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COMMENTARY ON THE ICC OFFICE OF THE PROSECUTOR'S POLICY ON CHILDREN

*Prepared by the
Public International Law & Policy Group;
Covington & Burling LLP; Debevoise & Plimpton LLP
and Milbank LLP
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PEACE NEGOTIATIONS
POST-CONFLICT CONSTITUTIONS
WAR CRIMES PROSECUTION

Commentary on the International Criminal Court Office of the Prosecutor’s Policy on Children

I. Introduction

The Public International Law and Policy Group (“**PILPG**”), Debevoise & Plimpton LLP, Milbank LLP, and Covington & Burling LLP offer the following comments on the International Criminal Court Office of the Prosecutor (“**OTP**”)’s 2016 Policy on Children (the “**2016 Policy**”). PILPG appreciates the OTP’s invitation for external contributions to the drafting process of an updated Policy on Children. In this document, PILPG, Debevoise & Plimpton LLP, and Milbank LLP offer commentary and recommendations on the nature, scope, different elements, and grounds the new policy ought to address, based on PILPG’s 27 years of legal expertise on human rights and international criminal law expertise. Covington & Burling LLP has also provided research support in relation to the preparation of this document, but has not endorsed the commentary or recommendations of PILPG or other law firms.

In this commentary, we will review the history of prosecuting crimes against children before the Court and offer practical recommendations for the OTP’s revised Policy on Children. Specifically, in considering the goals to be articulated in the forthcoming policy, we encourage the OTP to consider adopting the following policies and practices:

- Employ a Situational Analysis, and In Particular a Gendered Analysis, of Crimes Involving Child Soldiers;
- Recognize Child Victims of Crimes Committed by Members of Their Own Armed Forces;
- Expand Intersectionality in Investigating and Prosecuting Crimes Against and Affecting Children;
- Enhance Involvement and Protection of Child Witnesses in the OTP’s Work; and
- Adopt a Child-Centered and Child-Sensitive Approach to Reparations.

II. About the Authors

The Public International Law & Policy Group is a global pro bono law firm providing free legal assistance to parties involved in peace negotiations, drafting post-conflict constitutions, and war crimes prosecution/transitional justice. To facilitate the utilization of this legal assistance, PILPG also provides policy planning assistance and training on matters related to conflict resolution.

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III. Contextual Background

A. The Rome Statute and Related Provisions

The Rome Statute of the International Criminal Court (“**Rome Statute**”), supplemented by the Elements of Crime (“**Elements**”) and the Rules of Procedure and Evidence (“**Procedural Rules**”), pays particular attention to the rights of children,¹ noting that “during this century millions of children [...] have been victims of unimaginable atrocities that deeply shock the conscience of humanity” and the International Criminal Court (the “**ICC**” or the “**Court**”) was established “for the sake of present and future generations.”²

The Rome Statute provides that the Court has jurisdiction over several crimes directed specifically at children. In particular:

- The crime of genocide includes the act of forcibly transferring children (*i.e.*, persons under the age of 18) of one national, ethnical, racial, or religious group to another group;³
- Crimes against humanity include the act of enslavement when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, and for these purposes “enslavement” includes the exercise of any or all of the powers attaching to the right of ownership over persons or trafficking in persons, in particular children;⁴ and
- War crimes include the act of conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.⁵

Additionally, the Rome Statute includes several other crimes that are generally viewed as disproportionately affecting children. These include:

- Genocide by means of imposing measures intended to prevent births within a national, ethnical, racial, or religious group;⁶
- War crimes by means of intentionally directing attacks against buildings dedicated to education and health care;⁷

¹ The ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2002) [hereinafter “ROME STATUTE”] does not define the term “child”. However, the jurisdiction of the Court only extends to persons who were at least 18 years old at the time of their alleged commission of a crime, and the crime of genocide of forcibly transferring children is only triggered if the child victims are under the age of 18 years. This suggests that a “child” is typically regarded as any person under the age of 18 years.

² ROME STATUTE, Preamble ¶ 9.

³ ROME STATUTE, Art. 6(e); INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES (2013), [hereinafter “ICC ELEMENTS”] Art. 6(e) ¶ 5.

⁴ ROME STATUTE, Arts. 7(1)(c) and 7(2)(c); ICC ELEMENTS, Art. 7(1)(c) ¶ 1.

⁵ ROME STATUTE, Arts. 8(1), 8(2)(b)(xxvi) and 8(2)(e)(vii); ICC ELEMENTS, Art. 8(2)(e)(vii).

⁶ ROME STATUTE, Art. 6(d).

⁷ ROME STATUTE, Art. 8(2)(b)(ix).

- Crimes against humanity and war crimes involving acts of torture;⁸
- Crimes against humanity and war crimes involving acts of sexual slavery or other forms of sexual violence;⁹ and
- Crimes against humanity involving acts of persecution.¹⁰

Although the ICC does not have jurisdiction over any person below the age of 18 years at the time of that person's alleged commission of a crime, children play an important role as witnesses and victims in ICC cases. There are various structural and procedural mechanisms to protect child victims and witnesses:

- State Parties and the Prosecutor are under an obligation to include judges or advisors, respectively, with legal expertise on violence against children.¹¹
- When investigating and prosecuting crimes, the Prosecutor is under a duty to respect the interests and personal circumstances of victims and witnesses, including their age, and take into account the nature of the crime, in particular where it involves violence against children.¹²
- The Prosecutor may make an application to the relevant Chamber to audio or video record for questioning of children where the use of such procedures could assist in reducing any subsequent traumatization of a child when providing their evidence.¹³
- The Victims and Witnesses Unit has been established by the Registry and provides, in consultation with the OTP, protective measures and security arrangements, counseling, and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit must include staff with expertise in trauma, including trauma related to crimes of sexual violence and, subject to the general rules on staff employment under Article 44 Rome Statute, traumatized children.¹⁴ With respect to child witnesses, the Unit may assign (with parental or legal guardian agreement) a child support person to assist the child witness through all stages of proceedings.¹⁵
- Both the Court and Prosecutor must take “appropriate measures to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses,” having regard to the nature of the crime if it involves violence against children, and the Prosecutor must take such measures, particularly during the investigation and

⁸ ROME STATUTE, Arts. 7(1)(f), 7(1)(k), 7(2)(e), 8(2)(a)(ii), 8(2)(a)(iii), and 8(2)(c)(ii).

⁹ ROME STATUTE, Arts. 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi); ICC ELEMENTS, Arts. 7(1)(g)-2 ¶ 1, 8(2)(b)(xxii)-2 and Art. 8(2)(e)(vi)-2 ¶ 1.

¹⁰ ROME STATUTE, Art. 7(1)(h).

¹¹ ROME STATUTE, Arts. 36(8)(b) and 42(9).

¹² ROME STATUTE, Art. 54(1)(b).

¹³ RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL COURT (2019) [hereinafter “RPE”] Rule 112(4).

¹⁴ ROME STATUTE, Art. 43(6); RPE, Rules 19(f) and 86.

¹⁵ RPE, Rule 17(3).

prosecution of such crimes. However, such measures must not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹⁶ Appropriate measures can include facilitating the testimony of witnesses by allowing a psychologist or family member to be present while the witness gives a testimony or the use of a curtain to shield the witness from direct eye contact with the accused.¹⁷

- As an exception to the general principle that hearings should take place in public, the Chambers of the Court can conduct parts of proceedings *in camera*, or allow the presentation of evidence by electronic or other special means. These means are adopted to protect child victims and witnesses, unless otherwise ordered by the Court, having regard to all the circumstances. This is particularly influenced by the views of the victim or witness.¹⁸
- In relation to the staff interactions with child witnesses and victims, the Code of Conduct adopted by the OTP provides further guidance.

B. The 2016 Policy on Children

In 2003, the OTP created a Gender and Children Unit to assist it with work involving child victims and witnesses, and to advise the OTP on matters relating to children.

In its Strategic Plan 2012-2015, the OTP made it one of its six core strategic goals to “pay particular attention to sexual and gender-based crimes and crimes against children,”¹⁹ and reaffirmed that commitment in subsequent Strategic Plans.²⁰

In November 2016, the OTP published the 2016 Policy on Children.²¹ The stated objectives of the 2016 Policy are to:²²

- Affirm the OTP’s commitment to pay particular attention to crimes against or affecting children;
- Provide clarity and direction to staff in the interpretation and application of the Statute and the Rules, at all stages of the OTP’s work, in order to effectively address crimes against or affecting children;
- Ensure that staff interact with children sensitively and with due respect for their best interests and rights under international law;

¹⁶ ROME STATUTE, Art. 68(1); RPE, Rule 88.

¹⁷ ICC, *Helping build a more just world – Understanding the International Criminal Court* (2020) at 61, available at <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf>.

¹⁸ ROME STATUTE, Art. 68(2).

¹⁹ OTP, STRATEGIC PLAN 2012-2015 at 27.

²⁰ OTP, STRATEGIC PLAN 2016-2018 at 19; OTP, STRATEGIC PLAN 2019-2021 at 5.

²¹ 2016 POLICY ON CHILDREN, available at https://www.icc-cpi.int/sites/default/files/iccdocs/otp/20161115_OTP_ICC_Policy-on-Children_Eng.PDF [hereinafter “2016 Policy”].

²² 2016 Policy ¶ 9.

- Foster and advance a culture of good practices in relation to the protection of the rights of children, both within the OTP and more broadly; and
- Contribute, through the implementation of the Policy on Children, to the ongoing development of international jurisprudence regarding crimes against or affecting children.

The OTP’s Strategic Plan 2019-2021 noted that the Office already “pays particular attention to children,” and expressed the intention to “continue with this particular focus, including by ensuring the implementation of [the OTP’s] policies and by evaluating their effectiveness.”²³ Prosecutor Karim Khan, following his appointment in 2021, also pledged to prioritize crimes against children during his tenure, commenting that children, “far too often, have been invisible actors in the international criminal justice process.”²⁴

C. The 2023 Call for Public Submissions on the 2016 Policy

On 9 March 2023, the OTP issued a call for public submissions “for suggested changes to build upon, and renew, the 2016 OTP Policy on Children.”²⁵ The call noted that the OTP was seeking “to develop new and innovative approaches to its work so as to make children more visible in all of its work, and further improve effectiveness in the investigation and prosecution of crimes against or affecting children.” The first round of external consultations seeks comments on the substance of the 2016 Policy and proposals on how it may be enhanced.

IV. ICC Practice in Recent Years (2016-Present)

There have been a number of significant developments relating to the investigation and prosecution of crimes against and affecting children since the publication of the 2016 Policy. The OTP has brought a number of cases involving offenses related to child soldiers, such as the cases of Dominic Ongwen and Bosco Ntaganda, in addition to the earlier case related to Thomas Lubanga, against whom charges were brought in 2006.²⁶ These more recent cases have also addressed crimes related to sexual and gender-based violence against children, including the Ntaganda case brought forward by the OTP in 2014²⁷ and Ongwen in 2015.²⁸ Despite this evolution and broadening of the child-related crimes that the OTP is looking at, scholars indicate a need to pay further attention to engaging children, including as witnesses, in the

²³ OTP, STRATEGIC PLAN 2019-2021 (July 2019) ¶ 35.

²⁴ OTP, STRATEGIC PLAN 2019-2021 (July 2019) ¶ 35.

²⁵ ICC, *The Office of the Prosecutor launches public consultation to renew the policy paper on crimes against or affecting children* (9 March, 2023), available at <https://www.icc-cpi.int/news/office-prosecutor-launches-public-consultation-renew-policy-paper-crimes-against-or-affecting>.

²⁶ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on the confirmation of charges (29 January 2007), ¶ 20.

²⁷ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-203-AnxA, Document containing the Charges (10 January 2014) ¶¶ 100-108 (Count 6, rape as war crimes and Count 9, sexual slavery as war crime).

²⁸ *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Document containing the charges (22 December 2015).

OTP's work.²⁹ The following paragraphs provide an overview of the developments in the area of addressing crimes involving children.

New convictions go beyond child soldier offenses and focus, in particular, on sexual and gender-based crimes against and affecting children. Unlike earlier cases, such as *Prosecutor v Thomas Lubanga* (“**Lubanga**”), which focused entirely on the crimes relating to child soldiers, a number of recent decisions held perpetrators accountable for a wider array of crimes against and affecting children, including in particular sexual and gender-based crimes:

- In July 2019, the Court convicted Bosco Ntaganda, the former leader of the Forces Patriotiques pour la Libération du Congo, of war crimes and crimes against humanity in connection with events in 2002-2003 in Ituri, Democratic Republic of Congo. The crimes included conscription, enlistment, and use of child soldiers, and sexual and gender-based crimes such as rape and sexual slavery, which also targeted girls.³⁰ As will be discussed further below, the decision broke new ground by holding Ntaganda accountable for sexual and gender-based crimes committed against children who were forcibly recruited into and served in the same armed group as Ntaganda.³¹ The recognition that intra-party crimes can constitute war crimes is particularly relevant to children, who due to their age and other circumstances are more vulnerable to being targeted, especially in the closed environment of armed groups.
- In February 2021, the Court convicted Dominic Ongwen, the former leader of the Ugandan Lord's Resistance Army, for war crimes and crimes against humanity perpetrated in Uganda during an armed conflict in 2002-2005. The crimes included conscription, enlistment, and use of child soldiers, and various sexual and gender-based crimes including forced marriage, forced pregnancy, sexual slavery, rape, and torture, which again targeted girls as well as adult women.³²

Decisions on reparations recognize a wider range of child victims. A number of cases involving child victims have proceeded to the reparations phase since 2016. For instance, following Thomas Lubanga's 2012 conviction for war crimes of conscripting and enlisting child soldiers and using them to participate actively in hostilities,³³ the Court made an order for collective reparations and, in December 2020, approved the implementation of a program

²⁹ See, e.g., *Moving Forward: Enabling A Child-Centred Approach at the ICC And Beyond, Summary and Recommendations* (9 December 2021), available at https://www.justicerapidresponse.org/wp-content/uploads/2022/03/SummaryReport_ICC_Final.pdf.

³⁰ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Judgment (8 July 2019) ¶ 536.

³¹ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-1707, Second Decision on the Defence's Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9 (4 January 2017) ¶ 54; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06 OA5, Judgment on the appeal of Mr Ntaganda against the Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9 (15 June 2017) ¶¶ 2, 64.

³² *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-1762-Red, Trial Judgment (4 February 2021).

³³ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2842, Judgment (14 March 2012) and *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 A5, Decision on the Presiding Judge of the Appeals Chamber in the appeal of Mr Thomas Lubanga Dyilo against the decision of Trial Chamber I entitled “Judgment pursuant to Article 74 of the Statute” (24 October 2012).

designed by a partner organization of the Trust Fund for Victims.³⁴ The program includes projects aimed at mental and physical healthcare and improving the socio-economic situation of the victims, such as education and training to support the former child soldiers' effective reintegration into society.³⁵ In March 2021, the Court issued a decision on reparations in the *Ntaganda* case, which will be discussed further below. Victims eligible for reparations included child soldiers, victims of rape and sexual slavery, as well as children born out of rape and sexual slavery. Among other groups, children born out of rape and sexual slavery and former child soldiers received priority for payment of reparations.

Investigations and pending cases involving crimes against and affecting children. A number of cases pending before the Court include charges for crimes against and affecting children. Most of these center on child soldier offenses.³⁶ However, in a significant development, in March 2023, the Court issued the first warrants of arrest in connection with the ongoing investigation into the situation in Ukraine, following the invasion by the Russian Federation.³⁷ The warrants targeted Vladimir Vladimirovich Putin, President of the Russian Federation, and Maria Alekseyevna Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation, and focused specifically on the alleged unlawful deportation and transfer of children from occupied areas of Ukraine to the Russian Federation.³⁸

Other developments relevant to children. Since 2016, the Court has also taken a number of concrete steps to prioritize the effective investigation and prosecution of crimes against and affecting children. For instance, the Gender and Children Unit now reports to one of the Deputy Prosecutors, and all investigative plans are reviewed by the Head of the Unit.³⁹ The OTP's 2022 Policy on the Crime of Gender Persecution also expressly recognizes that gender persecution against or affecting children is particularly grave, and the Office will pay particular attention to child victims of all ages when investigating and prosecuting the crime of gender persecution.⁴⁰

³⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3495-Red, Public redacted version of Decision granting the request of the Trust Fund of Victims dated 21 September 2020 and approving the implementation of collective reparations in the form of services (4 March 2021).

³⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-3495-Red, Public redacted version of Decision granting the request of the Trust Fund of Victims dated 21 September 2020 and approving the implementation of collective reparations in the form of services (4 March 2021).

³⁶ See, e.g., *Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, ICC-01/14-01/18, Public redacted version of the decision on the confirmation of charges against Yekatom and Ngaïssona (20 December 2019) ¶¶ 144-156; *Prosecutor v. Maxime Jeoffroy Eli Mokom Gawaka*, ICC-01/14-01/22, Public Redacted Version of 'Warrant of Arrest for Maxime Jeoffroy Eli Mokom Gawaka' (ICC-01/14-01/22-2-US-Exp) (22 March 2022).

³⁷ ICC, OTP, *Statement on the Situation in Ukraine* (2 March 2022) available at <https://www.icc-cpi.int/situations/ukraine>.

³⁸ ICC, *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova* (17 March 2023), available at <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and> [hereinafter, "ICC, *Judges issue arrest warrants*"].

³⁹ *Moving Forward: Enabling A Child-Centred Approach at the ICC And Beyond, Summary and Recommendations* (9 December 2021), available at https://www.justicerapidresponse.org/wp-content/uploads/2022/03/SummaryReport_ICC_Final.pdf.

⁴⁰ ICC, OTP, *Policy on the Crime of Gender Persecution* (7 December 2022) [hereinafter, "*Gender Persecution*"] ¶ 8.

V. Recommendations

In this section, we recommend the following for inclusion in the revised Policy on Children:

- Employ a Situational Analysis, and In Particular a Gendered Analysis, of Crimes Involving Child Soldiers;
- Recognize Child Victims of Crimes Committed by Members of Their Own Armed Forces;
- Expand Intersectionality in Investigating and Prosecuting Crimes Against and Affecting Children;
- Enhance Involvement and Protection of Child Witnesses in the OTP's Work; and
- Adopt a Child-Centered and Child-Sensitive Approach to Reparations.

A. **Employ a Situational Analysis, and In Particular a Gendered Analysis, of Crimes Involving Child Soldiers**

There are three crimes involving child soldiers provided for under Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute: (i) enlistment of children into armed forces or groups; (ii) conscription of children into armed forces or groups; and (iii) use of children to participate actively in hostilities. In recent years, the international community has learned much more about children's experiences of armed conflict, including in relation to their participation in armed forces or groups.⁴¹ This includes the specific experiences of girls, who may be used to maintain or further active hostilities even without wielding weapons in active combat. It is important to incorporate these learnings into how the OTP investigates and prosecutes these crimes.

1. Capturing the Full Scope of "Conscription"

We recommend that the interpretation of the term "conscription" under the Rome Statute is broadened to fully capture the nature and consequences of compulsory involvement of children in armed forces and groups, taking into account the different experiences of boys, girls, and other children. Consistent with recent case law and scholarly commentary, we recommend that the OTP's revised policy expressly address some of the common ways in which children are, without their consent, incorporated into the armed forces, and which are currently not reflected in the 2016 Policy. In particular, the circumstances of children in the

⁴¹ See, e.g., Mark A. Drumbl, RESEARCH HANDBOOK ON CHILD SOLDIERS (2019); Mark A. Drumbl, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY (2012) [hereinafter, "Drumbl, *Reimagining*"]; C. Chamberlain Bolaños, CHILDREN AND THE INTERNATIONAL CRIMINAL COURT: ANALYSIS OF THE ROME STATUTE THROUGH A CHILDREN'S RIGHTS PERSPECTIVE (2014) [hereinafter "Bolaños"]; Gloria Atiba-Davies & Leo Nwoye, "Children, Gender, And International Criminal Justice" GENDER AND INTERNATIONAL CRIMINAL LAW (Indira Rosenthal et al., eds., 2022) [hereinafter, "Atiba-Davies & Nwoye"]; Sandhya Nair, *Child Soldiers and International Criminal Law: Is the Existing Legal Framework Adequate to Prohibit the Use of Children in Conflict?*, 2 PERTH INT'L L. J. 40 (2017).

following three groups should be considered: (1) children, in particular girls, given to armed groups by their families; (2) child brides of members of armed forces (to be distinguished from girls abducted to serve as wives or companions of male fighters);⁴² and (3) children born into and raised as part of armed forces.⁴³

In *Lubanga*, the Appeals Chamber defined “conscriptio[n]” as “enlist[ing] compulsorily, for example, by means of abduction.”⁴⁴ The key element of the crime is the existence of compulsion. According to the 2016 Policy, “[t]he element of compulsion necessary for the crime of conscription can be established by demonstrating that the child joined the armed force or group due to, *inter alia*, a legal obligation, brute force, threat of force or psychological pressure amounting to coercion.”⁴⁵ The Policy may benefit from broader language, which categorically captures the circumstances of children in the three groups identified above, none of whom can be considered to have voluntarily enrolled in the armed forces. For instance, the revised Policy could expressly acknowledge that compulsion takes a variety of forms, many of which will not involve physical force; and that while compulsion can, and commonly is, exerted upon the victim directly, it can also be exerted upon those with the power to determine the victim’s fate, such as their families or caregivers.

It may be helpful to draw from the more expansive definitions of “force” or “compulsion” as articulated in the elements of other crimes enumerated in the Rome Statute.

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- ⁴² See Yutaka Arai-Takahashi, *War Crimes relating to child soldiers and other children that are otherwise associated with armed groups in situations of non-international armed conflict. An incremental step toward a coherent legal framework?* QUESTIONS INT’L L. (23 September 2019), available at <http://www.qil-qdi.org/war-crimes-relating-to-child-soldiers-and-other-children-that-are-otherwise-associated-with-armed-groups-in-situations-of-non-international-armed-conflict-an-incremental-step-toward-a-coherent-legal/>. Girls abducted to serve as wives or companions of male fighters fall squarely within the present definition of “conscriptio[n]”. The crime of “conscriptio[n]” child brides into armed forces is distinct from the crime of forced marriage. The crime of conscription focuses on the joining of child brides into armed forces, even if done out of subservience to their “husband” or engrained social norms. The crime of forced marriage focuses on the deprivation of a child’s right to freely marry.
- ⁴³ Drumbl, *Reimagining* at 62-63, 149.
- ⁴⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment pursuant to Art. 74 of the Statute (14 March 2012) ¶ 608; *2016 Policy* ¶ 41. The separate term “enlistment” has been defined as “enrol[ling] on the list of a military body”, presupposing a voluntary act on the part of the child. However, the *Lubanga* Trial Chamber noted that the distinction between enlistment and conscription is superficial, as children by definition are unable to provide meaningful, genuine, and informed consent when enlisting. See *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment pursuant to Art. 74 of the Statute (14 March 2012) ¶¶ 613-614. See also *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, Judgment, Special Ct. for Sierra Leone (20 June 2007) ¶ 735 (noting that a child’s consent is not a valid defense); *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Special Court for Sierra Leone (28 May 2008) ¶ 140 (noting that where a child under the age of 15 is allowed to voluntarily join an armed group, their consent is not a defense). There is significant scholastic debate regarding whether a child can meaningfully provide consent within the context of enlistment, and whether consent can be considered a valid defense for enlistment. See Bolaños at 110-117; Drumbl, *Reimagining* at 29-35 and 44-50 (describing the complexities of children’s involvement in war over history, and the difficulty of defining who is a “child”); Sandhya Nair, *Child Soldiers and International Criminal Law: Is the Existing Legal Framework Adequate to Prohibit the Use of Children in Conflict?* 2 PERTH INT’L L. J. 40, 44-45 (2017); Rachel Brett, *Adolescents volunteering for armed forces or armed groups*, 85 ICRC: CURRENT ISSUES & COMMS 857, 863-864 (2003).
- ⁴⁵ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction (1 December 2014) ¶ 278; *2016 Policy* ¶ 41.

For example, “force” is defined as “not restricted to physical force,” and includes “threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment” in the elements of the crimes of (1) genocide by forcibly transferring children; (2) deportation or forcible transfer of population; (3) rape; (4) enforced prostitution; and (5) sexual violence.⁴⁶ The lack of meaningful consent of the person or persons being forced or compelled is also contemplated in the elements of the crimes of (1) rape;⁴⁷ (2) enforced prostitution;⁴⁸ (3) enforced sterilization;⁴⁹ and (4) sexual violence.⁵⁰ We recommend that the OTP’s guidance on “compulsion” within the meaning of the conscription of children into the armed forces be similarly broadened to include, for instance, “abuse of power” and “taking advantage of a coercive environment” to ensure that all children forcibly joined into armed groups or forces—including those in the three categories identified above—are accounted for under this crime.

In addition, we suggest that the revised policy delete the word “brute” before the word “force” in order to account for such a broader concept of compulsion, as force of any kind “abrogates autonomy just as denial of self-determination is coercive.”⁵¹ The *Lubanga* Appeals Chamber uses this language in 2014 as a means to prove compulsion for forced conscription but also references the psychological pressures that children may face that may amount to coercion.⁵² Removing this specific reference in the policy better encapsulates the plethora of pressures children may face when ultimately joining an armed group. Moreover, the *Lubanga* Trial Chamber in 2012 noted that “[t]he recruitment and enlisting of children in [the] DRC is not always based on abduction and the brute use of force,” but rather there are contextual factors that may lead to a child’s conscription that would still be considered involuntary, such as joining an armed group for survival purposes.⁵³

2. *A Gendered Understanding of “Using Children to Participate Actively in Hostilities”*

⁴⁶ ICC ELEMENTS, Arts. 6(e)(1), 7(1)(d), 7(1)(g)-1, 7(1)(g)-3, 7(1)(g)-6(1).

⁴⁷ ICC ELEMENTS, Art. 7(1)(g)-1, fn. 16 (“It is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity.”); ICC ELEMENTS, Art. 8(2)(b)(xxii)-1, fn. 51.

⁴⁸ ICC ELEMENTS, Art. 7(1)(g)-3 (“The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion ... or such person’s or person’s incapacity to give genuine consent.”); ICC ELEMENTS, Art. 8(2)(b)(xxii)-3.

⁴⁹ ICC ELEMENTS, Art. 7(1)(g)-5 (“The conduct was ... [not] carried out with [the person’s or persons’] genuine consent.”); ICC ELEMENTS, Art. 7(1)(g)-5, fn. 20 (“It is understood that ‘genuine consent’ does not include consent obtained through deception.”); ICC ELEMENTS, Art. 8(2)(b)(xxii)-5; *id.* Art. 8(2)(b)(xxii)-5, fn. 55.

⁵⁰ ICC ELEMENTS, Art. 7(1)(g)-6 (“The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, ... or such person’s or persons’ incapacity to give genuine consent.”); Art. 8(2)(b)(xxii)-6.

⁵¹ Catherine A. MacKinnon, *Defining Rape Internationally: A Comment on Akayesu*, 44 COLUM. J. TRANSNAT’L L. 940, 941 (2006).

⁵² *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06 A 5, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction (1 Dec. 2014) ¶¶ 278.

⁵³ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment pursuant to Art. 74 of the Statute (14 March 2012) ¶¶ 611.

Girls and boys may play different roles in hostilities and may, therefore, be affected differently. The revised Policy should emphasize that a child’s sex, gender identity, and gender expression—alongside the child’s other intersecting identities, such as socio-economic status, disability, and ethnicity—inevitably shape their experiences in armed groups, and in particular, the way that they are used to participate in hostilities.⁵⁴ For instance, the harm suffered by girl members of armed groups may be overlooked where they perform roles not traditionally associated with active combat.⁵⁵

In *Lubanga*, the Appeals Chamber found that “the crime of using children to participate actively in hostilities requires the existence of a link between the activity and the hostilities,” to be assessed on a case-by-case basis. The extent to which the child was exposed to risk due to the activity in which they were engaged may be an indicator of the existence of a sufficiently close relationship between the activity and the hostilities, but it cannot replace an assessment of the relationship itself.⁵⁶ Thus, it is not sufficient to focus on children who take part in active combat. Indeed, the Court, scholars, and practitioners have acknowledged that indirect support for combat operations is encompassed within the term “use actively in hostilities.”⁵⁷

When conducting an assessment of children’s roles in armed groups and their link to hostilities, it is important to account for the different experiences of girls, boys, and other children with diverse sexual orientation, gender expression and identity, and sexual characteristics within armed groups.⁵⁸ While the roles filled by children associated with armed

⁵⁴ See Nidhi Kapur and Hannah Thompson, *Beyond the Binary: Why Gender Matters in the Recruitment and Use of Children*, 5 ALLONS-Y J. CHILDREN, PEACE & SEC’Y, 21, 24, 27 (2001) [hereinafter, “*Beyond Binary*”]; Atiba-Davies and Nwoye at 128-129 (2022); see also *id.* at 133 (citing Valerie Oosterveld, *The Definition of ‘Gender’ in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55, 56 (2005); Indira Rosenthal & Valerie Oosterveld, *Gender and the ILC’s 2019 Draft Articles on the Prevention and Punishment of Crimes Against Humanity*, 6 AFR. J. INT’L CRIM. JUST. 214 (2020) (asserting that the term, “gender” remains undefined and ambiguous, subject to misapplication in international criminal law)).

⁵⁵ *Beyond Binary* at 27 (describing diverging and overlapping roles and responsibilities of boys and girls); UNICEF, *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* (30 January 2007) at 13-14, 23, available at <https://www.unicef.org/mali/media/1561/file/ParisPrinciples.pdf> [hereinafter, “Paris Principles”] (noting that girls may have specific situations requiring special considerations, and that girls risk being “invisible” in release and reintegration programs”); Waltraud Queiser Morales, *Girl child soldiers: The other face of sexual exploitation and gender violence*, *ASPJ AFRICA & FRANCOFONIE* 62 [hereinafter “Morales”], 64-69 (2011) (describing girls’ roles in armed conflicts).

⁵⁶ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction (1 December 2014) ¶ 333.

⁵⁷ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against his conviction (1 December 2014) ¶¶ 329-335, 340; see Rosemary Grey, *Sexual Violence against Child Soldiers*, 16 INT’L FEMINIST J. POLITICS [hereinafter, “Grey, *Sexual Violence*”], 601, 602-603, 613-614 (2014); Dyan E. Mazurana et al., *Girls in Fighting Forces and Groups: Their Recruitment, Participation, Demobilization, and Reintegration*, 8 J. PEACE PSYCH. 97 (2002) (describing complexities around rape, sexual violence, and ongoing sexual enslavement in relation to hostilities)..

⁵⁸ See Atiba-Davies and Nwoye at 150; *Paris Principles* at 13-14, 23. Art. 21(3) of the ROME STATUTE requires that the “application and interpretation of [relevant] law [...] must ... be without any adverse distinction founded on grounds such as gender” and the OTP has taken significant measures to ensure that a gendered-lens is applied to evaluating and collecting evidence for all charges in alignment with the OTP Policy on Gender. There is a dearth of data and research surrounding the use of children with diverse sexual orientation, gender expression and identity, and sexual characteristics, making it “impossible to ascertain (1) if gender non-conforming and/or non-heteronormative children are being actively recruited, (2) why they may be

conflict can and do overlap, the labor division “often mirrors context-specific gender roles and preconceived notions of relative strength and capacities.”⁵⁹ Consequently, girls are most likely to be used by armed groups for, *inter alia*, forced domestic labor or as sex slaves, rather than, or in addition to, active combat. Because they tend to “play multiple ... and changing roles,” the assessment of their contribution to hostilities is complex, and more likely to be overlooked.⁶⁰

Thus, it is important to perform a gendered analysis of the nature of the relationship between the roles of girls or other children employed as, for instance, domestic workers or sex slaves, and hostilities. It may be that, depending on the circumstances, cultural norms, nature of combat, and other considerations, girls (and other children) employed in such roles would make a tangible contribution to the armed group’s capacity to sustain combat operations.⁶¹ With its comment in *Lubanga* regarding the “complex and unforeseeable scenarios presented by the rapidly changing face of warfare in the modern world”, the Appeals Chamber expressly reserved space for such development, accounting for the evolution of the society’s understanding of girls’ roles in armed groups, and we recommend that the revised Policy recognize that.

As an example of a specific measure, the OTP may incorporate a harm-focused assessment into its investigations. Such an approach incorporates an analysis of how the accused violated a victim’s rights, and which of the victim’s rights were violated, rather than exclusively focusing on the accused’s conduct.⁶² For example, it could consider whether a child was deprived of their right, *inter alia*, to bodily autonomy, or to marry freely, in a way that maintains or furthers active hostilities. A finding in the affirmative could indicate a relationship between the child’s activities and the hostilities. Such an approach would reveal “motives and patterns of gender-based crimes against children, and the connection between these and other crimes, [which] can help the prosecution shape indictments that reflect the full criminality of the accused and the seriousness of the crime.”⁶³

targeted, (3) what the outcomes would be for them when they are, and (4) how best to prevent their enlistment as well as (5) how to support their release and reintegration in response. *Beyond Binary* at 26-27.

⁵⁹ *Beyond Binary* at 27.

⁶⁰ Atiba-Davies & Nwoye at 150 citing *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-223-ENG, Official Court Transcript (7 January 2010) at 10, 14, 20, 30, 36; see also *Beyond Binary* at 27 (describing diverging and overlapping roles and responsibilities of boys and girls); *Paris Principles* at 13-14, 23 (noting that girls may have specific situations requiring special considerations, and that girls risk being “invisible” in release and reintegration programs”; Waltraud Queiser Morales, *Girl child soldiers: The other face of sexual exploitation and gender violence*, *ASPJ AFRICA & FRANCOPHONIE* 62 [hereinafter “Morales”], 64-69 (2011) (describing girls’ roles in armed conflicts).

⁶¹ Armed groups commonly recruit girls to be distributed amongst members as sexual rewards, because they are perceived as compliant, submissive, obedient, or easily manipulated, and because girls can birth future members of armed groups. Girls are also understood to be more versatile as they can serve as combatants, spies, domestic aids, and/or sex slaves, and are less likely to be suspected of belonging to armed groups. Morales at 63; *Paris Principles* at 29; Tom Esslemont, *The child soldiers who escaped Colombia’s guerilla groups*, BBC NEWS (13 November 2013) available at <https://www.bbc.com/news/world-latin-america-24911286>.

⁶² See Patrick J. Keenan, *Doctrinal Innovation in International Criminal Law: Harms, Victims, and the Evolution of the Law*, 42 U. of PA. J. INT’L L. 407, 417 (2020) explaining how prosecutors can employ a harms-based approach to prosecuting novel crimes in international criminal law; see also *Beyond Binary* at 28 (describing how girls’ and boys’ experiences of harms may differ).

⁶³ Atiba-Davies & Nwoye at 129.

A broad understanding of what constitutes the use of children in hostilities finds support in international criminal law:

- The Special Court for Sierra Leone has held that the “use” of children in hostilities encompasses “[a]ny labour or support that gives effect to, or helps maintain, operations in a conflict,” including support roles – which are more likely to be carried out by girls – “such as carrying loads, finding/acquiring food, ammunition, or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints, acting as human shields or body guards.”⁶⁴
- The Cape Town Principles similarly included within the definition of “child soldier” children serving as “cooks, porters, messengers and anyone accompanying such groups,” and “girls recruited for sexual purposes and for forced marriage. It did not, therefore, only refer to a child who is carrying or has carried arms.”
- The Paris Principles, which built on and progressed the Cape Town Principles, use the terminology, “children associated with armed forces and armed groups,” rather than “child soldiers,” to encompass girls and boys used “in a variety of ways from support roles, such as cooking or portering, to active fighting, laying mines or spying and girls are frequently used for sexual purposes.”⁶⁵
- The Vancouver Principles, endorsed by 50 countries as of 2021, describes “children in situations of armed conflict by armed forces and groups” as “including fighters, cooks, porters, messengers, spies, or for sexual purposes.”⁶⁶

In doing so, international criminal law recognizes that the harms committed against girl child soldiers, who may not regularly wield weapons in active combat, are done so as to maintain or further active hostilities.⁶⁷ At the same time, it is important to recognize that boys and others who do not identify as girls can equally be used by armed groups in a variety of roles, including for sexual exploitation. This can take the form of direct sexual violence against the child, but also compelling children, in particular boys, to commit sexual violence against others.⁶⁸ In such cases, the harm is suffered not only by the child’s victim but also by the child. Such conduct needs to be part of the overall assessment of criminality in order to capture the full extent of harm suffered by children who are used in hostilities.⁶⁹

⁶⁴ *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute (14 March 2012) ¶¶ 624 – 625 (citing *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, Judgment, Special Court for Sierra Leone (20 June 2007) ¶ 737).

⁶⁵ *Paris Principles* at 4.

⁶⁶ Government of Canada, *The Vancouver Principles on Peacekeeping and the Prevention of the Recruitment and Use of Child Soldiers* [hereinafter, “*Vancouver Principles*”], Preamble, available at https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/principles-vancouver-principes-pledge-engageons.aspx?lang=eng.

⁶⁷ Cape Town Annotated Principles and Best Practice on the Prevention of Recruitment of Children into the Armed Forces and Demobilisation and Social Reintegration of Child Soldiers in Africa (30 April 1997) available at [https://nepal.ohchr.org/en/resources/Documents/English/children/Cape_Town_Principles\(1\).pdf](https://nepal.ohchr.org/en/resources/Documents/English/children/Cape_Town_Principles(1).pdf).

⁶⁸ See, e.g., *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-107-ENG, Trial Chamber I, 11 Transcript, (26 January 2009) lines 21–23 (describing boys being directed to rape).

⁶⁹ See, e.g., Grey, *Sexual Violence* at 601, 603 (describing the normative dimensions of prosecuting sexual violence); *Beyond Binary* at 28 (noting that boys do not escape sexual violence during combat).

The 2016 Policy already acknowledges the varied roles children perform in armed conflict.⁷⁰ Going forward, it is critical that the OTP continues to routinely include an assessment of gender dynamics as part of a full situational analysis of children's experiences of armed conflicts, including "to help dispel some persistent myths around child soldiers, such as the lingering misconception that girl child soldiers are not employed in combat roles, or that boy child soldiers do not experience sexual or gender-based violence."⁷¹ By continuously evaluating children's intersecting needs and realities, the OTP will move closer to understanding the complex experiences of children during armed conflict and reflecting them in the OTP's approach to investigations and prosecutions.

B. Recognize Child Victims of Crimes Committed by Members of Their Own Armed Forces

The 2016 Policy notes that "some crimes ... may be committed against children by members of the very armed forces of groups into which they are recruited."⁷² Given the significant developments in the case law since the publication of the 2016 Policy, we recommend that this guidance be emphasized and expanded throughout the revised Policy, rather than just mentioned briefly in the "prosecutions" section of the Policy, as it is now. The recognition that war crimes may be committed by perpetrators against members of the same armed forces is particularly relevant to children, who, due to their age and other circumstances, are more vulnerable to being targeted, especially in the closed environment of armed groups.

⁷⁰ 2016 Policy ¶ 17.

⁷¹ *Beyond Binary*, 15, citing *Vancouver Principles*.

⁷² 2016 Policy ¶ 86. The specific crimes mentioned are "killings, mutilation, torture, enslavement, forcible transfer, attacks against buildings dedicated to health care and education, pillaging, destruction of property, and sexual and gender-based crimes." Fn. 186 to the paragraph cites *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-309, Decision Pursuant to Art. 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda (9 June 2014) ¶¶ 81-82.

As noted above, the Trial Chamber⁷³ and the Appeals Chamber⁷⁴ in *Ntaganda* confirmed that war crimes may be committed against children by members of their own armed forces or groups. Such intra-party crimes (e.g., sexual and gender-based violence) can constitute war crimes under the Rome Statute provided that there is a nexus between the commission of the crime and the armed conflict. Such a nexus exists where the conduct in question “took place in the context of and was associated with an armed conflict” of either international or non-international character.”⁷⁵ While the decision centered on girl child soldiers, it is not limited to this group and likewise applies to boy child soldiers (as well as adult combatants).

The position taken by the Court in *Ntaganda* had been long held by the ICRC. In its judgment, the *Ntaganda* Trial Chamber cited the ICRC 2016 Commentary on the First Geneva Convention:⁷⁶

“The Chamber further considers it noteworthy that the ICRC, in its updated commentary to the First Geneva Convention of 1949, addresses the question of ‘whether armed forces of a Party to the conflict benefit from the application of common Article 3 by their own Party’. When considering the ‘example’ of ‘members of armed forces who are sexually or otherwise abused by their own Party’, the ICRC explains that:

⁷³ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-1707, Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9 (4 January 2017). *See*, in particular *Paris Principles* 54, in which the Trial Chamber held that “members of the same armed force are not per se excluded as potential victims of the war crimes of rape and sexual slavery, as listed in article 8(2)(b)(xxii) and (e)(vi); whether as a result of the way these crimes have been incorporated in the Statute, or on the basis of the framework of international humanitarian law, or international law more generally.”

⁷⁴ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06 OA5, Judgment on the appeal of Mr Ntaganda against the Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9 (15 June 2017). *See*, in particular, ¶ 2 in which the Appeals Chamber held that “Having regard to the established framework of international law, members of an armed force or group are not categorically excluded from protection against the war crimes of rape and sexual slavery under article 8 (2) (b) (xxii) and (2) (e) (vi) of the Statute when committed by members of the same armed force or group.” *See, also*, ¶ 64 in which the Appeals Chamber held that “With regard to the second issue – namely whether Status Requirements exist in international humanitarian law specifically for the war crimes of rape and sexual slavery – the Appeals Chamber observes that the prohibitions of rape and sexual slavery in armed conflict are without a doubt well established under international humanitarian law. As noted by the Trial Chamber, protection under international humanitarian law against such conduct generally “appear[s] in contexts protecting civilians and persons hors de combat in the power of a party to the conflict”. In this regard, the question arising before the Appeals Chamber is whether such explicit protection under international humanitarian law suggests any limits on who may be victims of such conduct. In the view of the Appeals Chamber, there is no conceivable reason for reaching such a conclusion.”

⁷⁵ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06 OA5, Judgment on the appeal of Mr Ntaganda against the Second decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9 (15 June 2017) ¶¶ 2, 68. *See also* *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-1707, Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9 (4 January 2017) ¶ 50.

⁷⁶ *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06-1707, Second Decision on the Defence’s Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9 (4 January 2017) ¶ 50 (citing ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2016), available at <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>, ¶ 547).

[t]he fact that [...] the abuse [is] committed by their own Party should not be a ground to deny such persons the protection of common Article 3. This is supported by the fundamental character of common Article 3 which has been recognized as a ‘minimum yardstick’ in all armed conflicts and as a reflection of ‘elementary considerations of humanity’.

This approach is consistent with the ICRC’s previous commentaries, in which it explains that due to the humanitarian principles underlying it, the categorisations of protected persons as adopted for the first two Geneva Conventions of 1949 were not intended to limit protection.”

The same wording cited by the Trial Chamber was included in the ICRC 2020 Commentary on the Third Geneva Convention;⁷⁷ the Commentary also cited the *Ntaganda* Appeals Chamber Judgment, noting that this confirmed “that members of armed forces are not categorically excluded from protection against war crimes of rape and sexual slavery committed against them by their own Party.”⁷⁸

Even though the decision sparked controversy in some circles,⁷⁹ it was endorsed by the Colombian Constitutional Court in the case of “Helena”, which concerned a woman forcibly recruited into FARC as a child.⁸⁰ Citing *Ntaganda*, the Constitutional Court found that the forced contraception and forced abortion Helena suffered at the hands of members of her own armed groups constituted a breach of international humanitarian law and a war crime. As in *Ntaganda*, the Constitutional Court held that there was a sufficient nexus to the armed conflict as sexual, gender, and reproductive violence had occurred in the context of an internal armed conflict. In a commentary on the Colombian case of Helena, two scholars noted that “[i]n applying the *Ntaganda* approach with respect to intra-party war crimes to these forms of reproductive violence, the decision also sheds light on a previously overlooked dimension of women’s experiences of conflict and victimization, and illuminates the complexities of their participation in armed groups.”⁸¹

⁷⁷ ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War* (2020) available at <https://ihl-databases.icrc.org/ihl/full/GCIII-commentary>, ¶ 581.

⁷⁸ ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*; fn. 297.

⁷⁹ See, e.g., Kevin Jon Heller, “ICC Appeals Chamber Says A War Crime Does Not Have to Violate IHL,” *Opinio Juris* (15 June 2017), available at <http://opiniojuris.org/2017/06/15/icc-appeals-chamber-holds-a-war-crime-does-not-have-to-violate-ihl/>; Yvonne McDermott, “ICC extends War Crimes of Rape and Sexual Slavery to Victims from Same Armed Forces as Perpetrator” *intlawgrlls* (5 January 2017), available at <https://ilg2.org/2017/01/05/icc-extends-war-crimes-of-rape-and-sexual-slavery-to-victims-from-same-armed-forces-as-perpetrator/>; Cóman Kenny & Yvonne McDermott, *The Expanding Protection of Members of a Party’s Own Armed Forces Under International Criminal Law*, 68 INT’L & COMPAR. L. QTRLY 943, 945–60 (2019).

⁸⁰ Sentencia SU-599/19, Corte Constitucional de Colombia (11 December 2019), available at <https://www.corteconstitucional.gov.co/Relatoria/2019/SU599-19.htm>.

⁸¹ Ciara Laverty & Dieneke de Vos, “‘Ntaganda’ in Colombia: Intra-Party Reproductive Violence at the Colombian Constitutional Court,” *Opinio Juris* (25 February 2020), available at <http://opiniojuris.org/2020/02/25/ntaganda-in-colombia-intra-party-reproductive-violence-at-the-colombian-constitutional-court/>.

In light of these developments, we recommend that the revised Policy emphasizes and expands on this guidance. In particular, it is currently only mentioned briefly in the “prosecutions” section of the 2016 Policy,⁸² but not elsewhere, including in the substantive discussion of crimes affecting children. We recommend that the OTP expressly notes in the Introduction, General Policy, and/or Regulatory Framework sections, as appropriate, that intra-party crimes committed against child soldiers, in particular sexual and gender-based crimes, can constitute war crimes in both international and non-international armed conflicts, and include commitments in subsequent sections of the revised Policy to incorporate this understanding into investigations and prosecutions.

C. Expand Intersectionality in Investigating and Prosecuting Crimes Against and Affecting Children

Children can be targeted as victims of crimes for a range of reasons, rather than solely due to their age. While the 2016 Policy briefly recognizes that,⁸³ we recommend that the guidance on intersectionality be emphasized and expanded in order to ensure that children—who already face significant risks of victimization within conflict and require special protection within the OTP’s investigative and prosecutorial processes—are adequately protected if and when they face discrimination and persecution on the ground of their young age and another factor or factors, such as race, disability, religion, gender, sexual orientation, ethnicity, or nationality.

Intersectionality theory seeks to provide a framework to better understand the connectedness between different but overlapping aspects of individual identity—such as race, gender, sexual orientation, religious belief, or disability—that often have been considered separately in academic literature and legal practice.

Intersectionality has its origins in a critique of “the tendency to treat race and gender as mutually exclusive categories of experience and analysis” when seeking to understand discriminatory behaviors.⁸⁴ In place of “a single-axis framework” that focuses on one aspect of discriminatory treatment alone, an intersectional analysis seeks to reflect “those who are multiply burdened” by overlapping and interrelated forms of discrimination.⁸⁵ For example, black women may face discrimination on the basis of their race and gender, and may therefore experience discrimination differently than those who are targeted because of their race or gender alone.

Over the past decade, a significant body of academic research has sought to encourage the use of intersectionality theory as an analytical framework for approaching international crimes targeting marginalized groups—particularly as a tool for understanding sexual violence

⁸² 2016 Policy Section VI.

⁸³ 2016 Policy ¶ 18.

⁸⁴ Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* 1 UNIV. CHICAGO L. FOR. (1989) 139 at 139.

⁸⁵ Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics* 1 UNIV. CHICAGO L. FOR. (1989) 139 at 139.

against women.⁸⁶ The OTP's 2022 Policy on the Crime of Gender Persecution builds on the recent literature and encourages an intersectional analysis of such crimes in several respects.⁸⁷ However, as noted above, the 2016 Policy on Children addresses intersectionality only briefly. First, the 2016 Policy records the OTP's commitment to:

“Take steps to understand the significance of attributes like age and birth, and the degree to which they may give rise to multiple forms of discrimination and social inequalities, either alone or as they intersect with other factors, like race, ability or disability; religion or belief; political or other opinion; national, ethnic or social origin; gender, sex, sexual orientation; or other status or identity [...]”⁸⁸

The 2016 Policy also expressly records the fact that the OTP “[...] recognizes that children may also be persecuted on intersecting grounds, such as ethnicity, religion and gender.”⁸⁹

Recent investigations and cases in the ICC illustrate the potential value of intersectionality theory as a means of understanding the specific manner in which victims may suffer disproportionate persecution and harm. Recent investigations and cases also demonstrate that the intersectionality of persecution and harm suffered by victims may be relevant at all stages of the Court's processes, from investigation to prosecution, and ultimately to remedy in the event of conviction. For example:

- **Investigation.** As noted above, in March 2023, the Court issued an arrest warrant against Vladimir Putin and Maria Lvova-Belova in relation to the alleged unlawful deportation and transfer of children from occupied areas of Ukraine to the Russian Federation.⁹⁰ The allegations illustrate the manner in which children may suffer intersectional persecution and harm: the alleged victims were targeted on the basis of their Ukrainian nationality, as well as their age.
- **Prosecution.** The Prosecutor's closing brief in *Ongwen* highlighted the intersecting bases for the abduction and victimization of children by the Lord's Resistance Army in Uganda.⁹¹ For example, the experiences of abducted boys and girls were distinct.

⁸⁶ See, e.g., Aisha Nicole Davis, *Intersectionality and International Law: Recognizing Complex Identities on the Global Stage*, 28 HRVRD. HUM. RIGHTS J. (2015) 205 at 242 (“[...] To properly address the plight of women around the world, human rights discourse must turn away from reliance on paradigmatic notions and look to the realities that different populations face. To accomplish this goal, international human rights mechanisms and international courts with jurisdiction over [international human rights law] and [international humanitarian law] violations must employ intersectionality. Applied to any degree, intersectionality provides a conceptual framework for acknowledging the complexities of identity, as well as how the interplay of identities affects one's life. Through an intersectional analysis, violations against women will be better understood and their needs better served.”); Ana Martin Beringola, *Intersectionality: A Tool for the Gender Analysis of Sexual Violence at the ICC*, 9 AMSTERDAM L. FOR. (2017) 84.

⁸⁷ *Gender Persecution*.

⁸⁸ *Policy 2016* ¶ 37.

⁸⁹ *Policy 2016* ¶ 51.

⁹⁰ ICC, *Judges issue arrest warrants*.

⁹¹ *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-1719-Red, Public Redacted Version of Prosecution Closing Brief (24 February 2020).

Whereas boys were abducted to become fighters,⁹² girls were enslaved, subject to sexual violence, and forcibly married.⁹³ Again, the prosecution case illustrates intersectional persecution and harm: child victims suffered particular harms that were distinct from those suffered by adult victims, but gender also impacted the way in which they were victimized.

- **Remedy.** The 2021 Reparations Order issued in the *Ntaganda* case, discussed above, paid close attention to the different ways in which victims were impacted by the offenses, based on their individual circumstances.⁹⁴ The Court highlighted, in particular, that “attention should be paid to [...] children”⁹⁵, and “consultations and outreach activities should take into account the victims’ diversity, different needs, and interests”.⁹⁶ In the specific context of the offenses at issue, the Court highlighted several harms that were specifically focused on children, including those who “were ‘deprived of their family education,’ taken away from their mothers and fathers, and cut-off from their school education.”⁹⁷

The Rome Statute itself implicitly reflects the fact that children may be especially harmed by offenses falling within the Court’s jurisdiction. For example, child victims of the crime of genocide must be primarily targeted on the basis of their national, ethnical, racial, or religious identity, as the intentional destruction of all or part of a national, ethnical, racial, or religious group is the essential element of the offense.⁹⁸ Yet certain of the acts that may form part of the crime of genocide exclusively or predominantly affect children, including the forcible transfer of children from one group to another group.⁹⁹ As such, in certain instances, the crimes themselves call for an intersectional analysis where children’s vulnerability is not only based on their age but also on other aspects, such as nationality, ethnicity, race, or religion.

Although the OTP “recognizes that children may also be persecuted on intersecting grounds,” recent investigations and cases suggest that children are very often targeted as victims on the basis of various or multiple overlapping identities, rather than on the basis of age alone. The Policy on Children could be revised to expressly recognize the prevalence of intersectional persecution of children, including by noting that children are *typically* or *very often* persecuted on intersecting grounds.

Furthermore, it is implicit in several provisions of the Rome Statute, and in the past practice of the Court, that child victims may face intersectional harms, not just intersectional persecution. For example, war crimes involving the targeting of educational establishments may have a disproportionate impact on children because of their age, even though children may not be the sole victims of such crimes. The Policy on Children could be revised to expressly

⁹² *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-1719-Red, Public Redacted Version of Prosecution Closing Brief (24 February 2020) ¶¶ 69-70.

⁹³ *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15-1719-Red, Public Redacted Version of Prosecution Closing Brief (24 February 2020) ¶ 109.

⁹⁴ *Prosecutor v. Bosco Ntaganda*, (ICC-01/04-02/06), Reparations Order (8 March 2021).

⁹⁵ *Prosecutor v. Bosco Ntaganda*, (ICC-01/04-02/06), Reparations Order (8 March 2021) ¶ 46.

⁹⁶ *Prosecutor v. Bosco Ntaganda*, (ICC-01/04-02/06), Reparations Order (8 March 2021) ¶ 47.

⁹⁷ *Prosecutor v. Bosco Ntaganda*, (ICC-01/04-02/06), Reparations Order (8 March 2021) ¶ 162.

⁹⁸ ROME STATUTE, Art. 6.

⁹⁹ ROME STATUTE, Art. 6(e).

recognize the possibility that children may be uniquely *affected* by crimes within the Court’s jurisdiction, even if the children were not specifically *targeted* by those crimes.

Lastly, the Court’s recent practice demonstrates the value of an intersectional approach at all stages of its work, from investigation to prosecution, and ultimately to the imposition of reparations following a conviction. Rather than merely reflecting the possibility that child victims may face intersectional persecution and intersectional harms, the Policy on Children could be revised to include illustrative examples from recent cases, to ensure that best practices are identified and replicated in future cases.

D. Enhance Involvement and Protection of Child Witnesses in the OTP’s Work

The protection of victims and witnesses, particularly child victims and witnesses, has been a long-standing matter of international concern and is firmly based in customary international law. Various provisions of the Rome Statute recognize the need for such protection, particularly in cases involving violence against children.¹⁰⁰ Nonetheless, judicial proceedings often pay little attention to the role of caregivers in supporting child witnesses and allocate insufficient resources to the psychosocial support needs and training of caregivers and children, including training and counseling on the court processes. We recommend that the revised Policy further emphasize the unique challenges child witnesses face when providing testimony and engaging with the OTP, as well as the role of caregivers in judicial processes; we also recommend that the revised Policy focus on the need for the allocation of sufficient resources and support for child witnesses and their caregivers.

1. Challenges Relating to Child Witnesses

In the 2016 Policy, the OTP rightfully recognizes that many crimes under the Rome Statute may cause multi-faceted impacts on children. For example, children may be victims, they may be involved in the commission of crimes, they may witness the commission of crimes against others, including members of their own families, or they may be unable to receive an education or medical care due to the destruction of schools or hospitals.¹⁰¹

The emotional and mental impact on children can also be significant. Some researchers found that younger child victims are more likely to develop lifelong post-traumatic stress disorder (“PTSD”), complex trauma,¹⁰² or child-traumatic stress¹⁰³ from the offending incident.¹⁰⁴ As such, a major concern is that the court system and testifying process may further traumatize these vulnerable children.¹⁰⁵

¹⁰⁰ ROME STATUTE; Arts. 8(2)(b)(xxvi) and 8(2)(e)(vii), 6(e), 7(1)(c) and 7(2)(c) addressing child specific crimes such as child conscription, forcible transfer of children and child trafficking.

¹⁰¹ 2016 *Policy* at 12.

¹⁰² Complex trauma refers to the exposure to chronic trauma (usually caused by adults entrusted with the children’s care) and the impact of such exposure on the children. Leslie Peterson et al., *Kids and Teens in Court (KTIC): A Model for Preparing Child Witnesses for Court*, 65 AM. J. CMTY PSYCHOL. [hereinafter, “Peterson, *Kids*”] 35, 37 (2020).

¹⁰³ Child traumatic stress refers to the physical and emotional responses of a child to events where the life or physical integrity of the child or someone critically important to the child are in danger. Peterson, *Kids* at 36.

¹⁰⁴ Peterson, *Kids* at 37.

¹⁰⁵ Peterson, *Kids* at 36.

Additionally, existing research suggests that young children may be more susceptible to false memories because they find free recall considerably more difficult than cued-recall and recognition, they are particularly deferential to adults' beliefs, and they have special difficulty identifying the sources for their beliefs.¹⁰⁶ This is worsened by the fact that victims of trauma commonly “dissociate” (i.e., separate themselves from their surroundings) from the offending incident.¹⁰⁷

Research studies have also found that child witnesses find the court process to be “distressing and confusing”¹⁰⁸ because they have little to no knowledge about the court procedures, the adversarial nature of cross-examination, the long timeframes for trials, and the insufficient resources available to victims after the conclusion of the trial process.¹⁰⁹ This anxiety can interfere with their memory recall and ability to testify if not adequately addressed.¹¹⁰

The 2016 Policy is commendable in that it includes the following steps to mitigate the challenges and risks related to child witnesses and victims:

- (i) Pre-trial: (i) conduct “psycho-social and security risk assessments” for child witnesses and victims; (ii) seek approval from ICC Chambers to conduct child witness testimony preparations; (iii) allow accompanying persons to provide support to the child witness; (iv) limit the number of staff interacting with the child.¹¹¹
- (ii) Trial: (i) use alternative testimony methods (e.g., shielding, closed-circuit video, children’s courtrooms); (ii) prevent harassment or intimidation in court (e.g., adapting the manner of questioning); and (iii) provide in-court assistance (e.g., providing psychologists and other support persons to the child witness/victim).¹¹²
- (iii) Post-Trial: (i) maintain regular contact with children to keep them informed of the developments in their case; (ii) offer child-sensitive consultations; and (iii) support child-sensitive approach to reparations.¹¹³

Nonetheless, we recommend that the revised Policy continues to build on these steps and pays particular attention to the unique challenges facing child witnesses. It is important to respect the autonomy of children while simultaneously also recognizing and mitigating the potential limitations and obstacles that children face (e.g., comparatively limited memory retention and information processing capabilities, greater likelihood for psychological and emotional trauma, etc.).

¹⁰⁶ Karen J. Saywitz & Thomas D. Lyon, *Coming to Grips with Children’s Suggestibility*, MEMORY AND SUGGESTIBILITY IN THE FORENSIC INTERVIEW 85, 86 (Mitchell L. Eisen et al, eds., 2002).

¹⁰⁷ Kyra Sanin & Anna Stirnemann, *Child Witnesses at the Special Court for Sierra Leone*, WAR CRIMES STUD. CTR. (2006) at 9.

¹⁰⁸ Isabel Randell et al., *The Experiences of Young Witnesses and Caregivers in Aotearoa New Zealand’s Sexual Violence Pilot Courts* 29 PSYCH. & L. 134 [hereinafter “Randell, *Experiences*”] at 135 (May 2021).

¹⁰⁹ Randell, *Experiences* at 136-146.

¹¹⁰ Peterson, *Kids* at 36.

¹¹¹ *2016 Policy* at 34-36.

¹¹² *2016 Policy* at 36-37.

¹¹³ *2016 Policy* at 37-40.

At the same time, as noted in the 2016 Policy, “a child may be vulnerable, capable, or both.”¹¹⁴ While the current policies of the Office encompass both, we recommend that it is further expanded to address the particular capabilities of children.

The point that any policy cannot ignore is this: children benefit from being given a platform to address the harm done to them.¹¹⁵ Being allowed to give their testimony and see justice being done can be a significant step towards healing for many children, and improve the long-term processing of crimes committed against them.¹¹⁶ Children want and benefit from being given a platform to address the harm done to them.¹¹⁷ The question then becomes how to offer children this platform by incorporating them safely into the judicial system.

The first step for integrating child witnesses into the judicial process is to ensure that children are not discriminated against based on their age but rather evaluated on their individual comprehension and capabilities.¹¹⁸ Thereafter, research currently shows that the best way to help child witnesses is to empower them with knowledge of the legal system.¹¹⁹ Children can have a number of anxieties regarding the justice system, such as the fear of not being believed, the prospect of direct examination, fear of answering questions in front of who hurt them (particularly if the victimizer was a parent), and general anxiety regarding their unfamiliarity with the legal process.¹²⁰ For many children, the extent of their knowledge of the justice system might come from watching television shows, or former contact with the judicial system such as through family court.¹²¹ Both can create intimidating and unpleasant prospects for children. This anxiety can not only re-traumatize the child, but it can directly affect their memory recall and ability to testify if not properly addressed.¹²²

Promptness is another important factor to address. It is imperative that children are heard without delay.¹²³ Too much time between preparing a child to testify and their actual testimony could cause either increased anxiety in the child, or alternately re-traumatize them as they may then be unprepared for their testimony, leading them to have to prepare a second time for trial.¹²⁴ The policy of the OTP can also benefit from further protecting the safety and privacy of each child witness.¹²⁵ Prior to testifying, children can be particularly vulnerable to intimidation or harassment from those against whom they are testifying. Current research is

¹¹⁴ 2016 Policy at 3.

¹¹⁵ Tanya Cooper, *Sacrificing the Child to Convict the Defendant*, 9 Cardozo Pub. L. Pol’y & Ethics, 239, 254 (2011); *See also* Peterson, *Kids* at 37.

¹¹⁶ Cooper, *supra* note 115, at 254.

¹¹⁷ *Id.*

¹¹⁸ Peterson, *Kids* at 36.

¹¹⁹ Peterson, *Kids* at 36.

¹²⁰ Cooper, *supra* note 115, at 251.

¹²¹ Peterson, *Kids*.

¹²² Cooper, *supra* note 115, at 277; *see also* Margaret-Ellen Pipe, Recent research on children’s testimony about experience and witnessed events, 24 NAT’L INST. CHILD HEALTH & HUM. DEV. 440 (October 2004).

¹²³ Myrna S. Raeder, *Comments on Child Abuse Litigation in a “Testimonial” World: The Intersection of Competency, Hearsay, and Confrontation*, 82 IND. L.J. 1009 (2007).

¹²⁴ *See, generally*, Michael E. Lamb et al., *Effects of Age and Delay on the Amount of Information Provided by Alleged Sex Abuse Victims in Investigative Interviews*, 71 CHILD DEV. 1586 (2000).

¹²⁵ United Nations Office on Drugs and Crime, *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, ch II, Principles ¶ 8.

sparse on retaliation against child victims, but we note that leaked information could be used by perpetrators to re-victimize and intimidate children and their families.

We also recommend the OTP to develop additional guidance materials for children written in a clear and concise way while giving them a broad knowledge of judicial proceedings. Various international and national institutions publish materials made specifically for children, such as the European Union Agency for Fundamental Rights booklet on child-friendly justice.¹²⁶ Likewise, the United Nations' Office of Drugs and Crime's Model Law is also published in a child-friendly version that discusses children's rights in a way they can understand, such as addressing words like discrimination, justice, and mental health care.¹²⁷ Not only are children able to learn the correct terminology and processes of the legal system, they can also understand human and civil rights concepts such as the right to reparations or right to representation.¹²⁸ For example, in the United States, the American Bar Association has sample instructions given to both child witnesses and their guardians, including short and simple sentences such as: "If your property was stolen and has been recovered you have a right to get your property back as soon as possible."¹²⁹

Guidance materials published by the OTP can likewise acknowledge these capabilities in children, further educating and empowering them as they integrate into the justice system. To that end, guidance materials are likewise needed for the professionals working with these children. In 2022, the European Union adopted a Strategy for the Rights of the Child, publishing and promoting various guidance materials to train justice professionals in child-friendly justice.¹³⁰ What children do not know, they are capable of learning for their proper integration into the justice system, preferably guided by adults who are knowledgeable and equipped with the necessary tools.

2. Challenges Facing Caregivers and Caregiving Professionals

In addition to challenges related to child witnesses, there is often very little focus placed on their adult caregivers.¹³¹ The 2016 Policy recognizes the need to explain court processes and

¹²⁶ Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (17 November 2010) available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804b2cf3.

¹²⁷ United Nations Office on Drugs and Crime, *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* (December 2006) available at <https://childhub.org/en/child-protection-online-library/united-nations-guidelines-justice-matters-involving-child-victims>.

¹²⁸ See United Nations Office on Drugs and Crime, *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* (December 2006) available at <https://childhub.org/en/child-protection-online-library/united-nations-guidelines-justice-matters-involving-child-victims>.

¹²⁹ *Child Victim Rights*, AM. BAR ASS'N CRIM. JUST. SEC. N. (Winter 2009) at 13.

¹³⁰ European Commission, *EU Strategy on the Rights of the Child*, available at https://commission.europa.eu/system/files/2021-09/ds0821040enn_002.pdf; Rights of the Child, European Justice, available at https://e-justice.europa.eu/content_rights_of_the_child-257-en.do?clang=en; *Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice* (17 November 2010), available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016804b2cf3.

¹³¹ See, generally, Emma Crawford & Ray Bull, *Child Witness Support and Preparation: Are Parents/Caregivers Ignored?* 15 CHILD ABUSE REV. 243, 244-246 (finding that caregivers' needs are often ignored in the

provide other relevant information to caregivers in a language and manner that is clear and understandable for them.¹³² However, we recommend that the revised Policy provide more elaborate consideration to the needs of the caregivers. For instance, since adult caregivers often serve as the key source of information about the court process for the child witnesses, the failure to adequately inform adult caregivers can lead to fewer critical information being trickled down to the child witnesses.¹³³

To start, greater emotional support resources should be made available to caregivers. Parental reactions to trauma can have significant impacts on the children's responses and later development.¹³⁴ Since the court proceedings are oftentimes of immense stress and emotional strain for caregivers, with many caregivers feeling "distraught" and "emotionally distress[ed]" after hearing their child's accounts of the offending incidents, these proceedings can leave lasting emotional trauma onto both the caregivers and the child witnesses.¹³⁵ This is also known as "PTSD a deux," where the caregiver's own traumatic response to the trauma endured by the child creates a complex system of dysfunction thereby affecting the child's memory retention and the child's own coping mechanisms.¹³⁶

There are often insufficient resources, training, and support available to caregivers (e.g., little to no formal training, scarce counseling opportunities during and following a trial, etc.).¹³⁷ Without such proper support, training, or resources, caregivers can find it difficult to adequately protect and guide the child through the court process safely. Failure to protect the child can increase the likelihood of errors and unnecessary delays in judicial proceedings, inflict long-term psychological trauma to child victims, and deter future child witnesses from participating in the judicial process.¹³⁸

Furthermore, caregivers are instrumental in the process of informing and protecting child witnesses. Support should be provided to both child witnesses and their caregivers at all stages of a judicial proceeding (i.e., pre-trial, trial, and post-trial). At the pre-trial stage, greater educational resources could be provided to both child witnesses and their adult caregivers so that they can better understand the court proceedings. At the trial stage, legal professionals with specialized training with respect to child witnesses could step in to assist. At the post-trial

judicial process and that a systematic approach to preparation and support programs are needed to better assist the caregivers).

¹³² 2016 Policy ¶¶ 26, 66, 69, and 88.

¹³³ Randell, *Experiences* at 146; see also Karen Appleyard & Joy D. Osofsky, *Parenting After Trauma: Supporting Parents and Caregivers in the Treatment of Children Impacted by Violence*, 24 *INFANT MENTAL HEALTH J.* 111, 116 (2003) (finding that under attachment theory, children often rely on their caregiver's support in times of stress).

¹³⁴ Randell, *Experiences*; Appleyard and Osofsky.

¹³⁵ Randell, *Experiences* at 147.

¹³⁶ Appleyard & Osofsky, *supra* note 133, at 115; see also Crawford & Bull, *supra* note 131, at 247-248 (finding that secure parents may "enhance a child's processing capabilities and memory through open discussion of stressful experiences.")

¹³⁷ Appleyard & Osofsky, *supra* note 133, at 146.

¹³⁸ See Appleyard & Osofsky, *supra* note 133, at 117-120 (finding that parental functioning is a key factor in determining which children are most at risk for negative psychological outcome); see also Randell, *Experiences* at 148-150 (finding that "high levels of distress reported by young witnesses and their caregivers" can lead to participants withdrawing from the judicial process, negatively affect a young person's ability to "provide the best evidence" and cause additional delays in the court system.)

stage, emotional support resources should be provided so as to follow up with the child witnesses and their adult caregivers and ensure a smooth transition and healing process.

Recognizing these shortfalls, the United Nations' Office of Drugs and Crime's Model Law contains several provisions supporting specialized training for caregivers, expanding the availability of existing support/protective mechanisms, and informing child witnesses and their caregivers of the court procedures.¹³⁹ In light of the obstacles facing caregivers in the judicial process, we recommend that the revised Policy on Children provide further attention to the need for both formal and informal support for both child witnesses and their caregivers. The OTP's revised Policy, with specific provisions developed in order to further enable caregivers to better serve their roles as the primary support system for the child witnesses, will allow the OTP to continue to interact with children in the manner most conducive to protecting their rights and shielding them from further trauma.

E. Adopt Child-Centered and Child-Sensitive Approach to Reparations

The 2016 Policy already recognizes that children's specific experiences of conflict, and the harm they suffer, should be adequately reflected in the reparations that are awarded. In particular, the 2016 Policy rightly:

- calls for “reparations . . . that contribute to the best interests of children;”¹⁴⁰
- supports “gender-sensitive forms of reparation;”¹⁴¹
- considers “the differentiated effects and the harms caused to [survivors] . . . as well as their right to reintegration into their communities;”¹⁴² and
- “supports consultation with the victims, including children, to determine the most effective . . . forms of reparation within a particular community.”¹⁴³

Since the adoption of the 2016 Policy, the Court's case law on reparations has evolved significantly. In the 2021 Reparations Order in *Ntaganda*, the Court moved beyond what could be seen as a punitive approach to reparations, which focuses on the wrong committed by the perpetrator, towards a survivor-centered approach, with a primary goal of repairing the harms the survivors suffered.¹⁴⁴ We recommend that the revised Policy be updated accordingly. In

¹³⁹ United Nations Office on Drugs and Crime, *Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime* (December 2006), available at <https://childhub.org/en/child-protection-online-library/united-nations-guidelines-justice-matters-involving-child-victims>.

¹⁴⁰ 2016 Policy ¶ 106.

¹⁴¹ 2016 Policy ¶ 106.

¹⁴² 2016 Policy ¶ 106.

¹⁴³ 2016 Policy ¶ 106.

¹⁴⁴ Compare *Prosecutor v. Ntaganda*, ICC-01/04-02/06, Trial Chamber vi, Reparations Order (8 March 2021), [hereinafter, “Ntaganda Reparations Order”] ¶ 218 (finding “Mr. Ntaganda liable to repair the full extent of the harm caused . . . regardless of whether others may have also contributed to the harm”) with *Prosecutor v. Katanga*, ICC-01/04-01/07, Trial Chamber ii, Order for Reparations pursuant to Article 75 of the Statute (24 March 2017) [hereinafter, “Katanga Reparations Order”] ¶ 264 (apportioning Mr. Katanga with USD\$1 million based on his participation and mode of responsibility); and *Prosecutor v. Al Mahdi*, ICC-01/12-01/15, Trial

particular, we recommend (i) broadening the personal characteristics of the child the OTP considers when framing submissions on reparations; (ii) adopting an expansive approach to harms suffered by children as a basis for reparations; and (iii) ensuring effective and meaningful participation of child survivors in reparations programs.

It is widely recognized that survivors¹⁴⁵ of gross violations of international human rights and humanitarian laws have a right to reparations under international law.¹⁴⁶ Reparations should be “adequate, effective and prompt.”¹⁴⁷ Such reparations may include restitution, compensation, rehabilitation, satisfaction, or guarantees of non-repetition.¹⁴⁸

As previously discussed, children are disproportionately affected by armed conflicts, meaning that not only are they injured by the generic harms that affect all civilians, but they also suffer from targeted harms due to their status as children.¹⁴⁹ The Convention on the Rights of the Child specifically calls attention to child survivors of armed conflicts, requiring States Parties to:

[T]ake all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.¹⁵⁰

Chamber viii, Reparations Order (17 August 2017) [hereinafter “*Al Mahdi Reparations Order*”] ¶ 111 (finding it was not “necessary to decide whether the figures [...] constitute[d] the sum-total of harm suffered.”)

¹⁴⁵ The CONVENTION ON RIGHTS OF THE CHILD, the ROME STATUTE, the RPE, the ICC case-law, and the *2016 Policy* use the term “victim.” However, more recent commentary has adopted the term “survivor” as a more empowering term. In this section, we use the term “survivor” whenever we are not quoting from the texts.

¹⁴⁶ United Nations General Assembly, BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW, A/RES/60/147 (21 March 2006) [hereinafter, “UN BASIC PRINCIPLES AND GUIDELINES”], Preamble (“a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 39 of the Convention on the Rights of the Child, and of international humanitarian law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and articles 68 and 75 of the Rome Statute of the International Criminal Court.”).

¹⁴⁷ UN BASIC PRINCIPLES AND GUIDELINES, Art. IX ¶ 15.

¹⁴⁸ See UN BASIC PRINCIPLES AND GUIDELINES, Art. IX ¶¶ 18-23.

¹⁴⁹ Dyan Mazurana & Christopher Carlson, “Children and Reparation: Past Lessons and New Directions,” Innocenti Working Paper 2010-2008, UNICEF Innocenti Research Centre (2010) [hereinafter “Mazurana & Carlson”], 7 (“Children are not only innocent bystanders and casualties of war; they are explicitly targeted and violated, sometimes by all parties to the conflict.”); see, e.g., ROME STATUTE, Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) (listing three crimes involving children: conscription, enlistment, and active participation in hostilities).

¹⁵⁰ CONVENTION ON RIGHTS OF THE CHILD, Art. 39.

In the same vein, in the *Lubanga* case, the ICC Appeals Chamber agreed with the Trial Chamber that reparations should “be directed at preventing future conflicts and raising awareness that the effective reintegration of these children requires eradicating the victimization, discrimination, and stigmatization of young people in these circumstances.”¹⁵¹ Accordingly when it comes to repairing the harms done to child survivors of violent conflicts, reparations should “acknowledge children as rights holders who suffered specific violations in light of their vulnerability, while also granting them special protections.”¹⁵²

The Rome Statute allows the ICC to “make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims.”¹⁵³ We recognize that the OTP’s role in the context of reparations is limited to providing observations where sought by the relevant Chamber. The recommendations below are therefore limited to high-level points of principle which the OTP may wish to reflect in its observations.

1. Broaden the Child’s Personal Characteristics Considered When Framing Reparations Submissions

We recommend that the personal characteristics which inform the examination of children’s experience of conflict, and reparations, be broadened beyond gender, to include age, culture, and other relevant personal characteristics. At the moment, the 2016 Policy only specifically acknowledges “the differentiated effects and the harms caused to boys and girls.”¹⁵⁴

Survivors of mass atrocities, including children, often suffer multifaceted harms such as sexual violence, ethnic cleansing, recruitment, and conscription into the armed forces. As commentators recognize, “[f]actors such as age, gender, and culture, play a critical role in determining the experiences and impact of war on all victims.”¹⁵⁵ For instance, in the *Al-Hassan* case, the Pre-Trial Chamber found that, although the harms were widespread, survivors had been particularly targeted because of their race (darker-skinned people had received harsher treatments), age (children and the elderly were treated particularly violently), and gender (pregnant women were treated particularly violently and women and girls from targeted groups were subject to stricter rules and harsher punishments).¹⁵⁶

¹⁵¹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-3129, Judgment on the Appeals Against the “Decision Establishing the Principles and Procedures to be Applied to Reparations” of 7 August 2012, 106-110 (3 March 2015) ¶ 202; see, also, ICC, Press Release, *Lubanga Case: ICC Appeals Chamber Amends the Trial Chamber’s Order for Reparations to Victims* (3 March 2015).

¹⁵² Cécile Aptel & Virginie Ladisch, *Through a New Lens: A Child-Sensitive Approach to Transitional Justice*, International Center for Transitional Justice (2011) [hereinafter, “Aptel & Ladisch”], 26.

¹⁵³ ROME STATUTE, Art. 75(2); see also RPE, Rules 94-95 allowing survivors to request reparations under Article 75 of the ROME STATUTE (“Reparations to victims”); and survivors to request reparations in cases where the Court intends to proceed with reparations on its own motion.

¹⁵⁴ *2016 Policy* ¶ 106.

¹⁵⁵ S. Marie Miano, *Toward a Child-Oriented Approach to Reparations: Reflecting on the Rights and Needs of Child Victims of Armed Conflict*, FLETCHER J. HUM SEC’Y, XXVIII (2013) [hereinafter, “Miano”], 34.

¹⁵⁶ *Prosecutor v. Al Hassan*, ICC-01/12-01/18, Pre-Trial Chamber i (30 September 2019) ¶¶ 702-707.

Consistent with Article 68(1) of the Rome Statute,¹⁵⁷ Rule 86 of the Rules of Procedure and Evidence,¹⁵⁸ and the Court’s approach in *Ntaganda*,¹⁵⁹ the survivor’s age should be a key consideration for reparations—both the age of the child when they suffered the harm and the age of the child (or former child) as a recipient of reparations. Specifically, reparations should reflect “the age of the victims who were children at the relevant time and their needs.”¹⁶⁰ This is because children experience armed conflicts differently depending on their age. Whereas children under the age of five are more susceptible to starvation, older children and teenagers are more likely to be forcibly recruited. Older children also have greater difficulty overcoming the long-term physical and mental health consequences of conflict.¹⁶¹ At the same time, survivors should not be disqualified from eligibility simply because they are no longer children. The reparations should “bear[] in mind the long-term effects [the conflict] may have had in their development as adults,”¹⁶² and be tailored in ways that are relevant to their current status as adults.¹⁶³

The revised Policy should also reflect a culturally sensitive approach to reparations.¹⁶⁴ Culture and local customs play an important role in how survivors experience violations as well as how reparations should be tailored. For instance, in certain societies, female survivors of rape may not be allowed to be married or join society due to “the loss of her virginity.”¹⁶⁵ Likewise, as the Court noted in *Ntaganda*: “[t]he concept of ‘family’ may have many cultural variations ... to the applicable social and familial structures.”¹⁶⁶ Examination of local cultural and customary practices can also help emphasize the priorities and values of the affected communities and ease the reintegration of child survivors into their communities.¹⁶⁷ Nevertheless, in some instances, the OTP should advise against adhering to certain cultural

¹⁵⁷ ROME STATUTE art. 68(1) stating in part, “The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children.”

¹⁵⁸ RPE, Rule 86 “A Chamber in making any direction or order, and other organs of the Court in performing their functions under the Statute or the Rules, shall take into account the needs of all victims and witnesses in accordance with article 68, in particular, children, elderly persons, persons with disabilities and victims of sexual or gender violence.”

¹⁵⁹ *Ntaganda Reparations Order* ¶ 43 “Practices and procedures for obtaining reparations must be inclusive and sensitive to gender, age, and cultural diversity.”

¹⁶⁰ *Ntaganda Reparations Order* ¶ 53.

¹⁶¹ *See Miano* at 34.

¹⁶² *Ntaganda Reparations Order* ¶ 59.

¹⁶³ *Miano* at 34 “For example, programs in Argentina and Chile offered technical training or tertiary education to beneficiaries, rather than ending provisions after secondary school.”

¹⁶⁴ *Ntaganda Reparations Order* ¶ 90 “Whenever possible, reparations should reflect local cultural and customary practices, unless these are discriminatory or exclusionary or deny victims’ equal access to their rights.”

¹⁶⁵ *Apfel & Ladisch* at 27.

¹⁶⁶ *Ntaganda Reparations Order* ¶ 37; *see also* ¶ 124 (“The Chamber stresses that due regard ought to be given to the applicable social and familial structures in the affected communities. For example, the Chamber notes that the Extraordinary African Chambers held that, ‘in Chad, and more broadly in the African continent, the family goes beyond the strict frame of a couple and their children, it includes their father and mother, brothers and sisters and other relatives.’”)

¹⁶⁷ *See Miano* at 36.

norms and practices, especially when they further stigmatize and discriminate against the survivors or when they serve to perpetuate existing inequalities.¹⁶⁸

Finally, we recommend that the revised policy acknowledge the fact that other personal characteristics (such as religion, skin color, and sexual orientation) may play a defining role in an individual's experience of conflict,¹⁶⁹ by using wording that is not exhaustive (for instance, using language such as "taking into account the differentiated effects and the harms caused depending on the victim's gender, age, culture, and other personal characteristics").

2. Adopt an Expansive Approach to Harms Suffered by Children as a Basis for Awarding Reparations

We recommend that the revised policy adopt an expansive approach when examining the harms suffered by children as a basis for awarding reparations. The effects of atrocities on survivors and the survivors' resulting needs for reparation vary significantly based on the types of harm they have suffered. The Court acknowledged as much in its survivor-centered approach in *Ntaganda*.¹⁷⁰

First, the Court in *Ntaganda* called attention to the significance of the type of harm suffered by stressing the prioritization of survivors who were made "particularly vulnerable" by certain harms. These include "individuals who require immediate physical and/or psychological medical care, victims with disabilities and the elderly, victims of sexual or gender-based violence, victims who are homeless or experiencing financial hardship, as well as children born out of rape and sexual slavery and former child soldiers."¹⁷¹

Second, the Court dedicated 35 paragraphs to describing the different harms suffered by survivors, as well as the consequences of each type of harm, and included a detailed list of these multidimensional harms.¹⁷² Significantly, in *Ntaganda*, the Court also recognized two exceptional harms which are specifically relevant to children. The first is transgenerational harm, which it described as "a phenomenon, whereby social violence is passed on from ascendants to descendants with traumatic consequences for the latter."¹⁷³ The second is the Court's recognition of children born out of rape and sexual slavery as "direct victims" because they suffered harm as "a direct result of the commission of the crimes of rape and sexual

¹⁶⁸ See *Prosecutor v. Lubanga*, ICC-01/04-01/06, Trial Chamber i, Decision establishing the principles and procedures to be applied to reparations (7 August 2012) ¶ 192; *Al Mahdi Reparations Order* ¶ 148.

¹⁶⁹ Mazurana & Carlson at 7-9 ("In nearly all armed conflicts, those who are most targeted and bear the brunt of the violence are the ethnic or political minorities and the poor, particularly those living in rural locations and, in Latin America, indigenous populations.")

¹⁷⁰ See generally, *Ntaganda Reparations Order*, ¶¶ 28-103 discussing various aspects of victim-specific reparations practice, including taking into account the needs of the victims, and engaging in inclusive and sensitive reparations practices.

¹⁷¹ *Ntaganda Reparations Order*, ¶ 214.

¹⁷² *Ntaganda Reparations Order*, ¶¶ 149-183.

¹⁷³ *Ntaganda Reparations Order*, ¶ 73.

slavery” against their mothers.¹⁷⁴ In so doing, the Court acknowledged the complex nature of sexual and gender-based violence crimes and their effects on children.

Finally, the Court also linked the harms suffered to reparations, stating: “In determining the amount of the convicted person’s liability, the primary consideration should be the extent of the harm and the costs to repair it. Other criteria, such as modes of liability, gravity of the crimes, or mitigating factors are not relevant to this determination.”¹⁷⁵

In line with the Court’s approach to reparations in *Ntaganda*, we recommend that the OTP take an expansive survivor-centered approach to its submissions on reparations, and the revised policy expressly acknowledge children-specific harms such as transgenerational trauma and the status of children born out of sexual violence. Another form of harm that may specifically affect children is statelessness, which significantly deepens the vulnerability of children by depriving them of the protection of state institutions.

3. Ensure Effective and Meaningful Participation of Children in Reparations Programs

We recommend that the revised policy encourage the Court to ensure the effective and meaningful participation of children in reparations programs, both in terms of access and design. This is because survivors are best placed to know their needs for repair. As stated in the *Ntaganda* Reparations Order: “A ‘victim-centered’ approach [...] requires full and meaningful consultation and engagement with victims, giving them a voice in the design and implementation of reparations programmes and allowing them to shape the reparation measures according to their needs.”¹⁷⁶

The process through which reparations are awarded by the Court is complex, and many children will lack the capacity to meaningfully engage with it unless the Court and its partner institutions take proactive measures to identify and reach potential child survivors. For instance, in some cases, the Court awarded reparations only to a limited number of survivors who submitted an application to the Court.¹⁷⁷ We recommend that when submitting observations in individual cases, the OTP advocates for a child-inclusive approach to reparation programs, which allows child survivors to effectively access reparations. This may include the

¹⁷⁴ *Ntaganda Reparations Order*, ¶¶ 122-123. This is in contrast to children who were not the product of rape and sexual slavery, but whose mothers were the “victims” of such acts, and thus were harmed as a consequence of the harms suffered by the direct survivors.

¹⁷⁵ *Ntaganda Reparations Order*, ¶ 98.

¹⁷⁶ *Ntaganda Reparations Order*, ¶ 45.

¹⁷⁷ *See, e.g., Katanga Reparations Order* ¶¶ 55 and 168 awarding reparations only to those who had submitted applications for reparations by a certain date pre-dating the order; see also *Prosecutor v. Bemba*, ICC-01/05-01/08, Trial Chamber iii, Order Requesting Submissions Relevant to Reparations (22 July 2016) ¶ 6 adopting an application-based process – note that Bemba was later acquitted and this order was never carried out; *Prosecutor v. Bemba*, ICC-01/05-01/08, Public Redacted Version of “Annex, 28 November 2017 – Expert Report on Reparation” (30 November 2017) ¶ 47 recommending against identifying additional survivors beyond the ones who submitted applications; *see generally*, Redress, *Making Sense of Reparations at the International Criminal Court* (20 June 2018), available at <https://redress.org/publication/making-sense-of-reparations-at-the-international-criminal-court/>.

direct participation of children and their representatives in designing reparations programs, or the participation of organizations dedicated to working with child survivors of conflict.

IV. Conclusion

The OTP has the opportunity to develop a Policy on Children that will further enhance the involvement and protection of children during ICC proceedings, whilst recognizing the unique and diverse experiences children have during armed conflict. Building on its 2016 Policy and its subsequent efforts, the OTP is not only able to empower child victims and witnesses to be active participants during the development of a more inclusive and just accountability process after the armed conflict but also best reflect their unique lived experiences. By broadening the understanding of how children can be affected by armed conflict and their needs during the accountability process, the OTP will be able to make children more visible in all of its work, and further improve effectiveness in the investigation and prosecution of crimes against or affecting children.

We commend the OTP for taking on the task of revising the 2016 Policy, which already reflects the evolving nature of this area. Research on child victims and witnesses has expanded since 2016 when the original ICC Policy was published, allowing the OTP as well as external experts to look into the broader effects on children and the best practices of their integration into legal proceedings.¹⁷⁸ It was not so long ago that children were often thought too vulnerable to participate in proceedings, relegated to unheard witnesses or giving their testimony prior to proceedings, never to be heard in court.¹⁷⁹ To maintain the usability and relevance of the Policy, we recommend its periodic review. Through an evolving and contemporary policy, the OTP can better integrate children into the legal system, using the platforms of justice so they may be heard and may heal from the crimes committed against them.

¹⁷⁸ See Peterson, *Kids*. See also Randell, *Experiences* at 134-153.

¹⁷⁹ See generally Cooper, *supra* note 115, at 275-76.