



STAHILI FOUNDATION

SUBMISSIONS TO THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT: DRAFT POLICY ON CHILDREN

5 August 2016
The Hague

I. INTRODUCTION

1. Stahili Foundation applauds the commitment of the Office of the Prosecutor (the “Office”) to develop a policy on children in order to foster a culture of good practice in relation to the protection of the rights of children in all aspects of the work of the Office, and in particular in its interaction with children and the decisions it makes which impact children.¹

2. Stahili is a child rights non-governmental organization headquartered in The Hague and Kenya. We work directly with vulnerable children and advocate for the universal protection of the rights of all children. The word ‘Stahili’ means “to deserve” in Swahili, and at the core of Stahili’s vision is the strong belief that every child deserves protection, access to education and the opportunity to grow up in a safe and supportive family unit and community.

3. We are grateful for the opportunity to provide the following observations on the draft policy dated June 2016 (“Draft Policy”) with the view to assisting the Office in its interaction with children. It is, however, important to emphasize that Stahili has not had the opportunity to consult with children and youth in order to hear their views on the Draft Policy. Our submissions are therefore in no way meant to be exhaustive.

II. SUBMISSIONS

1. The Best Interest of the Child

4. The Office has adopted a standard whereby the best interest of the child is *a* primary factor, among others. It is important to acknowledge at the outset there will be few

¹ See Draft Policy, para. 8.

circumstances which render a child's involvement in criminal justice systems, or the Office's engagement with a child, to be in his or her best interest.

5. Stahili acknowledges that the approach adopted by the Office is consistent with the UN Convention on the Rights of the Child ("CRC") and the standard endorsed in the UN Office of the High Commissioner for Human Rights General Comment No. 14.² It is important to emphasize, however, that a higher protection is afforded to the best interest of the child under Article 4 of the African Charter on Rights and Welfare of the Child ("ACRWC"). That article provides that the best interests of the child shall be *the* primary consideration in all actions. Stahili agrees that this latter standard should be adopted. If the Office is to promote meaningful engagement with children, it should have regard to a child's best interests above all.

6. The Office should clearly express in any future policies its reasons to derogate from rights which have, in the very least, been afforded to children in one continent.

2. Existing and Emerging Standards and Principles

7. The Office provides that "[w]here appropriate, [the Draft Policy] is further based upon applicable treaties and the principles and rules of international law", including the CRC, as well as relevant jurisprudence of international criminal tribunals, *inter alia*.³ The Office further provides that it will draw upon its own experience, including "its *good* practices and lessons learned".⁴

8. Stahili notes the importance of both developed and emerging standards and *best* practices in relation to children's rights and the absence of references to such practices in the Draft Policy. Stahili notes, for instance, the absence of references to specific principles such as the "Do No Harm" principle in the Draft Policy, which we consider should be at the heart of any policy directed at the engagement of children. We therefore recommend explicit reference in the body text of the Draft Policy that the Office has regard to "existing and emerging standards", "*best* practices", and principles developed by international and non-governmental organizations on the basis of lessons drawn from global experience in implementing the rights of the child in the field.⁵

3. All crimes impact children and differently

9. We strongly support the Office's commitment to investigate crimes under the Rome Statute that affect children, including attacks on buildings dedicated to education and other

² OHCHR, CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4), para. 24.

³ Draft Policy, paras. 10, 32. Stahili notes the omission of the reference to the jurisprudence of the UN Mechanism for International Criminal Tribunals which is equally as relevant in addition to the tribunals already enumerated (see Draft Policy, fn. 42).

⁴ Draft Policy, para. 10 (with emphasis).

⁵ See for *e.g.* Paris Principles: Principles and Guidelines on Children Associated with Armed Groups and Armed Forces, February 2007, available www.unicef.org/emerg/files/ParisPrinciples310107English.pdf accessed 2 August 2016.

spaces which may have specific protective value for children, such as hospitals.⁶ Recognition, however, should be made in the Draft Policy to the fact that *all* crimes under the Statute impact children. In this regard, Stahili concurs that “children are not a homogenous group”.⁷ As such, the Draft Policy would benefit from the recognition of the different ways in which boys and girls, children with disabilities, or other vulnerable children or those belonging to minority groups may experience, or be affected by, crimes.

10. Stahili notes that the Draft Policy singles out attacks on schools “[a]s among the war crimes that may have a disproportionate effect on children”.⁸ We draw the Office’s attention to the fact that attacks on hospitals also form part of the “Six Grave Violations Against Children During Armed Conflict” as identified by the UN Security Council,⁹ and have also been recognized as having detrimental effects on children.¹⁰ Stahili recommends an amendment to the Draft Policy to include reference to attacks on hospitals and their detrimental effects on children.¹¹

4. Child Soldiers

11. Stahili respectfully highlights four points in addition to the lessons learned drawn upon by the Office.

12. First, Stahili notes that children become associated with armed forces or groups in many capacities: direct and auxiliary, hostile and non-hostile. The portrayal of child soldiers in legal proceedings as faultless, passive victims (psychologically devastated and irreparably damaged) is of concern, as it does not reflect reality for all child soldiers. We believe that such depictions of child soldiers risk creating stereotypes that lead to less effective policy outcomes and factual exaggerations which are not representative of many, if not most, child soldiers. Not all child soldiers are forcibly conscripted; they are not always very young, nor always demobilized by international humanitarians. Stahili notes in this regard that whether recruitment is voluntary or forced is legally irrelevant. The Office should bear this factor in mind in its portrayal of child soldiers in its work.

13. Second, the *Lubanga* prosecution focused on the recruitment of children under the age of 15 thereby failing to recognize the full array of indignities that children over 15 had endured. While it is true that the term child soldiers includes, according to the Rome Statute, children under the age of 18, attention should be awarded and particular care should be

⁶ See Draft Policy, paras 2, 43, 77 (note that attacks on hospitals are only found in footnotes).

⁷ Draft Policy, para. 8.

⁸ See Draft Policy, paras 2, 43, 77. See also Draft Policy, Executive Summary, para. 1, where the Office singled out attacks on building dedicated to education.

⁹ See *e.g.* Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *The Six Grave Violations*, available <https://childrenandarmedconflict.un.org/effects-of-conflict/six-grave-violations/> accessed 2 August 2016.

¹⁰ Stahili notes that the Security Council gave the United Nations a mandate to identify and list, in the annexes of the Secretary-General’s annual report on Children and Armed Conflict, the armed forces and groups who attack schools or hospitals, or protected persons in relation to schools and hospitals (UN Security Council Resolution 1998 (2011), UN Doc. S/RES/1998 12 July 2011). See generally United Nations General Assembly and Security Council, *Children and Armed Conflict: report of the Secretary-General* (20 April 2016) UN Doc A/70/836-S/2016/360. See also UN Security Council Resolution 2286 (2016), UN Doc. S/RES/2286 3 May 2016.

¹¹ Draft Policy, paras 2, 43, 77.

provided to young adults conscripted into armed forces or groups. It is recommended that the Office reflects on this concern in the Draft policy.

14. Third, the credibility of child soldiers as witnesses may be diminished by portraying a child soldier as a faultless, passive victim, lacking in capacity. This can have a negative impact on the veracity of child soldiers' recollections when they testify or claim reparations.

15. Fourth, and as the Office is aware, child soldiers' testimony in the *Lubanga* case was found to be unreliable as a result of influence of the Office's intermediaries. Stahili recommends that the Office clarifies how it seeks to address this issue in the future so not to unnecessarily render former child soldiers incredible. Furthermore, the Office should make available accessible materials and training for their intermediaries dealing with children in conflict.

5. Age Assessments

16. Stahili acknowledges that that it is not always possible to obtain an accurate or authentic record of a child's age. Age assessments, however, must be a measure of last resort, and children ought to be given the benefit of the doubt as to their own age.¹² It is important to ensure that children are given relevant information regarding any age assessment procedures and that affected children have the right to appeal such assessment, should they wish to contest the outcome in light of the potentially serious consequences for a child whose age is wrongly assessed.¹³

17. We also note with concern the reference to the use of physical examinations when determining the age of a child. In this regard, we emphasize that assessments must follow the least intrusive method which upholds the dignity and physical integrity of the child.¹⁴ The use of physical examinations to conduct age assessments has indeed been highly criticized as failing to take into account variations between ethnicity, race, nutritional intake, and socio-economic background.¹⁵ As noted by the Royal College of Pediatrics and Child Health, "it is not possible to actually predict the age of an individual from any anthropometric measure, and this should not be attempted".¹⁶ We would also therefore welcome the removal of the reference to use of physical examinations to determine a child's age and suggest that the Office adopts a more holistic approach.

18. We further note with concern the use of the undefined phrase "very young" in order to ascertain whether the Office will engage a child.¹⁷ While acknowledging that the Office's engagement may not always be in the best interest of the child, a child, irrespective of age, should be considered as capable as fulfilling the role of a witness before the Court as an adult

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ UNICEF (T. Smith and L. Brownlees), "Discussion Paper: Age Assessment practices a literature review & annotated bibliography", April 2011.

¹⁶ The King's Fund and the Royal College of Paediatrics and Child Health, 1999:13

¹⁷ See Draft Policy, para. 57.

if the individual circumstances of the child deem fit.¹⁸ This is congruent with the CRC, which provides that a child who is capable of forming his or her own views has the right to freely express those views and that due weight is to be given in accordance with the age and *maturity* of a child.¹⁹ It is important that the Office clarifies the use of the phrase “very young” so to ensure that the Office is not arbitrarily denying a child his or her right to be heard.

6. Children without guardians

19. The Office should liaise with the Registry to ensure independent *ad litem* counsel assistance for children whom, for any number of reasons, find themselves without caregivers or guardians, and explain how it intends to engage with such children.

7. Children of Adult Witnesses

20. We recommend a more inclusive focus in the Draft Policy to specifically address children who are not witnesses themselves, but children of adult witnesses. This group comprises the majority of the children impacted by the work of the Office.

21. In this context, we draw the Office’s attention to the fact that the concept of “family” may vary depending on social context. As such, it is imperative to recognize informal care structures where children are placed under kinship care or the care of family friends. It is also important for the Office to adopt a flexible approach in relation thereto as informal care arrangements are more often than not made in the absence of any proper registration.

8. Meaningful Consultation Process

22. The Office has correctly identified the right of the child to have his or views heard. It is also, however, important to acknowledge that children also have the right to *participate* in decisions affecting them. Stahili has not had the opportunity to consult with children and youth. Notwithstanding, it is imperative that any adopted policy must be based on meaningful consultations with children from all regions and backgrounds, as children are not a homogeneous group. We are of the view that a policy should only be adopted once such a process has been conducted. Stahili would welcome details as to the consultation process which has been undertaken so far and its scope. We also remain at the disposal of the Office should any assistance be required.

23. Stahili further commends the Office for seeking out and considering the input of organizations like Stahili who work directly with children.²⁰ It is, however, unclear from the

¹⁸ UN Office on Drugs and Crime, “Handbook for Professionals and Policymakers on Justice in matters involving child victims and witnesses” in *Criminal Justice Handbook Series* (United Nations: New York, 2009), p. 25.

¹⁹ CRC, Article 12(1).

²⁰ See Draft Policy, para. 13.

Draft Policy whether such consultations have been conducted in a manner which ensures that regional perspectives are meaningfully heard and considered.²¹

9. Child-friendly material

24. Children have the right to receive information that is important to their well-being.²² We encourage the production of a child-friendly version of the policy and all other information pertaining to the Office's engagement with children. Stahili would be pleased to assist the Office in the preparation of any such materials. In this regard, we also recommend that the Draft Policy be produced in a child-friendly manner so to enable meaningful consultations leading to the adoption of this policy.

10. Evaluation and Reporting

25. Stahili is firmly of the view that any evaluation of a children's policy ought to involve children. We therefore strongly encourage the establishment of a meaningful process by which children and youth impacted by the Office's work can provide feedback on a yearly basis. Similarly, we would welcome a similar approach involving psychologists and other relevant experts in the field, in addition to legal experts.

26. Stahili would also welcome the development of a timely, inclusive, and transparent reporting mechanism to civil society. To that end, we recommend that the Office include civil society organizations in its evaluation of the implementation of any future policy.

III. CONCLUSION

27. Stahili welcomes the Draft Policy and commends the Prosecutor for the efforts she undertook. We strongly encourage the Prosecutor to adopt the above amendments and remain at the disposal of the Office for any further assistance.

²¹ See Draft Policy, para. 13, referring to consultations in the United States and the Netherlands.

²² CRC, Article 17.