes against children being reflected in the cases brought to court³ and in the Office's overall treatment of the children with whom they come into contact.

Suggestions on specific elements

9. The Policy is framed in sections that reflect, more or less, how a case moves through the ICC, especially as it relates to the OTP; thus it start with the regulatory framework, moves through the stages most relevant to the OTP (preliminary examination, investigation and trial) and ends with institutional issues and implementation of the Policy. This is, of course, necessary to ensure clarity and comprehensiveness, and reflects how justice processes are generally conceptualised. At the macro level, international criminal justice generally goes through documentation, investigations, prosecutions, appeals and reparations, where available. At the micro level, the ICC is further broken down with numerous actors playing different roles during those phases: pre-investigation documenters, be they civil society or otherwise; OTP investigators; outreach, both Registry and OTP; victim and witness protection; victims participation; Office of the Public Council for Victims; victims representatives; trial lawyers; defence lawyers; judges; and Trust Fund for Victims, to name a few.
10. For a child, however, justice is not neatly compartmentalised, but is a journey that starts with first contact by documenters or investigators and will inevitably involve a range of actors, who should be acting according to common principles and approaches to ensure consistency and

³ OTP 2022 Annual Report, pp 61-3, available from <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-05-annual-report-of-the-office-of-the-prosecutor.pdf>.



N O P E A C E W I T H O U T J U S T I C E

clarity for that child. Throughout this journey, the child (who may also become an adult during that time) has different levels of resilience, capacities, perspectives, vulnerabilities and needs, with the balance constantly shifting as mentioned in paragraph 7 above. As such, an ongoing review and assessment of the best interests of that child is needed to ensure the journey is empowering and does no harm. This will require constant engagement, checking in, listening to the child and ensuring an environment that is conducive to their communicating with the OTP, if they wish to do so. As noted in our 2016 submission, the concept of evolving capacities, 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. An explicit reference to this concept 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.

11. While it is relatively easy to pinpoint when the journey to justice begins, it is more difficult to determine when it ends. Depending on the situation and the individual child, the impact of both the events themselves, where a child was touched somehow by crimes within the court's jurisdiction, and their engagement with the ICC could mean that their individual journey continues long after the formal justice process has ended. It is important that someone who is a child when the journey began is not abandoned once they turn 18, even if they have not been involved with the OTP as a witness. In this respect, we note the OTP's Situation Completion Strategy of 2021,⁴ which in paragraph 91 in particular underscores the Office's "commitment to ensuring the continued effectiveness of the statutory protections afforded to witnesses and other persons potentially at risk due to their cooperation with the Court, even after the Court's proceedings in a case are concluded". We also note paragraph 96 of the Policy on Children, relating to maintaining contact, which is positive and to which we would suggest adding a specific reference to acquittals and convictions, not just to sentences and reparations. In

⁴ <https://www.icc-cpi.int/sites/default/files/itemsDocuments/20210615-Situation-Completion-Policy-eng.pdf>



N O P E A C E W I T H O U T J U S T I C E

general, we believe it is important there be deeper reflections on how the OTP could continue its engagement, or at least availability, for persons who were involved with the work of the OTP when they were children, to ensure those people's journeys are as empowering and positive as possible, for as long as is necessary.

12. In a number of places, the Policy indicates the OTP will strive to ensure its activities do no harm to the children with whom the Office interacts (see for example the executive summary) and that the OTP seeks to promote respect for the rights of the child and accountability for crimes committed against them (see for example paragraph 10). These are very important concepts and we commend their repetition throughout the Policy. Nonetheless, we respectfully suggest the Policy – and hence the work of the Office – could be greatly strengthened by explicitly adopting the more proactive approach of “how can the Office’s work be implemented in a way that proactively empowers children to exercise their rights”. This could be achieved through adding the elements of empowerment, participation and adopting a child-centred approach to all the work and in all stages of the work. Paragraph 36, for example, mentions the importance of the protection of children’s rights; this could be strengthened by adding also the promotion of children’s rights, including their right to participate. Likewise, paragraph 117 refers to ensuring the OTP has the institutional capacity so that its interactions with children respects their rights and best interests; this could be strengthened by adding the concept of the promotion of children’s rights and their empowerment in the justice journey.

13. As mentioned, we appreciate the recognition given in the Policy, such as in paragraph 3, that children are vulnerable, entitled to special care and protection, and that their interests, rights and personal circumstances must be given due consideration. We believe the impact of the Policy on how children’s rights are conceptualised, both within the OTP and by other stakeholders, could be enhanced through explicit inclusion of the fact that first and foremost, children are rights-holders. They are active participants in their own lives and their agency to be active participants should be supported. An additional way to do that would be to rephrase



N O P E A C E W I T H O U T J U S T I C E

how the Policy talks about children, notably in paragraphs 22 and 25, but in other parts of the Policy as well. Our respectful suggestion is to switch the concepts of vulnerability and capability/resilience, namely to move from recognising that children are both vulnerable and capable/resilient, to recognising the children are both capable/resilient and vulnerable. Putting vulnerabilities first creates a mindset that children are first and foremost vulnerable and in need of protection beyond all else, which may result in overlooking capabilities that would otherwise be more evident. If the concepts of capable and resilient are placed first, this would demonstrate the recognition of children as rights-holders and active participants in their own lives, thus seeing the strengths of children front and centre, followed by the recognition they may need special help and protection to realise their potential and their agency as active participants who have rights. Again, it would be important to reflect the concepts of the evolving capacities of the child in identifying the balance between capacity, resilience and vulnerability at each stage of the justice journey.

14. We fully appreciate that this Policy on Children is intended first and foremost to guide the work of the Office and we welcome the recognition of the contributions the Policy can play beyond that immediate purpose, for example in respect of the development of jurisprudence on crimes against children. We respectfully suggest that the policy objectives outlined in paragraph 9 could include the role the OTP can play in prompting other accountability actors to highlight the rights of the child and violations against children also in their work. For example, in addition to the development of jurisprudence, the OTP's work could not only serve as a reference for national jurisdictions and others, as mentioned in paragraph 110, it could promote national jurisdictions and others to highlight children's rights and crimes against children in their own accountability efforts and to adopt their own policies on children, much as was done by the International, Impartial and Independent Mechanism for Syria in its Children & Youth Strategy.⁵

⁵ <https://iim.un.org/what-we-do/victim-survivor-centred-approach/#children-&-youth-strategy>



N O P E A C E W I T H O U T J U S T I C E

15. As mentioned, the guidance of action by the concept of the best interests of the child is a defining and important feature of the OTP Policy on Children. We believe this concept could be given greater meaning and play a more determinative role. Presently, the Policy refers to consideration of the best interests of the child, balancing other interests then making a determination, in which the best interests of the child will be given substantial weight (see for example paragraph 32). While agreeing with this approach broadly speaking, we believe that the fact that the best interests of the child has to guide decision-making in respect of children (both collectively and individually), the burden should be explicitly on those seeking a result that may not be in the child's best interests to show that, under the circumstances, "other feasible and acceptable alternatives do not exist".⁶ For completeness, we also note that in determining the best interests of the child, especially when dealing with an individual person under the age of 18, it is important to take into account that child's views, in light of their evolving capacities and taking into account their specific circumstances and characteristics,⁷ as reflected in the Policy. This could be strengthened by also making reference to hearing the child's views during the balancing process described in paragraph 32.

16. We welcome the recognition in the Policy of the disproportionate impact of Rome Statute crimes on children and the commitment to capture the full extent of harm suffered and the multi-faceted impact on children, as is done for example in paragraph 17. We believe this could go further by recognising that potentially *all* crimes within the jurisdiction of the Court may involve children somehow, including as direct victims or witnesses, or as children of parents involved in Rome Statute crimes. It would be beneficial to include a specific commitment by the Office not just to examine information carefully, but to look actively for the impact of Rome Statute crimes on children as a standard operating procedure in all preliminary examinations and investigations. We note the wording of paragraph 88 about charging

⁶ See Philip Alston, *The Best Interests of the Child*, 1994, p 13.

⁷ See for e.g. CRC GC 20 (2016), para 22, which also states that in respect of adolescents, appropriate weight must be afforded to the views of adolescents as they acquire understanding and maturity.



N O P E A C E W I T H O U T J U S T I C E

whenever the evidence permits; for the evidence to permit, that evidence first has to be found and it is unlikely to be found unless people are actively looking for it.

17. We welcome the fact that the Policy recognises in paragraph 20 that children may come into contact with the OTP other than as witnesses, explicitly referring to children whose parents or caregivers have agreed to testify. It would be helpful to add children whose parents or caregivers are being interviewed by the OTP, i.e. during the investigation stage and not only during a trial, and children whose parents or caregivers are suspects or detainees, whether pre- or post-conviction. It would be important to set out procedures and guiding principles, either in this Policy or in the OTP's operational documents, for how the Office will interact with children in those situations, as it does for example in paragraph 65 about initial contacts with children being done through persons who have already established a relationship of trust with that child. In so doing, it should be highlighted that these are operational consequences of the fact that the child is a rights-holder, with rights that are separate from those of their parent. In the following section, our submission expands on this concept *vis a vis* children of parents who are suspects or detainees.
18. Regarding the crime of child recruitment in paragraphs 39 and following, the separation of the three parts of the crime is very important, as it underscores that each of these three acts may constitute the crime. Conscripted or enlisted 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 ensure complete clarity, it would be useful to delete “and” in the heading and in paragraph 40, replacing it with “or”, so the text reads “Conscription, enlistment or use”, which also reflects more accurately the wording of the Rome Statute. This is important because of the risk of confusion that the use of children to participate actively in hostilities requires the child to be involved somehow in active combat. Conversely, it is critical to be clear that any one of those three elements – conscription, enlistment or use – are



N O P E A C E W I T H O U T J U S T I C E

sufficient to establish the commission of the crime, even if the child never went anywhere near combat.⁸

19. Likewise, in paragraph 42 of the 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.⁹ Such “acts of war” may or may not constitute combat. 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 active combat, as reflected both in the law and in the actual experiences of children.
20. It would be interesting to consider to what extent the experience of the OTP in its preliminary examinations and investigations, and the Court’s jurisprudence, could be used by the OTP itself to advocate with States to ratify the CRC Optional Protocol on children and armed conflict, so as to increase the minimum age of recruitment to 18 within national jurisdictions or systems, in order to increase protection of children in armed conflict. For example, it would be interesting to understand whether the OTP could have prosecuted additional instances of the crime of child recruitment had the minimum age for conscription, enlistment or use been 18, and whether that kind of statistic could be used by the OTP or other stakeholders to encourage at least the nine Rome Statute States Parties¹⁰ who are not also parties to the CRC Optional Protocol to ratify that treaty.

⁸ In this respect, it is important to consider unintended consequences of extending too far the types of conduct or activities that may be considered to constitute active participation in hostilities, since that would qualify someone as a combatant and therefore a legitimate military target, irrespective of the method by which they acquired that status. See for example “Captured child combatants”, 1990, *International Review of the Red Cross*, No. 278, by Maria Teresa Dutli, available from <https://www.icrc.org/en/doc/resources/documents/article/other/57jmea.htm>.

⁹ See for example Rutaganda judgment, ICTR-96-3-T, Trial Chamber, 6 December 1999, para 100.

¹⁰ There are 175 States Parties to the Optional Protocol; the nine States Parties to the Rome Statute who have not yet ratified the Optional Protocol are: Antigua and Barbuda, Barbados, Comoros, Cook Islands, Marshall Islands, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&clang=_en.



N O P E A C E W I T H O U T J U S T I C E

21. In paragraph 49, we would suggest adding an explicit reference to the right to health, as contained in article 24 of the CRC, which is threatened when hospitals are attacked.
22. In paragraph 50, we welcome the recognition that ill treatment and torture may cause greater suffering to children and may require different responses than similar crimes committed against adults. We would suggest including the fact that ill treatment or torture of a child may have a greater potential impact on the rest of their lives, including their physical, mental, social and other development. In this respect, it may be helpful to reference various articles of the CRC that could be relevant here, including article 6 on survival and development of the child; articles 17 and 23 referencing cultural and spiritual development; and article 27 on the standard of living.
23. NPWJ fully agrees with the concept underpinning paragraph 58 of the 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 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”.
24. We welcome the emphasis in the Policy, such as paragraph 68, to taking the views of children into account, as well as that of their parents and caregivers, and to ensure those views are informed through the provision of information. It would be interesting to consider including children in risk assessment exercises with the Office, depending on the child’s capacities to do so, whether in this Policy or in operational document. In its General Comment 20, the Committee on the Rights of the Child stressed that “engaging adolescents in the identification of potential risks and the development and implementation of programmes to mitigate them



N O P E A C E W I T H O U T J U S T I C E

will lead to more effective protection”.¹¹ This could give real life to a commitment for the justice journey not only to be not harmful, but to be positively empowering.

25. It would be helpful if the Policy were explicit about seeking testimony and evidence directly from children who want to give it. As mentioned, the statement at the beginning of the Policy that children are capable of giving credible evidence evokes the idea that, if they wish to do so, children should give evidence about crimes committed against them, which we fully support as a realisation of a child’s right to participate. It would be helpful if the Policy were clearer that the consideration of alternate forms of evidence, for example as described in paragraph 68, is a secondary form of evidence, if children’s testimony is not available. This is important to underscore because the temptation is often to use alternate forms of evidence as a first resort, since they usually require less safeguards to obtain, which risks disempowering children by someone or something else speaking on their behalf about their experiences.
26. As mentioned, from the perspective of the individual child, justice is a journey that involves a range of different actors, both within and outside the OTP and the ICC more broadly. It may be helpful to reflect this idea in paragraphs 110 to 114, regarding the Office’s engagement with some of those actors, to highlight the objective of providing transitions that are as seamless as possible. This is also relevant to paragraph 66 on providing information on support that may be available for the child (whether internal or external) and paragraph 94 on collaboration with the Victims and Witnesses Section of the Registry.
27. As mentioned, we welcome the commitment to develop a presentation of the Policy that is accessible to and understandable by children, especially in paragraph 116. This paragraph, and the OTP’s plans, could be strengthened by an explicit reference to partnering with children and those working with children, including educators and entertainers, to develop both the accessible version of the Policy itself and other materials relating to the work of the OTP. It

¹¹ General comment No. 20 (2016) on the implementation of the rights of the child during adolescence of 6 December 2016, para 19, available from <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/404/44/PDF/G1640444.pdf?OpenElement>



N O P E A C E W I T H O U T J U S T I C E

could also reflect the thematic priority outlined in the OTP's 2022 Annual Report about bringing the work closer to communities, to deepen its presence and engagement in situation countries by interacting with communities about the Policy and the Office's commitment to children.¹²

28. The section on implementation, in paragraphs 123-5 of the Policy, could usefully add the concept of consultations as part of any future review process, especially with children who have interacted with the OTP, in order to obtain their perspective as the main beneficiary of the Policy. It may also be helpful to consider regular reporting on implementation of the Policy, for example in the OTP Annual Report, to provide assessments and insights between formal reviews, which could benefit both the OTP and other stakeholders.

Suggestions for additions

29. Since the adoption of the OTP Policy on Children in 2016, there has been increasing attention on accountability for crimes against the environment,¹³ with various cases and complaints being brought at the national, regional and international level,¹⁴ and a growing movement to include the crime of ecocide within the Rome Statute.¹⁵ There is also increasing attention being paid to environmental destruction and damage as it intersects with the rights of the child,¹⁶

¹² OTP 2022 Annual Report, pp 20, available from <https://www.icc-cpi.int/sites/default/files/2022-12/2022-12-05-annual-report-of-the-office-of-the-prosecutor.pdf>.

¹³ NPWJ for example is implementing a multi-year project on accountability for deforestation and other environmental crimes in the Amazon region: <http://www.npwj.org/node/17888>

¹⁴ See for example Maria Antonia Tigre, "A look back at significant decisions in climate litigation in 2022", 22 December 2022, available from <https://blogs.law.columbia.edu/climatechange/2022/12/22/a-look-back-at-significant-decisions-in-climate-litigation-in-2022/>

¹⁵ See for example a side event hosted by the Republic of Vanuatu and the Stop Ecocide Foundation with Parliamentarians for Global Action and NPWJ in the margins of the 21st session of the ASP: <http://www.npwj.org/ICC/%E2%80%9DGlobal-crisis-and-potential-ICC-relevance-ecocide-fifth-crime%E2%80%9D.html-0>

¹⁶ Following a long consultation process, including with children, the Committee on the Rights of the Child is scheduled to adopt General Comment 26 on children's rights and the environment with a special focus on climate change in May 2023: <https://www.ohchr.org/en/documents/general-comments-and-recommendations/draft-general-comment-no-26-childrens-rights-and>



N O P E A C E W I T H O U T J U S T I C E

which include the right to a safe and healthy environment as recently recognised by the UN Human Rights Council in October 2021 and by the UN General Assembly in July 2022.¹⁷ The 2016 OTP Policy on Case Selection and Prioritisation, in paragraph 41, signals the intention of the Office to “give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land”.¹⁸ While ecocide is not yet within the jurisdiction of the ICC, the Rome Statute contains some provisions through which crimes of this nature could be investigated and prosecuted, such as the war crime of intentionally launching an attack in the knowledge that such attack will cause ... 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;¹⁹ and, potentially, war crimes relating to the use of poison, dangerous gas, or biological agents or toxins.²⁰ We therefore propose the addition of a new section in chapter III of the Policy on Children, on the Regulatory Framework, addressing this element, highlighting the disproportionate impact of crimes against the environment on children and enumerating some of the rights of the child that are violated by environmental damage and destruction.

30. NPWJ is currently conducting in-depth research into the rights of children whose parents are suspects or detainees, whether through criminal or other proceedings, reviewing national, regional and international legislation, case law, scholarly articles and numerous other sources. The research is being conducted from the perspective of the child: while suspects and detainees have their own rights concerning their children, for example the right to family contact, any child (i.e. someone between the ages of 0 and 18) of that person has their own, separate rights that are affected by the arrest or detention of their parent. We believe that, in general, insufficient attention has been paid to the child as a rights-holder when facing the arrest or

¹⁷ See UNDP, “What is the Right to a Healthy Environment?”, 5 January 2023, available from <https://www.undp.org/publications/what-right-healthy-environment>

¹⁸ https://www.icc-cpi.int/sites/default/files/20160915_OTP-Policy_Case-Selection_Eng.pdf

¹⁹ Rome Statute, article 8(2)(b)(iv)

²⁰ Rome Statute, articles 8(2)(b)(xvii), (xviii), (xxvii) and 8(2)(e)(xiii), (xiv) and (xvi).



N O P E A C E W I T H O U T J U S T I C E

detention of their parent and to how those rights should be taken into account from the moment of a parent's arrest to any eventual release. The following parts of this submission have been informed by that research, which we will be happy to share with the OTP once it is finalised.

31. As mentioned in paragraph 17 above, the Policy is currently silent on children whose parents or caregivers are suspects or detainees, whether pre- or post-conviction. The Regulations of the Court on detention – which we recognise are not within the purview of the OTP but we mention for the sake of completeness – contain scant reference to children beyond the detainee's right to communicate with their family and arrangements for the care of infants,²¹ and no reference to the rights of children of detainees. The right of the child to visit a parent in detention has been explicitly recognised in article 9(3) of the CRC in terms of their right to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. This right should be reflected in relevant regulations and procedures and should be taken into account in the event the Prosecutor requests Chambers to restrict contact with a detained person pursuant to regulation 101(2) of the Regulations of the Court on detention.
32. Article 9(1) of the Convention on the Rights of the Child provides that a child shall not be separated from their parents against their will, going on in paragraph (2) to specify that a child (as an interested party) should have an opportunity for their views to be heard in any judicial proceedings regarding separation. While article 9(1) appears to refer primarily to situations where separation is in the best interests of the child, for example in cases of abuse, article 9(4) refers to detention and imprisonment as possible causes for that separation. As such, it is submitted that article 9(1) and 9(4) read together confer the obligation on those deciding on detention and imprisonment to take the child's right not to be separated from their parent into account when making decisions that result in a restriction of the parent's liberty. This is

²¹ Regulations of the Court, Chapter 6 on Detention Matters, regulations 98(1)(i) and 104, available from https://www.icc-cpi.int/sites/default/files/RegulationsCourt_2018Eng.pdf



N O P E A C E W I T H O U T J U S T I C E

especially relevant at the stage of pre-trial detention, given the presumption of innocence. This interpretation is supported by a recommendation of the Committee of Ministers of the Council of Europe to member States concerning children with imprisoned parents, which states that before a judicial order or sentence is imposed on a parent, “account shall be taken of the rights and needs of their children and the potential impact on them.”²² The recommendation goes on to say that “the judiciary should examine the possibility of a reasonable suspension of pre-trial detention or the execution of a prison sentence and their possible replacement with community sanctions or measures.”²³

33. The right of the child not to be separated from their parent is relevant to the OTP in respect of decisions taken about whether to issue an arrest warrant or a summons to appear for suspects with children, given that the former results in pre-trial detention while the latter does not. It is also relevant in respect of any submissions the OTP may make regarding interim release in the pre-trial stage,²⁴ for the purposes of sentencing following conviction,²⁵ or in respect of early release (“sentence reduction”).²⁶ This is not about the rights of the defendant or their mitigating circumstances;²⁷ it is about consideration of the rights of a third party, i.e. the child, for whom the right not to be separated from their parent against their will intersects with other rights they hold, such as the right to family life. A commitment by the OTP to take the rights of the child into account during its decision-making at these moments could usefully be reflected in its Policy on Children and could have a significant impact on how the rights of

²² Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents, paragraph 10, available from <https://rm.coe.int/cm-recommendation-2018-5-concerning-children-with-imprisoned-parents-e/16807b3438>

²³ Recommendation CM/Rec(2018)5 of the Committee of Ministers to member States concerning children with imprisoned parents, paragraph 10, available from <https://rm.coe.int/cm-recommendation-2018-5-concerning-children-with-imprisoned-parents-e/16807b3438>

²⁴ Rome Statute, article 60(2).

²⁵ Rome Statute, article 76.

²⁶ Rome Statute, article 110.

²⁷ In this respect, the fact that someone has a child could possibly be considered a mitigating factor in determining the length of any sentence, like other individual circumstances of the convicted person: ICC Rules of Procedure and Evidence, rule 145(1)(c).



N O P E A C E W I T H O U T J U S T I C E

children whose parents are suspects or detainees are viewed on the broader level, particularly within national jurisdictions.

34. The arrest of a parent is a critical moment that, if not handled sensitively, risks causing severe and potentially lifelong trauma, especially to the child. So far, our research has uncovered few police protocols that provide positive guidance about how to plan and carry out an arrest in a way that takes children and their rights into account, although there is some anecdotal evidence about some best practices that appear to be followed in some jurisdictions. At the same time, there are alarming reports about police failures to even ask if the person they are arresting has children or to ensure that children present during an arrest have proper care and support following the arrest of their parent; research suggests that many police services do not have policies, procedures, or training specifically addressing actions that should be taken to reduce and prevent trauma associated with the arrest of a parent.²⁸
35. The ICC does not have its own police service and therefore relies on national law enforcement of both States Parties and non-States Parties to carry out any arrest warrant it issues. The OTP could therefore prepare guidelines and minimum standards for what it would expect to be done in relation to children when an ICC arrest warrant is being executed, covering such areas as providing training for police to identify if children are involved; carrying out the arrest when the children are not present; not using handcuffs or other restraints in the presence of children; ensuring a safe place for children to go during any search and after their parent is removed; providing families with information in a language and format they can understand about the next steps; and providing training for police officers about the rights of the child and how to deal with children during an arrest to reduce their trauma. Similarly to the Documentation

²⁸ See, for example, Adele D. Jones and Agnieszka E. Wainaina-Woźna, “Children of Prisoners: Interventions and mitigations to strengthen mental health” (2019) available from <https://childrenofprisoners.eu/wp-content/uploads/2019/02/COPINGFinal.pdf> and International Association of Chiefs of Police, “Safeguarding Children of Arrested Parents” (2014) available from <https://www.nicco.org.uk/userfiles/downloads/601%20-%20IACP-SafeguardingChildren.pdf>



N O P E A C E W I T H O U T J U S T I C E

Guidelines for Civil Society, these guidelines could indicate a baseline of “dos and don’ts”²⁹ for what the OTP expects when national law enforcement is executing an ICC arrest warrant against a person who has a child under the age of 18.

Final remarks

36. 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 that may be helpful.³⁰

²⁹ ICC OTP, EuroJust and the Genocide Network, “Documenting international crimes and human rights violations for accountability purposes: Guidelines for civil society organisations”, p 5, available from https://www.icc-cpi.int/sites/default/files/2022-09/2_Eurojust_ICC_CSOS_Guidelines_2-EN.pdf

³⁰ Please contact Alison Smith, NPWJ’s International Criminal Justice Director, on asmith@npwj.org.