**Public Comment on the Draft Policy on Children of the Office of the Prosecutor at the International Criminal Court**

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**Executive Summary**

* Respect for the rule of law and all relevant areas of international law is of crucial importance when examining issues concerning the participation of children in investigations and legal proceedings at the International Criminal Court.
* The child should have access to an independent and effective complaints mechanism if their rights have been violated during investigations conducted by the Office of the Prosecutor and any subsequent judicial proceedings.
* Due process norms such as the right to access a lawyer and the right of access to the Court should be guaranteed for all children in both legal and non-legal proceedings and not side-stepped under the guise of the best interests of the child.

**Introduction**

The Office of the Prosecutor’s Draft Policy on Children is timely and important. This written submission is disclosed to the Office by Dr Anna Marie Brennan (‘the author’) in her personal capacity. She is a lecturer in law in the School of Law and Social Justice at the University of Liverpool in the United Kingdom where she teaches and researches in the areas of the Law of Armed Conflict (LOAC) and International Criminal Law (ICL).

Before joining the law school she held an Irish Research Council Fellowship and was based at University College Cork in Ireland where she completed her PhD and lectured Public International Law. In 2014, the author was a visiting professional at the International Criminal Court providing assistance to Judge Sylvia Steiner with the draft of the final judgement in the Jean-Pierre Bemba Gombo trial. She is also a former member of the defence team of Radovan Karadzić, who was recently convicted on genocide, crimes against humanity and war crimes charges at the International Criminal Tribunal for the Former Yugoslavia.

In her research, the author is particularly interested in the limits of ICL in bringing members of network-based transnational terrorist groups such as ISIS to justice under ICL. She has undertaken research on the military capabilities of transnational terrorist groups including how they are regulated under the LOAC and how they can be prosecuted under ICL. Publications resulting from this research include:

1. Anna Marie Brennan, *Transnational Terrorist Groups and International Criminal Law* (Oxford: Routledge, book forthcoming in early 2018).
2. Anna Marie Brennan, “Critical Perspectives on Classifying Hostilities involving ISIS as a Transnational Armed Conflict under International Humanitarian Law” (2017) Asian Yearbook of Humanitarian Law and Human Rights (forthcoming).
3. Anna Marie Brennan, “Exploring the Accountability of Leaders of Armed Opposition Groups under International Law” (2010) 23 The Hague Yearbook of International Law 221.
4. Anna Marie Brennan, “Holding Members of Transnational Terrorist Groups Accountable under Article 25 of the Rome Statute: Effectiveness, Legitimacy and Impact” (2013-2014) 18 Spanish Yearbook of International Law 115.
5. Anna Marie Brennan, “Historical Reflection on the Criminalisation of Terrorism under International Law from the League of Nations to *R.* v. *Mohammed Gul*: How Britain has Swollen the Tide Obscurity” in J. Gauci and R. McCorquodale, *British Influence on International Law* (Leiden: Brill/Martinus Nijhoff, 2016) 417.
6. Anna Brennan, Written Submission to the UK House of Commons Defence Select Committee Inquiry into UK Military Operations in Syria and Iraq (11 January 2016).

The author has also published in the area of children’s rights:

1. Anna Marie Brennan, “The Garda Diversion Programme and the Juvenile Offender: The Dilemma of Due Process Rights” (2012) 22(2) Irish Criminal Law Journal 14.
2. Anna Brennan, Amy Coleman and Emily Bartholomew, “Amicus Curiae Brief – Request for Advisory Opinion on Migrant Children before the Inter-American Court of Human Rights” (Co-authored on behalf of the UCC Child Law Clinic and submitted to the Inter-American Court of Human Rights in February 2012).

**The Scope and Purpose of this Response**

The reason for this submission is to provide some thoughts on the draft policy on children and how it approaches the matter of views, rights and the needs of the child during the investigation and prosecution of international crimes. The policy should be applied in all ways in which a child could be potentially brought into contact with the various different sections of the Office of the Prosecutor. Moreover, the policy should aim to ensure that in any such investigations or prosecutions all rights of the child, including the right to legal representation, the right to protection and the right to participation are fully respected in line with the child’s level of emotional maturity and comprehension of the investigation and proceedings. This submission will consist of an overview of child-friendly justice and how respect for children’s rights can be enhanced by the Office of the Prosecutor. Particular focus will be placed on the provision of information and advice for the child from their first involvement with the Office and the conduct of interviews with the child in a child-friendly environment using child friendly language.

**The Provision of Information and Advice to the Child**

Greater emphasis needs to be placed in the policy on the provision of information and advice to the child and his or her parents/guardians. In particular, there seems to be little emphasis in the draft policy on the provision of information and advice on the system and procedures involved in the investigation and prosecution of international crimes and what remedies are available if the child’s rights are violated including the possibility of recourse either to a judicial/non-judicial mechanism.[[1]](#footnote-1) In particular, the child should be provided with information on the duration of the investigation and any potential prosecution and how they can access an independent complaints procedure if the child or his or her parent/guardian is of the view that the child’s rights have been violated.

It would be very welcome if the Office of the Prosecutor also considered including in the Draft Policy that information concerning the systems and procedures for investigating international crimes should be communicated to the child in a child-friendly environment using child-friendly language. In line with international best practice this should also include information on the:

* general progress and outcome of the investigation and proceedings;
* availability of protective measures if there is a risk that the child could be subjected to intimidation or harm;
* existing procedures to review decisions affecting the best interests of the child;
* availability of health, psychological, cultural interpretation and language professionals available to provide support to the child and his or her parent/guardian including information about organisations in the place of the child’s residence which can provide support to the child and his or her family;
* special procedures designed to protect the best interests of the child if he or she is not resident in the state where the crimes allegedly occurred.[[2]](#footnote-2)

The author welcomes the Office of the Prosecutor’s stance that all information will be communicated to the child in a way that is appropriate to their age and emotional maturity and in a language that the child and his or her parent/guardian can understand. However, information should be communicated to both the child and his or her parent/guardian. Indeed, in keeping with Council of Europe Guidelines the communication of information to the parent/guardian should not be regarded as an alternative means of communicating to the child.[[3]](#footnote-3)

The Office should consider providing child friendly materials on the workings of the International Criminal Court and how it investigates and prosecutes allegations of international crime. In particular, the Office should consider establishing a specialised website on the International Criminal Court which utilises child-friendly language to distribute information about the operation and goals of the Court.

**Interviews in a Child-Friendly Environment and Child Friendly Language**

It would be most welcome if the Office of the Prosecutor included in the draft policy further guidance on the child’s right to access their lawyer or guardian ad litem during the interview process and any subsequent trial proceedings where the child must provide witness testimony. In particular, the child’s lawyer or guardian ad litem should explain the outcome of the investigation or judicial proceedings to the child using language that is appropriate to their age and level of emotional maturity. This should also include information about possible future proceedings such as appeals and reparations.

During investigations and subsequent judicial proceedings, the Office should avoid all unnecessary delays which could adversely impact the child. When a decision has been taken not to pursue an individual suspected of perpetrating an international crime it would be most welcome if the Draft Policy could specify that children would be informed of this decision through their lawyer or guardian ad litem. Moreover, following the conclusion of an investigation and any subsequent judicial proceedings guidance and support should be offered to the child and his or her family free of charge by specialised psychological services.

**Conclusions**

The centrality of the best interests of the child in the Office of the Prosecutor’s draft policy is to be most welcomed and highly commended. The author’s recommendations for the Office of the Prosecutor are as follows:

* A more detailed step-by-step overview of the procedures which will be invoked to protect the best interests of the child during the investigation and trial process would be welcomed;
* In depth information about how and when a child can access his or her lawyer or guardian ad litem is needed;
* The Office of the Prosecutor is also encouraged to promote research and disseminate best practice in the field of child-friendly justice;
* The Office should publish child-friendly versions of all relevant legal instruments including the Rome Statute;
* The Office is encouraged to establish and maintain information on the Court and children’s rights which is easily accessible to children and their parent/guardian;
* Facilitate the child’s access to an independent complaints mechanism if the child or his or her parent/guardian is of the view that the child’s rights have been violated during legal and non-legal proceedings;
* Consider establishing a database of lawyers with expertise in child-friendly justice;
* Raise awareness of the particular vulnerability of children in armed conflict situations;
* Review all policies and practices within the child-friendly justice environment on a regular basis;
* Enable international organisations and bodies which promote the rights of the child to participate in this review process;

**References**

Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice (adopted on 17 November 2010) available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804b2cf3>

A. Brennan, “The Garda Diversion Programme and the Juvenile Offender: The Dilemma of Due Process Rights” (2012) 22(2) Irish Criminal Law Journal 14.

1. Council of Europe, page 21. [↑](#footnote-ref-1)
2. Ibid. [↑](#footnote-ref-2)
3. Ibid. [↑](#footnote-ref-3)