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A photograph of a man with dark hair and a beard, wearing a blue t-shirt, looking intently at a framed portrait of a historical figure. The portrait depicts a man with a mustache and a large white ruff collar. The man's hand is visible, resting on the portrait. The background is a plain wall.

Quality Control in Preliminary Examination: Volume 2

Morten Bergsmo and Carsten Stahn (editors)

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Front cover: *Alberto Gandolfi inspects his fresco of Hugo Grotius in Florence. Trained for years in fresco painting and restoration, including at the Accademia di Belle Arti di Firenze, he employs the fresco techniques used since the 1400s in Florence, including preparing ingredients such as the lime plaster himself. An exceptional level of quality control of the preliminary stages is required for the paintings to stand the test of time. Photograph: © CILRAP 2017.*

Back cover: *Section of a Roman street close to where the Statute of the International Criminal Court was negotiated, paved with ‘sampietrini’ cobblestones of trimmed, black basalt-cubes. When each stone is precisely cut and placed, they make up a robust and attractive whole, with the ability to withstand pressure and inundation. Preliminary examination is similarly made up of numerous small steps, each of which should be undertaken with proper quality control. Photograph: © CILRAP 2018.*

Preliminary Examinations and Children: Beyond Child Recruitment Cases and Towards a Children's Rights Approach

Cynthia Chamberlain*

32.1. Introduction

On November 2016, as the International Criminal Court ('ICC') advanced into adolescence, the OTP ('OTP') adopted its Policy on Children.¹ After a difficult childhood (during its first cases), the OTP recognised that it could reclaim the ICC's objective to work "for the sake of present and future generations".² With the adoption of the Policy on Children, the OTP showed a strong commitment to go beyond child recruitment cases, in order to include a child-sensitive approach in all its current and future work.

However, a policy is just that: a set of ideas or a plan of what to do in particular situations that has been agreed to officially.³ It is therefore crucial to determine how the OTP will use and employ the ideas and plans adopted in its Policy on Children.

This chapter will focus on how the Policy on Children can be interpreted and applied as regards preliminary examinations. Preliminary ex-

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¹ OTP ('OTP'), *Policy on Children*, November 2016 (<http://www.legal-tools.org/doc/c2652b/>).

² Rome Statute of the International Criminal Court, 17 July 1998, preamble (<http://www.legal-tools.org/doc/7b9af9/>) ('Rome Statute'). Quoted in paragraph 1 of the *Policy on Children*.

³ "Policy", in *Cambridge Dictionary* (available on its web site).

aminations are the gateway to trials at the ICC, as they trigger investigations and lead to selection of cases against individuals for specific crimes. Ultimately, they may result in convictions, sentences and reparations. If the initial steps exclude children from the equation, they will most likely not benefit from judicial redress.

32.2. The Prosecutor's Policy on Children

The Policy on Children follows the OTP's previous thematic policies on Interests of Justice, Victims' Participation, Preliminary Examinations, Case Selection and Prioritisation and Sexual and Gender Based-Crimes.⁴ During the first years of its work, the OTP focused mainly on the crime of enlistment, conscription and use of children to actively participate in armed forces or groups. Thus, early policies referred to children mainly as victims and witnesses of crimes.⁵ Hence, albeit having focused on child-specific crimes at the outset,⁶ and referring to the protection of child victims and witnesses in these cases,⁷ the OTP still lacked a general approach to mainstream children's rights in its mandate. The Policy on Children is both a remedial strategy given the lessons learnt from these first trials, but also an undertaking to comprehensively integrate children's rights perspective in the OTP's work.

⁴ OTP, *Policy Paper on the Interests of Justice* (<http://www.legal-tools.org/doc/bb02e5/>); *idem*, *Policy Paper on Victim's Participation* (<http://www.legal-tools.org/doc/3c204f/>); *idem*, *Policy Paper on Preliminary Examinations* (<http://www.legal-tools.org/doc/acb906/>); *idem*, *Policy Paper on Case Selection and Prioritisation* (<http://www.legal-tools.org/doc/182205/>); and *idem*, *Policy Paper on Sexual and Gender-Based Crimes* (<http://www.legal-tools.org/doc/7ede6c/>).

⁵ OTP, "Report on the activities performed during the first three years (June 2003-June 2006)" (<http://www.legal-tools.org/doc/c7a850/>); OTP, "Prosecutorial Strategy 2009-2012" (<http://www.legal-tools.org/doc/6ed914/>).

⁶ The first three cases included charges of child recruitment. See ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Warrant of Arrest, 10 February 2006 (<http://www.legal-tools.org/doc/59846f/>); ICC, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Warrant of Arrest, 2 July 2007 (<http://www.legal-tools.org/doc/53f65c/>); ICC, Situation in Uganda, ICC-02/04-01/05, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, 27 September 2005 (<http://www.legal-tools.org/doc/b1010a/>).

⁷ OTP, "Report on the activities performed during the first three years (June 2003-June 2006)", pp. 12, 24, see *supra* note 5. See *idem*, "Strategic Plan June 2012-2015", para. 60 (<http://www.legal-tools.org/doc/954beb/>).

The adoption of the Policy on Children is the first palpable step of a plan that started in 2013, when the OTP turned its attention to child victims and witnesses beyond child recruitment cases.⁸ The adoption of a Policy on Children was hence long overdue and its absence became more evident with the *Lubanga* judgment, where the Trial Chamber reproached the Prosecution's approach towards child witnesses and its use of intermediaries.⁹

Already in its Prosecutorial Strategy 2009-2012, the OTP identified crimes against children as one of the main issues to be addressed,¹⁰ in respect of its own investigations, but also with reference to the positive complementarity principle and the duty for States Parties to investigate and prosecute crimes of genocide, crimes against humanity and war crimes committed against children.¹¹

As with all other previous policies, the Policy on Children is aimed at providing greater clarity and transparency to the work of the OTP. In the case of preliminary examinations, the Rome Statute has left considerable room for prosecutorial discretion. Therefore, the OTP adopted a Policy Paper on Preliminary Examinations,¹² to promote clarity and predictability in the manner in which it applies the Rome Statute's sometimes-nebulous legal criteria. As regards children, the Rome Statute's provisions are also quite general,¹³ hence the pressing need to adopt a more specific work plan. In light of this, the Policy on Children should be read together with the OTP's other previously adopted policies. For the purpose of this chapter, and in relation to preliminary examinations, it is evident that the Policy on Children must be interpreted and applied consistently with the policy on preliminary examinations.

⁸ OTP, "Strategic Plan June 2012-2015", para. 63, see *supra* note 7. See OTP, *Policy Paper on Sexual and Gender-Based Crimes*, para. 8, see *supra* note 4.

⁹ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, paras. 479–484 (<http://www.legal-tools.org/doc/677866/>).

¹⁰ OTP, "Prosecutorial Strategy 2009-2012", p. 8, see *supra* note 5.

¹¹ *Ibid.*, p. 14.

¹² OTP, *Policy Paper on Preliminary Examinations*, see *supra* note 4.

¹³ See, for example, Rome Statute, Article 68, see *supra* note 2; Rules of Procedure and Evidence of the International Criminal Court, 9 September 2002, rule 86 (<http://www.legal-tools.org/doc/8b9cf6/>) ('Rules of Procedure and Evidence').

32.3. The Relevant Legal Framework

At the outset, it is significant to note that the Policy on Children adopts a child-sensitive approach, which should be distinguished from a children's rights or child-centred approach.¹⁴ In fact, the Convention on the Rights of the Child is referred to as one of the “applicable treaties”,¹⁵ in apparent reference to Article 21(1)(b) of the Statute. Accordingly, the OTP interprets the Convention, including its core principles, as subsidiary and optional sources of law, instead of “international recognised human rights” of compulsory application pursuant to Article 21(3) of the Statute.

Nonetheless, as will be explained below, the present chapter is based on the relevant provisions of the Rome Statute and the Rules of Procedure and Evidence, interpreted and applied pursuant to internationally recognised children's rights.¹⁶

Regardless of whether the applicable law is internal (Article 21(1)(a) and 21(2)) or external and subsidiary (Article 21(1)(b) and (c)), Article 21(3) of the Rome Statute establishes two interpretative principles that must be involved throughout all proceedings before the ICC. That is, interpretation and application of the law must be (a) non-discriminatory and (b) in accordance with internationally recognised human rights:¹⁷

¹⁴ Cynthia Chamberlain, *Children and the International Criminal Court: Analysis of the Rome Statute Through a Children's Rights Perspective*, Intersentia, Antwerp, 2015, pp. 39–40.

¹⁵ OTP, *Policy on Children*, para. 11, see *supra* note 1. In fact, the Policy includes other international human rights instruments of quasi-universal application within this same narrow definition of ‘applicable treaties’. See, for example, Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 17 June 1999 (<http://www.legal-tools.org/doc/4a7509/>) (‘Convention No. 182’); and the Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979 (<http://www.legal-tools.org/doc/6dc4e4/>) (‘Convention on the Elimination of All Forms of Discrimination against Women’).

¹⁶ Gerhard Werle, *Tratado de Derecho Penal Internacional*, Tirant lo blanch, Valencia, 2005, pp. 98–100.

¹⁷ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the ICC pursuant to Article 19(2)(a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06, paras. 37–38 (<http://www.legal-tools.org/doc/1505f7/>); Mikaela Heikkilä, “Article 21”, in Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, Brussels, 2015, fn. 255 (<http://www.toaep.org/ps-pdf/29-klamberg>).

The application and interpretation of law pursuant to this article *must* be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, *age*, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status. [emphasis added]

Rule 86 of the Rules of Procedure and Evidence also provides a general interpretation and application principle that is binding to all organs of the Court, and refers specifically to the needs of children:

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. [emphasis added]

Nonetheless, as mentioned above, these interpretative principles are general (including children within a broad category of victims and witnesses requiring special consideration) and should be analysed in view of specific “internationally recognised human rights” – in the instant case, children’s rights, and more specifically those protected in the Convention on the Rights of the Child.¹⁸ Although the ICC is not bound by the Convention on the Rights of the Child (not being a party thereto), it must apply norms of similar or identical content of customary international law or general principles of law as enshrined in Article 21(3) of the Rome Statute.¹⁹ Moreover, considering that children may also be part of other protected groups (for example, persons with disabilities and/or girls), other international human rights treaties that crystallise these other internationally recognised human rights are also applicable.

For the purpose of this chapter, the core principles of the Convention on the Rights of the Child are considered as “internationally recognised human rights” pursuant to Article 21(3) of the Rome Statute. The

¹⁸ Convention on the Rights of the Child, 20 November 1989 (<http://www.legal-tools.org/doc/f48f9e/>) (‘Convention on the Rights of the Child’).

¹⁹ Chamberlain, 2015, p. 43, see *supra* note 14; Rebecca Young, “Internationally recognised human rights before the International Criminal Court”, in *International & Comparative Law Quarterly*, 2011, vol. 60, no. 1, pp. 190, 199, 204–205.

Convention on the Rights of the Child enjoys nearly universal ratification²⁰ and its core principles have been recognised as the general requirements for children to enjoy all other rights contained in the Convention.²¹

Article 2 [Non-Discrimination]

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3 [Best Interests of the Child]

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of chil-

²⁰ To date, 140 ratifications. Likewise, very few reservations refer to the articles of the Convention on the Rights of the Child containing these four core principles, and in fact do not question the principles themselves. See Convention on the Rights of the Child, entry into force 2 September 1990 (<http://www.legal-tools.org/doc/f48f9e/>); Susanna Greijer, "Thematic Prosecution of Crimes Against Children", in Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes*, Torkel Opsahl Academic EPublisher, Beijing, 2012, p. 140 (<http://www.toaep.org/ps-pdf/13-bergsmo>).

²¹ Committee on the Rights of the Child ('CRC'), "General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)", 2013, para. 12 (<http://www.legal-tools.org/doc/69c527/>) ('GC No. 5').

dren shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 6 [Right to Life, Survival and Development]

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 12 [Right to be Heard]

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

As regards preliminary examinations at the ICC, these are mainly regulated by Article 15 and Article 53 of the Rome Statute. While Article 15 provides the jurisdictional trigger mechanism allowing *proprio motu* investigations, Article 53 provides the criteria that must be evaluated by the Prosecutor when taking her discretionary prosecutorial decision.

Article 15

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Vic-

tims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

[...]

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 53

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the *gravity of the crime* and the *interests of victims*, there are nonetheless substantial reasons to believe that an investigation would not serve the *interests of justice*.

[...]

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:

[...]

(c) A prosecution is not in the *interests of justice*, taking into account all the circumstances, including the *gravity of the crime*, the *interests of victims* and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; [...].*[emphasis added]*

On the basis of the above legal framework, the Prosecutor must endeavour to conduct preliminary examinations in accordance with internationally recognised children's rights. For the purpose of this chapter, particular attention will be given to how the Convention on the Rights of the Child should be taken into consideration in the interpretation and application of the concepts of "gravity", "interests of victims" and "interests of

justice”. Although preliminary examinations are, in essence, within the discretionary realm of the Prosecutor, this power has intrinsic responsibilities and boundaries. As stated above, in respect of internationally recognised human rights there is no room for discretion. This was determined by the Appeals Chamber of the ICC at the outset of the Court’s first trial: “[h]uman rights underpin the Rome Statute; every aspect of it, including the exercise of jurisdiction of the International Criminal Court”.²² These human rights include the rights of the accused person, but also the rights of victims and witnesses of crimes within the jurisdiction of the Court.

32.4. Quality of Communications

Pursuant to Article 15(1) of the Rome Statute, the Prosecutor may initiate investigations on the basis of information received. This information can be provided by victims themselves, but also by human rights and other organisations. Unless communications relate specifically to children (that is, child recruitment cases), it is foreseeable that in the more ‘general’ communications, children – as an often ‘misinformed and misrepresented’ group in an adult-centred system – will not be automatically included in the information received by the Prosecutor pursuant to Article 15 (for example, communications related to a situation of post-election violence). The same stands as regards State or UN Security Council referrals, which will most likely focus on what happened or is happening ‘in general’ within the territory of a State, and may exclude specific reference to children within the affected population. Children as a group have less ability than adults to present Article 15 communications in their own interests. Thus, if the interests of children are not highlighted in general information submitted to the Prosecutor, they will be overlooked.

However, children represent almost half of the refugee population worldwide,²³ and it is well documented that armed conflict has a destructive impact on education, which ultimately affects children’s development

²² ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the ICC pursuant to Article 19(2) (a) of the Statute of 3 October 2006, 14 December 2006, para. 37 (<http://www.legal-tools.org/doc/1505f7/>).

²³ UNICEF, “Protecting against abuse, exploitation and violence: children affected by armed conflict” (<http://www.legal-tools.org/doc/f44dd4/>).

and future.²⁴ Hence, excluding the children's perspective is not an option. If information received pursuant to Article 15(1) of the Rome Statute lacks the children's perspective, the analysis of the OTP pursuant to Article 53 of the Rome Statute may result in an incomplete and partial application of its mandate.

It is therefore important to maintain the highest children's rights standards as undertaken in the Policy Paper. To achieve this, the OTP must create a network with children's rights organisations already involved in States where the OTP is carrying out preliminary examinations, but also with other international organisations dealing with children's rights (for instance, United Nations Children's Fund). Only if such a network is created, will the OTP be able to receive communications that duly inform about the crimes committed against children or affecting their interests as part of multi-generational communities.²⁵

Moreover, in creating this network with children's rights organisations, the OTP's interaction with them should be two-fold. First, the OTP should receive from organisations and other information providers views on a given situation that is child-sensitive. Second, it would be useful if these organisations would have appropriate tools and training so that communications are relevant for potential international criminal proceedings. Although this is not necessarily the mandate of the OTP or even the ICC, the Prosecutor has continuously referred to 'positive complementarity' as one of its main strategies. Within this concept of positive complementarity, the OTP has mentioned the need for capacity building at a national level, even if it has referred to it only indirectly.²⁶

Just like OTP must endeavour to receive information that sees all sides of a conflict or situation, it should also endeavour to include all members of the affected communities, and among them, children. Information provided under Article 15 should also include different groups within children (for instance, minority groups, young children and youth, and girls).

²⁴ UNICEF, "The State of the World's Children 2016: A fair chance for every child", p. 53 (<http://www.legal-tools.org/doc/7cf2c6/>).

²⁵ OTP, *Policy on Children*, para. 3, see *supra* note 1. See also OTP, "Strategic Plan 2016-2018", pp. 11, 44 (<http://www.legal-tools.org/doc/7ae957/>).

²⁶ OTP, "Prosecutorial Strategy 2009-2012", para. 17, see *supra* note 5.

In other words, it is not only about receiving Article 15 communications or information about crimes affecting children (*quantity* of information), but these communications should also meet minimum standards so that they are useful to the work of the OTP (*quality* of the information).

Partial information under Article 15(1) that is not further complemented by impartial and inclusive information pursuant to Article 15(2) may result in incomplete and unfair decisions by the OTP in the context of preliminary examinations.

To achieve this impartiality and non-discrimination pursuant to Article 21(3) of the Statute, the OTP's interaction with NGOs must also be organised and duly regulated, and most importantly, kept under careful and continuous scrutiny.

The analysis under Article 15(2) of the Rome Statute pertaining to the "seriousness of the information", does not only refer to the truthfulness of the material received, but should also evaluate whether the information encompasses information that may ultimately result in a determination of the truth (not a partial determination that excludes a certain group of the population, that is, children). The OTP should therefore require from these organisations complete and impartial information. Nonetheless, in order to achieve this 'quality control' in the information received, organisations co-operating with the ICC must be knowledgeable of the statutory provisions, not only *vis-à-vis* child victims, but also the rights of the accused and to a fair trial. Therefore, training of information providers in the field is essential.

Moreover, from the receiving point of view, the OTP should have specialised and trained staff that will be able to adequately process information received so that the children's perspective is not 'lost' in the process.²⁷ Moreover, if the OTP's staff is duly trained, they will also seek

²⁷ Staff should also be well-trained in order to make the assessment under the OTP Policy on Children, particularly *vis-à-vis* the best interests of the child. In this regard, the CRC has stated the following: "Facts and information relevant to a particular case must be obtained by well-trained professionals in order to draw up all the elements necessary for the best-interests assessment" (CRC, "General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)", 2013, p. 10 (<http://www.legal-tools.org/doc/18a4c1/>) ('GC No. 14'). See Comisión Interamericana de Derechos Humanos, *El derecho del niño y la niña a la familia: Cuidado alternativo poniendo fin a la institucionalización en las Américas*, 2013, para. 158.

further information when children's rights views are absent. Pursuant to Articles 15(2) and 21(3) of the Rome Statute, discriminatory or biased information should be considered as not 'serious' and should be supplemented with additional information.

Otherwise, this biased and partial information sometimes may reach the investigation and pre-trial phase and exclude children. For example, as regards communications transmitted to the Pre-Trial Chambers in both the Kenya and Côte d'Ivoire situations, victims' representations were in their majority from middle-aged men. Although these communications were made for purposes of Article 15(3) of the Rome Statute (request for authorisation to open an investigation), it is reasonable to conclude that the Prosecutor could have had similar information for the purpose of its Article 15(2) analysis (information received on crimes). For example, in the Kenya situation, there were no victims' representations of children (the youngest was a 19-year-old person). The average age of the persons who made individual representations was 44 years old and 60% of the victims were men. In the Côte d'Ivoire situation, out of 655 individual representations received, a limited number (20) were from persons aged below 20 years old, while the majority (232) were 31-50 years old. Of these representations (655), 423 were men and 179 were women, while 53 did not specify gender.²⁸ One could think that perhaps the views of children were transmitted to the Court via adult persons. However, this has not been the case.

Such numbers are not positive *vis-à-vis* children's rights (nor as regards gender). Ultimately, children are being excluded or restricted, on the basis of their age and sex (girls). Although this is clearly not the *purpose* of the OTP, the Registry (who transmits Article 15 communications to Pre-Trial Chambers) or of organisations co-operating with the ICC, this is the *result* (which impairs or nullifies the recognition, enjoyment and exercise of children's rights to judicial redress).²⁹ Consequently, this is mani-

²⁸ ICC, Situation in the Republic of Kenya, ICC-01/09, Public Redacted Version Of Corrigendum to the Report on Victims' Representations (ICC-01/09-17-Conf-ExpCorr), 29 March 2010, paras. 40–45 and annexes 1 and 5 (<http://www.legal-tools.org/doc/b9ce79/>); ICC, Situation in the Republic of Côte d'Ivoire, ICC-02/11, Report on Victims' Representations, 29 August 2011, paras. 35–36 (<http://www.legal-tools.org/doc/5dd52b/>).

²⁹ The right to non-discrimination is not a passive obligation, prohibiting all forms of discrimination in the enjoyment of rights under the Convention, but also requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all chil-

festly contrary to the principle of non-discrimination, enshrined in Article 21(3) of the Rome Statute.³⁰

With the adoption of the Policy on Children, these numbers should shift and more reference should be made to the plight of children living in the current and future situations under scrutiny by the OTP. Otherwise, the OTP would be failing to meet its pledge that “any information received is subject to critical analysis and evaluation”. It is not only, as stated in its Policy on Children, to pay “particular attention to information received on crimes against or affecting children”,³¹ but to proactively seek additional information when these are missing from information received.

32.5. Analysing the Article 53 Test from a Children’s Rights Perspective

Although the OTP’s Policy on Children adopted a child-sensitive approach (that is where children’s best interests are taken into consideration but not necessarily prevail over other interests),³² it should apply and interpret the law pursuant to internationally recognised children’s rights (Article 21(3)).

Therefore, as noted above, in its application and interpretation of the statutory texts, including Article 53 of the Rome Statute, the OTP shall respect, at a minimum, the four guiding principles of the Convention on the Rights of the Child: (a) the best interests of the child; (b) the right to life, survival and development; (c) respect for the views of children according to their age and maturity; and (d) the right to non-

dren to enjoy the rights under the Convention. This may require positive measures aimed at redressing a situation of real inequality (GC No. 14, p. 6, see *supra* note 27). See also, Convention on the Elimination of All Forms of Discrimination against Women, Article 1, see *supra* note 15, which defines what is meant as ‘discrimination’: “For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.

³⁰ OTP, *Policy Paper on Preliminary Examinations*, para. 28, see *supra* note 4.

³¹ OTP, *Policy on Children*, para. 53, see *supra* note 1.

³² *Ibid.*, para. 22.

discrimination.³³ However, on a case-by-case basis, the OTP may also be guided by other internationally recognised human rights contained in the Convention on the Rights of the Child, for example, the right to education, freedom of religion, prohibition of sexual abuse and ill-treatment, among others.³⁴ Moreover, the OTP should also bear in mind other general or specific internationally recognised human rights and the impact that the Prosecutor's actions could have on children's enjoyment of these rights. For example, the right to reparations,³⁵ gender equality,³⁶ and the rights of children with disabilities.³⁷

³³ CRC, "General Comment No. 12 (2009): The Right of the Child to be Heard", 2009, para. 2 (<http://www.legal-tools.org/doc/8c2532/>).

³⁴ Convention on the Rights of the Child, arts. 14, 19, 28, see *supra* note 18.

³⁵ See Permanent Court of Arbitration, *Chorzow Factory Case (Germany v. Poland)*, Judgment, 13 September 1928, Series A, No. 17, p. 47 (<http://www.legal-tools.org/doc/b2ff98/>); International Court of Justice ('ICJ'), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, 27 June 1986, I.C.J. Reports 1986, General List No. 70, p. 114 (<http://www.legal-tools.org/doc/046698/>); ICJ, *Corfu Channel Case (United Kingdom v. Albania)*, Merits, 9 April 1949, I.C.J. Reports 1949, General List No. 1 (<http://www.legal-tools.org/doc/861864/>); ICJ, *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, I.C.J. Reports 1949, General List No. 4, p. 184 (<http://www.legal-tools.org/doc/f263d7/>); ICJ, *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie (deuxième phase)*, Avis Consultatif, 18 July 1950, I.C.J. Report 1950, General List No. 8, p. 228 (<http://www.legal-tools.org/doc/5a4014/>). See also International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts", Article 1 (<http://www.legal-tools.org/doc/10e324/>) ("Every internationally wrongful act of a State entails the international responsibility of that State").

³⁶ Convention on the Elimination of All Forms of Discrimination against Women, see *supra* note 15, Article 1 defines discrimination against women (this is applicable to interpret the principle of non-discrimination in the CRC and ultimately in the Rome Statute): "the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

³⁷ Convention on the Rights of Persons with Disabilities, 6 December 2006, Article 7 (<http://www.legal-tools.org/doc/06e036/>) ('Convention on the Rights of Persons with Disabilities'): "States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right". This article allows for a specialised, cross-sector interpretation of the Convention on the Rights of the Child, Article 12, see *supra* note 18.

The following criteria of Article 53 of the Statute will now be analysed pursuant to the children's rights framework previously mentioned.

32.5.1. Gravity

As regards gravity, the Policy on Children states that in general, crimes committed against or affecting children are particularly grave. In fact, it is stated that the OTP will ensure that an assessment of the impact of the alleged crimes on children is incorporated into its analysis of the gravity of potential cases.³⁸ This affirmation and assurance of the OTP is in accordance with the guiding principle of children's right to life, survival and development. Most (if not all) crimes within the jurisdiction of the Court will infringe this core principle of the Convention on the Rights of the Child. The fact that information received by the OTP refers to crimes against or affecting children is relevant for the gravity analysis. For example, scale of the crime (number of children that directly or indirectly suffered harm), nature (crimes committed against children),³⁹ and manner (cruelty standards are different in respect of children and adults)⁴⁰ are all relevant for the gravity analysis under Article 53 of the Statute.

Gravity also examines the impact of crimes on victims and communities.⁴¹ Thus, analysing the impact of crimes *vis-à-vis* children in a community will most likely shift the balance in favour of gravity (and thus

³⁸ OTP, *Policy on Children*, paras. 57–58, see *supra* note 1.

³⁹ OTP, *Policy Paper on Preliminary Examinations*, para. 63, see *supra* note 4. The nature of the crimes refers to the specific factual elements of each offence, including crimes committed against or affecting children (OTP, *Policy Paper on Case Selection and Prioritisation*, para. 39, see *supra* note 4).

⁴⁰ OTP, *Policy Paper on Preliminary Examinations*, para. 64, see *supra* note 4. See OTP, *Policy Paper on Case Selection and Prioritisation*, para. 40, see *supra* note 4: “The manner of the commission of the crimes may be assessed in light of, inter alia, the means employed to execute the crime, the extent to which the crimes were systematic or resulted from a plan or organised policy or otherwise resulted from the abuse of power or official capacity, the existence of elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination held by the direct perpetrators of the crimes, the use of rape and other sexual or gender-based violence or crimes committed by means of, or resulting in, the destruction of the environment or of protected objects”.

⁴¹ OTP, *Policy Paper on Preliminary Examinations*, para. 65, see *supra* note 4; Roisin Burke, “UN Military Peacekeeper Complicity in Sexual Abuse: The ICC or a Tri-Hybrid Court”, in Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes*, Torkel Opsahl Academic EPublisher, Beijing, 2012, p. 354 (<http://www.toaep.org/ps-pdf/13-bergsmo>).

opening an investigation), as harm caused to children has long-lasting effects in their lives and may be easily passed down to entire generations. For example, the Policy on Children refers to the notion of a child's life plan,⁴² which is not only relevant for the analysis of the impact of the crime for gravity purposes, but also for future reparations.

32.5.2. Interests of Victims

When analysing the element of “interests of victims”, Articles 3 and 12 of the Convention on the Rights of the Child are essential. While Article 3 enshrines the principle of “best interests of the child”, Article 12 contains the complementary principle of the right of children to be heard.⁴³

A preliminary examination is without a doubt an action that will concern children of the affected communities,⁴⁴ and as such, the “best interests of the child” shall be a primary consideration. As explained by the Committee on the Rights of the Child, this concept, far from being abstract and general, is a “dynamic concept that requires an assessment appropriate to the specific context”.⁴⁵ This guiding principle requires all actors to engage in securing the holistic integrity of the child and promote his or her human dignity.⁴⁶ Thus, in assessing a situation under Article 53 of the Rome Statute, the OTP should consider the three-fold nature of this principle. *Firstly*, the OTP must assess and give primary consideration to

⁴² OTP, *Policy on Children*, fn. 78, see *supra* note 1. OTP, *Policy Paper on Case Selection and Prioritisation*, para. 41, see *supra* note 4: “The impact of the crimes may be assessed in light of, inter alia, the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities. In this context, the Office will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land”. See Elisabeth Schauer, “The Psychological impact of child soldiering” (<http://www.legal-tools.org/doc/ccb0d2/>).

⁴³ The CRC has noted that articles 3 and 12 have an inextricable link. Article 12 provides the methodology for hearings the views of children, including the child's best interests (GC No. 14, 2013, p. 6, see *supra* note 27). See Comisión Interamericana de Derechos Humanos, 2013, para. 249, see *supra* note 27.

⁴⁴ The CRC has stated that the principle applies to situations directly concerning children, but also other measures that have an effect on children, even if they are not the direct targets of the measure (GC No. 14, 2013, p. 4, see *supra* note 27).

⁴⁵ *Ibid.*, pp. 2, 5. The CRC has stated that the concept is flexible and adaptable, and should be adjusted and defined according to specific circumstances.

⁴⁶ *Ibid.*, p. 2.

the interests of children of the situation at hand.⁴⁷ *Secondly*, if two or more interpretations of a legal provision are possible (for example, regarding the principle of complementarity in Article 17 or the threshold in the context of crimes against humanity under Article 7), the OTP should favour the interpretation which most effectively serves children's best interests. *Thirdly*, in its decision-making process in general pursuant to Article 53 (including the Prosecutor's discretion), an evaluation of the possible impact (positive or negative) of the decision on children concerned must be included.⁴⁸

As regards this last point, the adoption of the Policy on Children is not enough, and general reference to it in a decision under Article 53 will be insufficient. The OTP must show in its decision under Article 53 that the right has been explicitly taken into account and explain how the right has been respected in its decision (which criteria it is based on and how the interests of children were weighed against other competing interests).⁴⁹

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* This may be difficult to achieve as the Policy (OTP, *Policy on Children*, para. 32, see *supra* note 1) establishes an approach which foresees decisions that are contrary to the best interests of the child. However, the CRC also foresees this, although exceptionally, and provides some further guidance that could be useful in situations where the OTP has to choose other competing interests. The CRC has stated: "In order to demonstrate that the right of the child to have his or her best interests assessed and taken as a primary consideration has been respected, any decision concerning the child or children must be motivated, justified and explained. The motivation should state explicitly all the factual circumstances regarding the child, what elements have been found relevant in the best-interests assessment, the content of the elements in the individual case, and how they have been weighted to determine the child's best interests. If the decision differs from the views of the child, the reason for that should be clearly stated. If, exceptionally, the solution chosen is not in the best interests of the child, the grounds for this must be set out in order to show that the child's best interests were a primary consideration despite the result. It is not sufficient to state in general terms that other considerations override the best interests of the child; all considerations must be explicitly specified in relation to the case at hand, and the reason why they carry greater weight in the particular case must be explained. The reasoning must also demonstrate, in a credible way, why the best interests of the child were not strong enough to be outweighed by the other considerations. Account must be taken of those circumstances in which the best interests of the child must be the paramount consideration" (GC No. 14, 2003, p. 11, see *supra* note 27). See Comisión Interamericana de Derechos Humanos, 2013, para. 157, see *supra* note 27.

But how can the OTP determine what the best interests of children in a specific ICC situation are? One of the methods is self-evidently to seek the children's views, which is where Article 12 of the Convention on the Rights of the Child becomes imperative. However, one could think, on the other hand, that given the initial stages of the proceedings, it would be counterproductive to expose children to international criminal proceedings. Thus, the OTP must apply Articles 3 and 12 of the Convention on the Rights of the Child in a manner that is also consistent with its obligation to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses as provided for in Article 68(1) of the Rome Statute. Children's direct participation with the OTP at this early stage of the proceedings may not be opportune. However, interaction with local children's rights organisations or youth groups could enable the OTP to gather the views of children, while at the same time preserving their security, safety and well-being.

In relation to Article 12 of the Convention on the Rights of the Child, the Committee on the Rights of the Child has established that views should be weighed in accordance with the child's age and maturity (evolving capacities); and taking into consideration the diversity among children (including their social and cultural differences and needs).⁵⁰ It must be noted that as regards these cultural or religious values, when these are incompatible with other rights (for instance, non-discrimination or sexual and reproductive rights) they should never be regarded as 'in the best interests' of children.⁵¹

Just as the "best interests of the child" should be interpreted broadly (direct and indirect), the term 'matters affecting the child' pursuant to Article 12 of the Convention on the Rights of the Child should also be defined as involving all ICC situations, as these all relate to traumatic social processes in a community (genocide, crimes against humanity, armed conflict) that will certainly deeply affect children's lives.

⁵⁰ Comisión Interamericana de Derechos Humanos, 2013, paras. 252, 258, see *supra* note 27; GC No. 12, 2009, paras. 21, 74, see *supra* note 33; GC No. 14, 2013, para. 43, see *supra* note 27.

⁵¹ For example, the fact that sexual violence against girls is considered as taboo or stigmatised in a given society is not a reason not to investigate these crimes (to prevent the victims from being embarrassed, harassed or ostracized).

And how does the OTP seek the views of children (that is, children of a situation under scrutiny) according to Article 12 of the Convention on the Rights of the Child? Article 12 applies to one child but also to a group of children in general,⁵² which will most likely be the case of preliminary examinations.

Article 12 is not a ‘momentary act’ (that is, one consultation meeting), but a process, and should be the “starting point for an intense exchange” between children of a situation and the OTP.⁵³ Moreover, the OTP needs to be active (“shall assure”) to ensure the right of children to express their interests/views.⁵⁴ The OTP cannot presume that children or persons acting on their behalf will present their views in the context of preliminary examinations. Thus, measures must be taken so that preliminary examinations are child-friendly (accessible and age appropriate), but also appropriate to the particular characteristics of children within a given situation.

As stated above, children’s views should be sought for the purpose of preliminary examinations, but in a manner that is consistent with Article 68(1) of the Rome Statute. Children must be informed about the right to be heard, but most importantly, their right to live free of violence (as some of them may have been born into violence already).⁵⁵ Likewise, participation of children in preliminary examinations should avoid putting them at risk and therefore a child-protection strategy is necessary.⁵⁶ The Policy on Children already gives some indications that the OTP already has, at least, a general strategy. However, the Policy refers more to the stages after the start of an investigation, and not to the preliminary examination stage.⁵⁷ This is logical, since individual children will most likely not participate at this early stage of the proceedings. However, this does

⁵² GC No. 12, 2009, paras. 87–88, see *supra* note 33; Comisión Interamericana de Derechos Humanos, 2013, paras. 151–153, see *supra* note 27.

⁵³ GC No. 12, 2009, para. 13, see *supra* note 33.

⁵⁴ GC No. 14, 2013, p. 19, see *supra* note 27; Comisión Interamericana de Derechos Humanos, 2013, para. 251, see *supra* note 27.

⁵⁵ GC No. 12, 2009, para. 120, see *supra* note 33.

⁵⁶ The Policy on Children already gives some indications that the OTP already has some strategy set-out, but these refer more to the stages after the start of an investigation, and not to the Preliminary Examination stage.

⁵⁷ OTP, *Policy on Children*, paras. 62 ff., see *supra* note 1.

not mean that the OTP will not be able to consider their views. It can always do so indirectly, as noted above, through organisations working with affected children.

The creation of some kind of ombudsperson within the OTP, that monitors children's legal rights but also maintains communications between children from a situation and the OTP could be a possible mechanism to guarantee that a children's rights policy is correctly implemented at all stages, including the preliminary examinations. Another solution could be that of creating a monitoring mechanism (for example, with the Committee on the Rights of the Child, United Nations Children's Fund or another specialised agency). Such a joint venture could provide needed feedback and expertise to the OTP but also to organisations in the field that work with affected communities. As regards preliminary examinations, this ombudsperson or the specialised agency/organisation could make child-rights impact assessments on how a certain investigation by the OTP could affect children and their enjoyment of rights.⁵⁸ Although the Gender and Children Unit within the OTP already fulfils some these duties, it may not necessarily have the autonomy to carry out such impact assessments,⁵⁹ which may sometimes clash with broader prosecutorial strategy.

32.5.3. The Interests of Justice

In its analysis under Article 53 of the Statute, the Prosecutor must also evaluate the "interests of justice". However, this concept must also be understood from the perspective of the best interests of the child and the interests of child victims, as members of affected communities.

The Convention on the Rights of the Child provides that children shall be heard in any judicial and administrative proceeding affecting the child.⁶⁰ The preliminary examinations carried out by the OTP are the eve of judicial proceedings before the ICC, but they also will inevitably have an impact on both judicial and administrative procedures, including domestic and international non-judicial transitional justice mechanisms.

⁵⁸ GC No. 14, 2013, p. 11, see *supra* note 27.

⁵⁹ GC No. 12, 2009, paras. 129–131, see *supra* note 33. The CRC has encouraged networking among organisations working with children to increase opportunities for shared learning and collective advocacy.

⁶⁰ Convention on the Rights of the Child, Article 12, see *supra* note 18.

Thus, an analysis of Article 53(1)(c) from a human rights perspective (something required pursuant to Article 21(3) of the Rome Statute), obliges the Prosecutor to balance competing interests. In the case at hand, the Prosecutor must take into consideration recognised human rights of child victims of an alleged crime but also children of a situation country in general. Such analysis, depending on each situation, could lead the OTP to consider a wider approach to the concept “interests of justice”,⁶¹ for example, in favour of non-judicial or traditional justice mechanisms that could address some of the previously mentioned human rights in the “best interests of children”. For example, a non-judicial justice mechanism that will address the crimes more expeditiously or in a more child-friendly manner could have an impact on the analysis of “interests of justice”. However, this would have to be assessed carefully and on a case-by-case basis, taking into account all the other elements addressed above, as well as other competing obligations of the Prosecutor, such as its primary obligation to avoid impunity.

Another important consideration is that of time. The Committee on the Rights of the Child has established that the passing of time is not the same for children and adults and has affirmed that delays in or prolonged decision-making have particularly adverse effects on children as they evolve.⁶² Hence, a non-decision or delayed decisions under Article 53 of the Statute (that is, situations that are still under analysis for years) may be contrary to the best interests affected children. Thus, effects on children should be considered when the OTP extends a preliminary examination for a prolonged period of time.

The Policy on Children affirms that there is a strong presumption that investigations and prosecutions of crimes affecting children are in the interests of justice.⁶³ This commitment of the OTP to give serious consideration to crimes committed against children not only entails the investigation and prosecution of such crimes, but also the prompt determination of preliminary examinations, and eventual investigations and prosecutions. When the OTP receives information about crimes affecting children, pre-

⁶¹ Talita de Souza Dias, “‘Interests of justice’: Defining the scope of Prosecutorial discretion in Article 53(I)(C) and (2)(C) of the Rome Statute of the International Criminal Court”, in *Leiden Journal of International Law*, 2017, p. 3.

⁶² GC No. 14, 2013, p. 10, see *supra* note 27.

⁶³ OTP, *Policy on Children*, para. 59, see *supra* note 1.

liminary examinations should be dealt with expeditiously. From a prosecutorial point of view, this is necessary in order to preserve the relevant evidence. As proven in *Lubanga*,⁶⁴ with the passing of time all evidence depreciates, but particularly if it relates to children. Also, from an “interests of victims” perspective, the passing of time is also of essence, as reparations for child victims should be granted in a timely manner, preferably when they are still children and measures such as rehabilitation can still be meaningful.⁶⁵ Given their age and vulnerability, the adage “justice delayed is justice denied” is strikingly applicable.

Finally, as part of this broader system of protection of human rights (because although criminal in nature, the ICC was established to protect human beings from heinous crimes), if and when the OTP decides not to open an investigation, it could still transmit that the information received to other appropriate mechanisms that could still address victims. For example, as regards information received on children’s rights violations, the Prosecutor could still transmit the information to other relevant fora, such as the Committee on the Rights of the Child or regional human rights courts. This is important, as the OTP may receive information about human rights violations that although not within the jurisdiction of the Court, they could be within the jurisdiction of other mechanisms.⁶⁶ Such actions are within the general mandate and the objects and purpose of the Court to combat impunity against the most heinous crimes (even if, for example, these crimes are outside the Court’s material, temporal or territorial jurisdiction).

32.6. Conclusions

The Policy on Children is a welcome development, but now the OTP has to put in place a formal process, with procedural safeguards, designed to assess and determine whether it is following its undertaking consistently with internationally recognised children’s rights.⁶⁷

⁶⁴ ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute, 14 March 2012, paras. 479–484 (<http://www.legal-tools.org/doc/677866/>).

⁶⁵ In *Lubanga*, the victims that were aged 10–14 at the time of the events (2002–2003) are currently 25–30 years old. To date, reparations for these victims are still pending.

⁶⁶ Gerhard Werle, 2005, pp. 99–101, see *supra* note 16.

⁶⁷ GC No. 14, 2013, p. 10, see *supra* note 27.

Although there is ample prosecutorial discretion in preliminary examinations, internationally recognised human rights underpin the entirety of proceedings before the ICC and are of compulsory application. Hence, the Convention on the Rights of the Child, and its core principles must guide all prosecutorial actions, including preliminary examinations. The OTP equally needs to create a network with children's rights organisations and children rights experts, so that a child-centred perspective can be truly mainstreamed in the Court's prosecutorial mandate.

With the adoption of the Policy on Children the OTP should not only pay particular attention to information received regarding children, but also seek this information when it is missing in adult-centred communications. An analysis of victims' interests and interests of justice that excludes the child population is partial and discriminatory. Accordingly, the views of children must be taken into consideration, balancing between the often-conflicting rights of children to express their views and the eminent security risks that may arise when they interact with the Court. Measures should be taken to guarantee that their views are considered in a manner that safeguards children well-being. However, excluding them due to their vulnerability alone is not a valid reason.

The adoption of the Policy on Children cannot be seen as a goal. It is only the first step in a process that requires careful and co-ordinated implementation on all those involved in the OTP, beginning at the first stages of the preliminary examinations and until the conclusion of judicial proceedings. If child victims, survivors of crimes within the jurisdiction of the Court are excluded from the preliminary examinations, they will be excluded from the 'determination of the truth' after trial proceedings, and ultimately be excluded from eventual reparations in case of conviction.

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