



# Renewal of Policy on Children

SUBMISSION BY LEGAL ACTION WORLDWIDE (LAW) TO OFFICE  
OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT

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# Introduction

Children are disproportionately impacted by armed conflict. In the past few decades, as deterioration in respect for rules of conduct has led to increasingly savage hostilities, children have been uniquely affected. In 2022, around 449 million children were living in conflict, with an estimated 230 million living in high-intensity conflict. Since 2005, the United Nations (UN) has documented 266,000 grave violations against children in over 30 conflict situations, with annual numbers of verified violations increasing gradually and first reaching 20,000 in 2014.<sup>2</sup> Today, children are ten times more likely to become victims of conflict-related sexual violence than they were thirty years ago.<sup>1</sup>

The scale of the problems facing the world's children requires a response of similar scope and gravity. In November 2016, the Office of the Prosecutor (OTP) of the International Criminal Court rose to the challenge by adopting its Policy on Children (2016 Policy), an operational tool that synthesized relevant international and regional instruments, jurisprudence, and academic literature, and committed the OTP to pay particular attention to crimes against or affecting children and its own interactions with children. The OTP has presided over important milestones in global struggle to end the war against children, from the Court's first ever trial leading to a conviction for use and recruitment of child soldiers, to the recent arrest warrant issued against Russian President Vladimir Putin for unlawful deportation and unlawful transfer of children.

The 2016 Policy was instrumental in shaping the relationship between the ICC and child victims and witnesses and giving children greater agency in cases involving them. Since its adoption, however, there have been significant developments in international criminal justice, as well as in the international community's understanding of children's wellbeing and harmonious development. Attacks on children have increased, repeating old forms like forced marriage and enslavement, while also taking on new and invidious forms and characteristics, such as attacks on education, health care, that are often based on intersectional identity criteria. Increasingly powerful open-source technologies have transformed the way in which international crimes are investigated, evidenced, and prosecuted. Finally, greater understanding and recognition of children's identity, particularly gender diversity and non-conformity and diverse sexual orientations, demands a renewed commitment to inclusivity.

This paper, submitted to the OTP for consideration in updating its 2016 Policy, explores four areas: (1) children's participation in proceedings; (2) crimes against and affecting children; (3) an intersectional and trauma-informed approach, and (4) greater inclusivity and gender competence, including for children of diverse sexual orientation and gender identity (SOGISC).

## 1. CHILDREN'S PARTICIPATION IN PROCEEDINGS

A child's right to be heard, including in any judicial and administrative proceedings, is a core principle of international law, enshrined in Article 12 of the United Nations Convention on the Rights of Child and reaffirmed in numerous instruments since then.<sup>3</sup> International law also guarantees children's right to preserve their identity, which must be taken into consideration in assessing the best interests of the child.<sup>4</sup> The right to self-expression and identity points to a fundamental truth about children that should govern all interactions with them. Children are a heterogeneous group. A child's identity is made up of different characteristics including sex, sexual orientation, gender identity, cultural identity, religion and beliefs, and personality. Though they may share basic universal needs, the way in which children express need is individual to them, and depends on a range of personal, social, economic, and cultural factors and their evolving capacities.

### a. Children are more than just victims

The 2016 Policy broke ground in overcoming the "faultless passive victim" stereotype that has traditionally been placed on children in the criminal justice system.<sup>5</sup> It recognized that children's agencies in armed conflict are not static, and that children can exercise their agency in multiple or overlapping ways, as victims, as witnesses, and as people who participate in the commission of crimes.<sup>6</sup> The recognition that children are capable of providing credible evidence has supported an expansion in investigative resources devoted to crimes against and affecting children.

However, there is tension between the OTP's recognition of children's agency, and their ability to participate in proceedings, and the significance attached to 'alternate forms of evidence'. In its deliberations on whether to interview a child victim or witness, the OTP considers alternate forms of evidence, including adult witnesses and physical or documentary items.<sup>7</sup> This formulation is not as restrictive as some operational guidance in other organizations, which follow a logic of strict necessity and specify that children should only be interviewed if the information is critical and cannot be obtained through other means.<sup>8</sup> In practice, though, the direction to consider alternate forms of evidence can lead to a presumption that children are subordinate sources of evidence, and that children require extra work to testify meaningfully. These factors increase the likelihood that children are only invited to participate in justice when they are victims or sole witnesses of crimes, and thus risks reintroducing the passive victim stereotype.

There are often valid trauma-informed reasons for preferring alternative primary and secondary sources, such as parents and older siblings, over children. However, these trauma-informed reasons are adequately addressed by the overriding duty to consider the best interests of the child and the principle of do no harm. Subsequent investigative manuals and field guides do not suggest an order of priority for adult witnesses or physical or documentary items.<sup>9</sup> Nor do they condition assessment of the suitability or necessity of interviewing children on the (un-)availability of other forms of evidence. The OTP would do well to follow their lead.

<sup>1</sup> Save the Children, *Stop the War on Children* (November 2022) pg. 8.

<sup>2</sup> UNICEF, *25 Years of Children and Armed Conflict Taking Action to Protect Children in War* (June 2022) pg. 13.

<sup>3</sup> See e.g. ECOSOC Resolution 2005/20 "Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crimes (22 July 2005).

<sup>4</sup> United Nations Convention on the Rights of the Child, article 8.

<sup>5</sup> Mark A. Drumbl, *Reimagining Child Soldiers in International Law and Policy*, Oxford University Press, Oxford and New York, 2012, pp. 8–9.

<sup>6</sup> ICC Office of the Prosecutor, *Policy on Children, November 2016 (Policy on Children)* para.17.

<sup>7</sup> ICC Office of the Prosecutor, *Policy on Children, (November 2016)* para.68.

<sup>8</sup> See e.g. Office of the High Commissioner for Human Rights, *Manual on Human Rights Monitoring Chapter 11 Interviewing* (2011), pg. 23.

<sup>9</sup> See e.g. United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL, "Interviewing Child Victims and Witnesses Interim Standard Operating Procedures (29 April 2020); United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISL.



Children of sufficient age and maturity should not be denied the opportunity to participate in the accountability process just because adults are able to provide evidence of similar quality. As long as the best interests and welfare of the child are protected, it is unclear why any principle should operate to bar children from providing evidence. This is true even when there are multiple other witnesses to the same incident. Children want to be part of justice. In many instances, they are interested and able to understand the process. Creating more space for children to take part in investigations maximizes their right to express themselves and have their views taken into account, not only as victims, but as representatives of their communities.

Paragraph 68 of the Policy should be amended as follows:

“ ... In its deliberations on whether to interview or take evidence from a child, careful consideration will be given to his or her age, development, level of maturity, capabilities and vulnerabilities. While the Office can and should encourage the participation of children in proceedings where possible, the Office may also consider the availability of other forms of evidence when interviewing is not in the best interests of the child, including adult witnesses, physical and documentary items, and scientific or other expert evidence.”

**b. Children are capable of speaking for themselves**

Parents and guardians are important interlocutors in international criminal justice. The right of parents and guardians to give consent to the child's involvement is widely recognized, including in the 2016 Policy.<sup>10</sup> There is also broad agreement that the presence of parents and guardians during the interview may be beneficial in certain circumstances, though standards differ as to the extent of moral support. Some operational tools prefer an approach in which active

involvement of parents is only permitted in the early stages of an investigation.<sup>11</sup> Others stipulate that interviews should be conducted in the presence of a trusted adult, unless the child would be hesitant to speak about certain issues in front of them.<sup>12</sup>

In practice, obtaining consent and negotiating parental involvement are matters that can be difficult to resolve, particularly in conservative cultures, such as

in the Middle East, where there is a strong emphasis on parental authority. Survivors of sexual violence are in an especially difficult position. Their desire to speak out might conflict with parents' reasonable concerns regarding the social consequences of sexual violence, which can range from divorce to alienation from one's family or community to honour killing.<sup>13</sup> As described in more detail below, consideration

must be taken to competently reach out to, interview, and protect children with diverse sexual orientations and gender identities from parental or social backlash. Investigation plans should be attuned to these cultural/religious sensitivities and there should be a clear policy on parental consent and involvement in cases of sexual violence against children.

Paragraph 31 should be amended as follows:

“In addition to the input of children, the Office will seek the views of parents or caregivers, and also experts, if necessary, and will give consideration to internationally recognised child rights, as applicable. In cases where seeking the views of parents or caregivers may harm the wellbeing or interests of the child, particularly when cultural norms or sensitivities place the child at risk of adverse family or social consequence, the Office may seek the views of other trusted adults or rely solely on the child's views.”

<sup>10</sup> ICC Office of the Prosecutor, *Policy on Children*, (November 2016) paras. 69.

<sup>11</sup> See e.g. OHCHR, *Istanbul Protocol Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment* (Geneva, 2022) paras. 291.

<sup>12</sup> United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL, “Interviewing Child Victims and Witnesses Interim Standard Operating Procedures (29 April 2020) pg. 8.

<sup>13</sup> See e.g. UN Commission of Inquiry for Syria, *I lost my dignity: Sexual and gender-based violence in the Syrian Arab Republic*, UN Doc. A/HRC/37/CRP.3 (8 March 2018) para. 46.





Paragraph 72 should be amended as follows:

“Whenever possible and appropriate, the initial contact with a child may be facilitated through persons who have already established a relationship of trust with that child, including persons with similar experience. In the case of children and young people of diverse sexual orientations and gender identities, initial contact may be facilitated through persons belonging to or allied with the same community.”

Regardless of the role accorded to parents or guardians in the investigation plan, investigators must strictly manage the process to empower the child to speak for themselves. Parental influence and interference is obvious when it occurs in the interview room. Instructions are usually given to third parties to remain silent when their role is limited to moral support. However, investigators should also be aware of the possibility of ‘coaching’. Parental

coaching may be done with the best of intentions, to alleviate anxiety or fill gaps in the child’s memory. Ultimately it ends up doing more harm than good, by negatively impacting the child’s credibility and acting as an unnecessary stressor as the child attempts to perform the rehearsed script. Parents should receive clear instructions pre-interview that the child’s evidence must be given in their own words and without help or assistance.

Paragraph 80 should be amended as follows:

“The decision to proceed with an interview will be informed by the best interests of the child, the views of the child and his or her parents or caregivers, as well as the psycho-social and security assessments, and the relevance of the evidence. The expert may be present, if required, during the interview itself in order to advise and support the child and the interview team. An accompanying person may also provide support to the witness, as requested. Child witnesses will be informed of the possibility of having such a person with them. Accompanying persons will be instructed that their role is limited to moral support, and specific instructions will be given pre- and post-interview not to assist the child in forming or delivering testimony.”



### c. Integration of children's views in policies, programmes, and measures

Over the last few years, progress has been made in increasing access to justice for children and mainstreaming children's experiences of conflict in investigative strategies. However, children and young people have not been involved in the development of existing tools and resources and are not given a voice in the conduct of investigations and legal or prosecutorial strategies. Children's right to participation goes beyond providing evidence. Inclusion of children should not be a limited practice but an organisational commitment that supports an intense exchange between children and adults on the development of policies, programmes, and measures.<sup>14</sup>

The updated Policy must find ways to enable an ongoing dialogue with children on the conduct of investigations. In early planning stages of an investigation, the OTP should develop outreach and sensitization activities, working in partnership with non-governmental organisations and local authorities, to engage children with child-friendly materi-

als and provide them opportunities to ask questions and express their views. However, the Policy must enshrine children's right to have their views taken into account in the work of the Court, by integrating such views in investigation plans and legal or prosecutorial strategies, with a reasonable basis on which children can hope to influence the conduct or focus of investigations.

The Policy should also acknowledge the OTP's accountability to affected populations and set out ways that it can be operationalized during the lifetime of an investigation. One possible method involves cooperation frameworks between the OTP and reliable, independent child protection entities. In addition to providing important, localized wrap-around support for child victims and witnesses, they can play an important role in facilitating independent and impartial feedback mechanisms. By taking these steps, the Policy can establish that children are not merely sources, but important stakeholders in the fight against impunity.

Paragraph 90 should be amended as follows:

"The Office commits to maintaining contact with child witnesses in order to keep them informed of developments in the case, and also to listen to their views and any concerns. Appropriate measures will be taken to facilitate their contact with the Office, including independent complaints procedures in line with robust principles of child safeguarding."

<sup>14</sup> United Nations Committee on the Rights of Child, General Comment No 12 The right of the child to be heard, UN Doc. CRC/C/GC/12 (2009) para. 13.



Paragraph 117 should be amended as follows:

The Office will seek to ensure that it has the necessary institutional capacity to conduct preliminary examinations, investigations and prosecutions of crimes against or affecting children more effectively, and that its interaction with children respects their rights and best interests. To this end, the Office will also explore partnerships with external entities, including reliable child protection agencies and organisations at the national level."



#### d. Technology

Technology can be an important tool for obtaining children's buy-in to ICC investigations and sustaining their interest and participation in proceedings. Conducting outreach and sensitization activities online can expand the OTP's connectivity with child stakeholders while reaching them in a format that they find accessible and comfortable. Use of technology for these purposes should be targeted and considered. Care should be exercised to ensure that online outreach and sensitization does not exacerbate pre-existing inequalities by, for example, further marginal-

izing poor or rural communities. Technology can also transform the way in which child victims engage with the Court as witnesses. Children and young people are active across all digital platforms, including social media and video sharing platforms, where they may be actively documenting violations or vital contextual information corroborating the commission of international crimes. Tapping into this reservoir of open-source intelligence should be a priority of the OTP as it renews its relationship with child victims and witnesses.

Paragraph 68 should be amended as follows:

"The Office recognises that children can give credible evidence. Children's evidence can take the form of eyewitness testimony, physical evidence, or open source or other digital material. During investigations involving child witnesses, investigators will remain cognizant that children are potentially sources of multiple forms of evidence..."





## 2. CRIMES AGAINST AND AFFECTING CHILDREN

Accountability for crimes against and affecting children has been a central component of armed conflict prevention and response over the past two decades. The UN Security Council has required monitoring and reporting of grave violations against children, including sexual violence, since 2005. A commitment to investigating and prosecuting crimes against children has formed part of the strategic plan of the OTP at least since 2012, augmented by the 2016 Policy. International investigative mechanisms have integrated children's rights and a focus on crimes against children in their methodologies. However, more needs to be done to widen the net of accountability beyond a core set of emblematic crimes, such as use and recruitment of child soldiers and sexual violence. Grave crimes deserving of the Court's attention, and which should be comprehensively addressed in Part III The Regulatory Framework, include:

### a. Forced marriage

Though not a standalone crime under the Rome Statute, forced marriage has been charged as the crime against humanity of 'other inhumane acts' by the ICC, the Special Court for Sierra Leone (SCSL),<sup>15</sup> and the Extraordinary Chambers in the Courts of Cambodia (ECCC).<sup>16</sup> The scale of child early and forced marriage in fragile and conflict-affected countries suggests that more resources are needed to tackle the problem and to ensure that children's harmonious development is not stolen from them. Victims of forced marriage may experience permanent injury

or disability due to forced physical labor and sexual violence, including mental illness, chronic pain, damage to reproductive health, and an inability to have children. The long-term physical and mental health impacts of forced marriage necessitate greater focus on the crimes, and they should be considered aggravating factors in sentencing and in awarding reparations.

### b. Attacks on girls' schools

Attacks on female education institutions are prevalent around the globe, restricting girls' basic right to education while threatening their personal wellbeing and security.<sup>17</sup> Attacks on girls' schools can compound existing vulnerabilities and barriers to education, such as targeting minority ethnicities, disabled minors, internally displaced persons, and young people in rural, remote, and impoverished areas.<sup>18</sup> Gendered attacks on schools are common particularly when the perpetrator intends to carry out a broader gendered crime. For example, Boko Haram led a well-documented attack on Chibok Girls School in 2014, kidnapping 276 girls, 98 of whom are still missing today.<sup>19</sup> Similar attacks by parties to conflict continue to this day, often targeting young girls who are then abducted, raped, forced into slavery, forced into marriages, or killed.<sup>20</sup> In Afghanistan, the Taliban has implemented a repressive regime with severe restrictions targeting young girls. For example, girls are prohibited from going to school and measures introduced requiring principals to examine the bodies of girls for signs of puberty – and to expel from school any girls who appear older or whose bodies are beginning to mature.<sup>21</sup> Investigations into attacks on

girls' education should not ignore intersectional factors, including compounded forms of discrimination creates additional barriers to education for specific groups of girls such as girls with disabilities, women belonging to national, ethnic, religious and linguistic minorities, girls living in rural or remote areas, pregnant girls, and girls who are internally displaced or non-citizens.

### c. Enslavement and forced labor

Enslavement and forced labour of children have caused horror to affected populations and the international community during recent conflicts, not least of all the enslavement and genocide of Yazidis by the Islamic State of Iraq and the Levant (Da'esh/ISIL). On 1 December 2021, a German Court convicted Taha Al J of genocide, crimes against humanity and war crimes for purchasing and enslaving a Yazidi woman and her daughter and murdering the girl by cuffing her to a window in the scorching heat. There has never been a charge successful prosecution for enslavement or slavery of children at the ICC.

## 3. INTERSECTIONAL AND TRAUMA-INFORMED APPROACH

Intersectionality recognizes that real or perceived identities are fixed in dominant hierarchies, whether they be political, social, economic, or cultural. An intersectional approach addresses the drivers of structural violence and the harm experienced by victims at the overlap of dominant hierarchies. This situation can arise when an individual inhabits multiple identity categories that expose them to discriminatory harm at the intersection of two or more hierarchies, for example when indigenous women and girls are raped during conflict.<sup>22</sup> It can also arise when discriminatory hierarchies are instrumentalized in such a way that victims are forced to occupy the position of identity

categories that would otherwise be inapplicable to them, such as when sexual violence is perpetrated against male detainees in an ethnic conflict to dehumanize and "feminize" them.

In addition, intersectionality promotes an understanding of human beings as unique individuals whose experiences and needs are shaped by the interaction of different social categories. The social categories which impact a survivor's needs at any given time are socially constructed through the interplay of different power structures, including the way in which forms of privilege are created and allocated in society. The simultaneous and complex interplay between different categories determines the relative social location of an individual, or group of individuals, and leads to inequities in political participation, education, opportunity, and health. Intersectionality is one of the foundations for a trauma-informed approach, because it impacts survivors' ability to access relevant resources.

Investigation plans need to move beyond Western notions of child protection that dominate at the international level. Interviews should be conducted in consultation with local experts. Any assessment of sufficiency of referral pathways needs to account for cultural specificities and vulnerabilities that arise from discrimination. Consistent with the principle of "do no harm", localized and culturally relevant psychosocial support is a key element throughout the whole process and must be as broad as possible. In some cultures, it can include members of the family and members of the community, and in others, a trusted third party, community member, or mediator may suffice. Participating in the justice mechanism can be stressful and may harm children; but often time constraints at the international level impede a thorough psychological assessment of the child. The Policy should be amended to include culturally

<sup>15</sup> *Special Court for Sierra Leone, Prosecutor v. Brima, Kamara and Kanu (AFRC Case), SCSL-04-16-A, Judgment, Appeals Chamber, (February 2008), §199-201.*

<sup>16</sup> *Extraordinary Chambers in the Courts of Cambodia, Prosecutor v. Suy-Hong et al., Case No. 002/19-09-2007/ECCC/TC, Judgement, Trial Chamber (16 November 2018).*

<sup>17</sup> [https://www.edulinks.org/sites/default/files/media/file/impact\\_of\\_attacks\\_on\\_education\\_nov\\_2019\\_lowres\\_webspreads.pdf](https://www.edulinks.org/sites/default/files/media/file/impact_of_attacks_on_education_nov_2019_lowres_webspreads.pdf) pg. 9-10.

<sup>18</sup> [https://www.ohchr.org/sites/default/files/Documents/HRBodies/CEDAW/Report\\_attacks\\_on\\_girls\\_Feb2015.pdf](https://www.ohchr.org/sites/default/files/Documents/HRBodies/CEDAW/Report_attacks_on_girls_Feb2015.pdf) pg. 4.

<sup>19</sup> *ICC Office of the Prosecutor, Report on Preliminary Examination Activities (2019) pg.47-52.*

<sup>20</sup> <https://www.amnesty.org/en/latest/news/2023/04/nine-years-after-chibok-girls-abducted/>

<sup>21</sup> *United Nations Office of the High Commissioner for Human Rights, Afghanistan: Latest Taliban treatment of women and girls may be crime against humanity, say UN experts (25 November 2022).*

<sup>22</sup> See e.g. *Human Rights Council, Report of the Special Rapporteur on rights of indigenous peoples, Victoria Tauli Corpuz UN Doc. A/HRC/30/41 (6 August 2015), paras. 51-53.*





relevant and gender competent referral pathways, including, where needed, training and sensitivity to treat children of diverse sexual orientation and gender identity (SOGISC). Explicit mention should be made to ensure the identification, involvement, and protection of children of diverse SOGI throughout the justice process, particularly in situations where they experience additional marginalization from might live in a hostile or unaccepting environment.

Paragraph 65 should be amended as follows:

“Networks are crucial for effective investigations. They also assist in addressing the challenges faced when investigations involve children. The establishment of contacts and networks within the community will be prioritised, to the extent possible, to support the operational activities of the Office. In doing so, the Office will consider the information obtained during the preliminary examination stage relating to local communities and the existence of civil society organisations. It 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, [ ] between young children and adolescents, and between children of diverse sexual orientations and gender identities and their peers...”

Paragraph 77 should be amended as follows:

“The Office recognises the importance of considering diversity, local knowledge and relevant experience when working with children, and the need for localized, gender-competent, SOGISC-competent, and culturally relevant referral pathways. All interviews with children will be conducted by staff members with expertise in interviewing and interacting with children, seeking the support of external experts if and when required. In order to build trust and minimise feelings of anxiety and intimidation, the Office will seek to maintain continuity and to limit the number of staff interacting with a child.”

Paragraph 79 should be amended as follows:

“Psycho-social assessments shall be conducted by trained and certified psychologists and/or psychotherapists with the relevant experience, with advice from local experts. Relevant experience shall include appropriate training and sensitivity to treat children of diverse sexual orientation and gender identity.”

Sourcing appropriate support is only one of the challenges that needs to be addressed through an intersectional approach. The overriding purpose of an intersectional analysis is to identify and surface overlapping discriminatory harms, which means, in international criminal law terms, establishing targeting based on intersectional identity factors. The 2016 Policy does not go far enough in acknowledging the multiple points of exposure to discriminatory harm that endanger children’s lives. In particular, the recognition of sexual orientation and gender identity as factors that may cause multiple forms of discrimination and social inequalities is insufficient. The new

Policy should explicitly state that sexual orientation and gender identity can form the basis of discriminatory attacks against children. In addition, sexual orientation and gender identity should be incorporated into all investigative plans and legal analysis to ensure establishment of criminal responsibility is as comprehensive and inclusive as possible.



Paragraph 71 should be amended as follows:

"Consistent with its commitment to follow a child-sensitive approach, the Office will undertake its initial contact with children with particular care and planning. There will also be careful preparation for the screening and interviewing of child victims and witnesses. The situation-specific briefing will include guidance on how to work sensitively with children in the particular region or community. The Office recognizes that children can have multiple, overlapping identities and can therefore belong to more than one community. Situation-specific briefings will take account of such intersectional factors. The implications that these factors may have on field operations will be considered. The Office will, where possible, consult with organisations and individuals with relevant expertise."

#### 4. GREATER INCLUSIVITY AND GENDER COMPETENCE

Diverse sexual orientations and gender identities have been marginalized in the normative frameworks that govern international criminal law. Through its renewal of the Policy on Children, the OTP has an opportunity to correct decades of indifference towards LGBTQI+ experiences of conflict; an indifference that is, sadly, inscribed into the foundations of international criminal justice. It should not be forgotten that the indictments presented to the international military tribunal at Nuremberg were silent on the Nazis' treatment of persons of diverse sexual orientations and gender identities, even though 5,000–15,000 such persons perished in concentration camps.<sup>23</sup>

That legacy of indifference carried through to the drafting of the Rome Statute.<sup>24</sup> The OTP has made commendable progress in dismantling the gender binary that was written into the statute. The 2014 Policy Paper on Sexual and Gender-based Crimes acknowledged the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys. This approach was further developed in the 2022 Policy on the Crime of Gender Persecution, which clarifies that "gender" refers to sex characteristics and social constructs and criteria used to define maleness and femaleness, including roles, behaviours, activities and attributes. Further, social constructs and criteria used to define gender include

sexual orientation, gender identity and gender persecution. The 2022 Policy allows for a deeper understanding of why LGBTQI+ people are targeted in the commission of atrocity crimes, as well as LGBTQI+ experiences of armed conflict. The language in the Policy on Children should similarly be expanded to recognize all genders, including transgender and gender-nonconforming youth, across all aspects of the OTP's mandate. During investigations, the need for sources of support for children should not account solely for differences between boys and girls, but the needs of children of all genders.<sup>25</sup> Otherwise, there is a risk of LGBTQI+ and gender diverse youth not being able to participate in justice proceedings without access to competent resources and referral pathways, and the OTP risks not getting the full picture of criminality – for example the motives or drivers that cause perpetrators to target persons on gendered grounds.

Reparations should take account of the differentiated effects and harms caused to children of all genders.<sup>26</sup> An inclusive approach to reparations, particularly regarding the child's right to reintegrate into the community, may require measures that are transformative in design, implementation, and impact.<sup>27</sup> Transformative, in this context, means measures that can assist in overcoming structures of inequality and discrimination. Finally, to achieve these objectives, the Office must maintain in-house expertise related to working with children of all genders.<sup>28</sup>

<sup>23</sup> Moreover, victims of diverse sexual orientations and gender identities did not receive any of the reparations made available to other victims of the Nazi regime. Detlev Peukert, *Inside Nazi Germany*, (Yale, 1987), p. 220.

<sup>24</sup> Article 7(1)(h) of the Rome Statute defines gender as a ground of persecution as "two sexes, male and female" emphasizing that gender "does not indicate any meaning different from the above." During the drafting process, a bloc that included "the Holy See, certain Arab states, and conservative nongovernmental organizations" was concerned that the Statute could provide impetus for persecution of LGBTQI+ individuals to be recognized as a crime against humanity. Valerie Oosterveld, "Gender, Persecution, and the International Criminal Court: Refugee Law's Relevance to the Crime Against Humanity of Gender-Based Persecution", 17 *Duke J. Comp. & Int'l L.* 49, p. 58.

<sup>25</sup> ICC Office of the Prosecutor, *Policy on Children*, (November 2016) para.65.

<sup>26</sup> ICC Office of the Prosecutor, *Policy on Children*, (November 2016) para.106.

<sup>27</sup> United Nations, *Guidance Note of the Secretary-General Reparations for Conflict-Related Sexual Violence* (June 2014) p. 8.

<sup>28</sup> ICC Office of the Prosecutor, *Policy on Children*, (November 2016) para.119.

Paragraph 106 should be amended as follows:

“The Office supports a child-sensitive approach to reparations, taking into account the differentiated effects and the harms caused to children of all genders by the crimes for which an individual was convicted, as well as their right to reintegration into their communities. The Office also supports consultation with the victims, including children, in order to determine the most effective, appropriate and gender-sensitive forms of reparation within a particular community. This approach is intended to promote reparations that are transformative in nature taking account of intersectional identity factors and resulting discriminatory harms and that contribute to the best interests of children.”

Paragraph 119 should be amended as follows:

“The Office recognises the need to maintain strong in-house expertise related to working with children of all genders, and will continue to provide appropriate training for staff, as well as to recruit persons with qualifications and experience in this field.”

#### **a. Stigma and re-traumatization**

Underreporting of crimes is, of course, one of the main challenges in conducting evidence-based needs assessments and providing gender-competent facilities and services. Victims of diverse sexual orientations and gender identities fear the social consequences of reporting, which can range from stigma and re-traumatization to alienation from one's family, or even being killed. They may also fear legal repercussions due to anti-LGBTQI+ laws, up to and including life imprisonment and the death penalty. Some of the 67 countries that criminalize diverse sexual orientations and gender identities are countries in which the OTP has open investigations.<sup>29</sup> The Policy must give careful consideration to what this means for the safety and protection of witnesses, as well as cooperation and external relations.

The heightened risk to LGBTQI+ children will increase the stress of participation in ICC proceedings and place them at greater risk of re-traumatization. While part of managing the stress caused by the process is ensuring that gender competent referral pathways exist to targeted psychosocial services for LGBTQI+ youth, there are also specific measures that must be taken to reduce the risk to LGBTQI+ victims and enable their participation.

#### **b. Confidentiality**

The Policy should enable confidential participation in investigations and trials where outing LGBTQI+ youth might put them in danger. This includes the need for confidential interview locations outside of the community and without the presence of parents or family members. Exceptions might be made if the person requests the presence of a trusted adult. The OTP should also consult with local LGBTQI+ rights organizations and service providers, if in existence, to help manage the risks to LGBTQI+ youth and develop protocols that ensure confidentiality.

The OTP's duty of care to LGBTQI+ youth extends further than the interview process and should be inscribed into every aspect of the Office's mandate. Special consideration should be given to the situation of LGBTQI+ victims as regards:

- Protective measures: Close cooperation between OTP and Victim Participation and Reparations Section is needed to ensure that protective measures are in place that are commensurate with the grave risk to LGBTQI+ victims, including removal to safe houses in case of imminent harm or threat of harm. When parents, guardians, or other family members or community members are supportive of LGBTQI+ victims and their participation, appropriate protective measures should extend to them.
- In-court special measures: When called upon to testify in court, there should be a presumption that LGBTQI+ youth are entitled to give testimony as part of in camera proceedings, unless victims wish otherwise. Special measures such as the use of in camera proceedings protect LGBTQI+ youth from harm while also preserving their autonomy in deciding whether, how and when to come out.
- ICC Protection Program: The Policy should recognize the heightened risk to LGBTQI+ and gender-conforming youth when participating in ICC proceedings, noting that LGBTQI+ discrimination and targeting are grounds for consideration of exceptional protection measures, including relocation and resettlement under the ICC Protection Program. Support to LGBTQI+ victims and witnesses through the ICC Protection Program should be available, in particular, when they reside in countries where anti-LGBTQI+ laws put them at risk of imprisonment or the death penalty.

<sup>29</sup> E.g. Uganda, where parliament recently adopted an anti-LGBTQI+ law that makes it illegal to identify as gay or transgender, and imposes the death penalty for same-sex intimacy. OHCHR, “Uganda: UN Experts condemn egregious anti-LGBT legislation” (29 March 2023) available at <https://www.ohchr.org/en/press-releases/2023/03/uganda-un-experts-condemn-egregious-anti-lgbt-legislation>.





## Conclusion



The renewed Policy on Children offers a significant opportunity for the OTP to maximize children’s participation in the accountability process. Children’s participation in proceedings should be based on the recognition that they are more than just victims and that they are members of society who also have an interest in justice. Children are credible witnesses and, when steps are taken to ensure that their best interests are safeguarded, they have a lot to contribute to the OTP’s work, whether during investigations, trials, and prosecutions. They are unique individuals capable of providing credible evidence and speaking for themselves. As such, their views should be taken into account not just as victims but also as witnesses and observers of the events unfolding around them. A carefully constructed policy can help expand the Office’s investigative horizons by mainstreaming an intersectional approach, tapping into new reservoirs of open source technology and expanding the way in which international crimes are investigated, evidenced, and prosecuted. A greater understanding and recognition of children’s identity, particularly gender diversity and non-conformity and diverse sexual orientations by the OTP would ensure a strong commitment to empowering children, in all of their diversity.



## About LAW

LAW is an independent, non-profit organisation comprised of human rights lawyers and jurists who specialise in providing legal information, assistance, and representation in fragile and conflict-affected areas. LAW has represented thousands of victims globally and currently support survivors in South Sudan, Somalia, Ethiopia, Uganda, Bangladesh/Myanmar, Sri Lanka, Lebanon, Syria and occupied Palestine. LAW works with diverse constituencies of stakeholders, first and foremost survivors, including survivors’ groups that have come together to collectively seek justice and accountability. Our areas of collaboration and partnerships include strategic litigation, clients’ representation, legal aid and assistance, capacity-building and technical advice, and research and advocacy. LAW works with, represents, and advocates on behalf of lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+) individuals. We support them to engage and participate in truth seeking investigations and justice processes. We also build and disseminate the evidence on how conflict and fragility settings affect LGBTQI+ people, and barriers to them accessing support and services, as well as legal assistance and representation.

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