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Delegating Investigations: Lessons to be Learned from the Lubanga Judgment

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Delegating Investigations: Lessons to be Learned from the *Lubanga* Judgment

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I. INTRODUCTION

¶1 On March 14, 2012 the International Criminal Court (ICC) rendered its first judgment. Thomas Lubanga, President of the *Union des Patriotes Congolais* (UPC), was convicted of the enlistment and conscription of children under 15 in his army the *Forces Patriotiques pour la Libération du Congo* (FPLC) and using them to participate actively in hostilities.[1]

¶2 International opinion has welcomed his conviction as "an important step forward in the worldwide struggle against impunity for grave crimes."[2] The *Lubanga* verdict has been hailed as a "landmark ruling,"[3] and a "great victory" for child soldiers in Congo and elsewhere,[4] although

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* Since 2002, the author has been involved in the defense of several defendants in international criminal proceedings before the ICTY, ICTR, SCSL and ICC (Katanga and Ruto). The views expressed in this paper and many of the factual assertions about investigations are based on the author's extensive personal experience in conducting defense investigations in DRC, Sierra Leone, Kosovo and Rwanda. The author wishes to express gratitude to Ben Gumpert for his invaluable input, as well as Logan Hambrick and Christopher Santora for their helpful suggestions to improve this paper.

[1] ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute (Mar. 14, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf [hereinafter Lubanga Judgment, ICC-01/04-01/06-2842]; *see also* ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2901, Decision on Sentence Pursuant to Article 76 of the Statute (July 10, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf (Thomas Lubanga Dyilo has since been sentenced to 14 years imprisonment).

[2] David Smith, *Congo Warlord Thomas Lubanga Convicted of Using Child Soldiers*, GUARDIAN, (Mar. 14, 2012), http://www.guardian.co.uk/world/2012/mar/14/congo-thomas-lubanga-child-soldiers; *see also* Michael Bochenek, *DRC: ICC Conviction of Thomas Lubanga Welcomed*, AMNESTY INT'L (Mar. 14, 2012), http://www.amnesty.org.uk/news_details.asp?NewsID=19998; Marie Lamensch, *Democratic Republic of Congo: Domestic Media Monitoring Report*, MONTREAL INST. FOR GENOCIDE & HUMAN RIGHTS STUDIES 2 (Mar. 9–18, 2012), http://migs.concordia.ca/Media_Monitoring/documents/DRC_Domestic_Media_Monitoring_Report_9_March_18_March_2012.pdf (reporting U.N. Secretary-General Ban Ki-moon welcomed verdict as "an important step forward" in fight against use of child soldiers, Special Representative for Children and Armed Conflict, Radhika Coomaraswamy, said verdict will "serve as a strong deterrent," and head of MONUSCO in DRC referred to judgment was a "powerful message" to perpetrators of human rights violations who "will be held accountable for their actions"); Julie McBride, *Assessing Lubanga*, HUMAN RIGHTS IN IRELAND (Mar. 19, 2012), http://www.humanrights.ie/index.php/2012/03/19/assessing-lubanga; Women's Initiatives for Gender Justice, *ICC Convicts Thomas Lubanga Dyilo for War Crimes*, LUBANGATRIAL.ORG (June 11, 2012), http://www.lubangatrial.org/2012/06/11/icc-convicts-thomas-lubanga-dyilo-for-war-crimes-reactions-from-drc-partners/ (discussing reactions of their partners in the DRC, including the *Ligue pour la solidarité Congolaise* (LSC), and referring to Lubanga judgment as "an important step in the fight against impunity in the DRC" and "a strong signal to all those who committed serious human rights violations").

[3] *ICC: Landmark Verdict a Warning to Rights Abusers*, HUM. RTS. WATCH (Mar. 14, 2012), http://www.hrw.org/news/2012/03/14/icc-landmark-verdict-warning-rights-abusers; Priyanka Pruthi, *In a Historic Judgment, the International Criminal Court Convicts Thomas Lubanga Dyilo of Recruiting Children Into Armed Conflict*, UNICEF (Mar. 14, 2012), http://www.unicef.org/protection/57929_62002.html.

[4] Géraldine Mattioli-Zeltner, International Justice Advocacy Director of HRW, called the Lubanga verdict "a victory for the thousands of children forced to fight in Congo's brutal wars." *Landmark Verdict*, HUM. RTS. WATCH, *supra* note 3; *see also* McBride, *Assessing Lubanga*, *supra* note 2 (quoting HRW Executive Director Kenneth Roth

commentators have criticized the Prosecutor for failing to charge any offences of sexual violence or other serious crimes punishable under the Rome Statute. Mainly on this basis, a number of Non-Governmental Organizations (NGOs) have concluded that "[l]essons need to be learned for future cases."[5]

¶3 But does the judgment represent a "victory," however flawed? Although this is now a topic of discussion,[6] initially, there was near complete silence on the 'dark side' of the judges' findings.[7] Nine witnesses who claimed to have been child soldiers in the FPLC gave evidence at the trial. Not one of them was found by the Court to have been honest and reliable.[8] Roughly a third of the judgment (157 out of 593 pages) is taken up with the Court's detailed and careful findings on these witnesses and the "intermediaries" (liaison officers facilitating contact with potential witnesses)[9] who may have manipulated them.[10]

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making same statement).

[5] HRW researcher Anneka Van Woudenberg urged that other co-accused be arrested and brought to justice as well, noting that other officers could be found in Uganda, Rwanda and the DRC. *See* Lamensch, *Congo*, *supra* note 2; *see also* Bochenek, *DRC*, *supra* note 2; *Landmark Verdict*, HUM. RTS. WATCH, *supra* note 3; Women's Initiatives, *ICC Convicts Lubanga*, *supra* note 2.

[6] *See, e.g.*, Women's Initiatives for Gender Justice, *Lubanga Judgment—The Prosecution's Investigation and Use of Intermediaries*, LUBANGATRIAL.ORG (Aug. 20, 2012), http://www.lubangatrial.org/2012/08/20/lubanga-judgment-the-prosecutions-investigation-and-use-of-intermediaries/. *See also* 'The Law and Practice of the International Criminal Court: Achievements, Impact and Challenges' Conference (Sept. 26, 2012) (The criticism raised by the Lubanga Trial Chamber in respect to the prosecution investigations was also discussed at length at the Conference). In addition, the War Crimes Research Office is in the process of finalizing a report on the problematic aspects of the ICC Prosecution's investigative practices, as was discussed by its director Susana SáCouto at the Conference. Susana SáCouto, Director, ICC War Crimes Research Office, Remarks at 'The Law and Practice of the International Criminal Court: Achievements, Impact and Challenges' Conference (Sept. 26, 2012).

[7] There were a number of notable exceptions. *See, e.g.*, *Landmark Verdict*, HUM. RTS. WATCH, *supra* note 3 (addresses this criticism); *see also* Alison Cole, *Lubanga: A Landmark Decision for International Justice*, LUBANGATRIAL.ORG (Mar. 14, 2012), http://www.lubangatrial.org/2012/03/14/a-landmark-decision-for-international-justice/. When the issue of intermediaries was first raised, a number of NGOs made comments. *See, e.g.*, Open Society Justice Initiative, *Intermediaries and the International Criminal Court: A Role for the Assembly of States Parties* (Nov. 2012), http://www.opensocietyfoundations.org/sites/default/files/intermediaries-20111212.pdf. There have further been a number of earlier academic publications commenting on the same issue. *See* Christian M. De Vos, *Case Note: Prosecutor v. Thomas Lubanga Dyilo: 'Someone Who Comes Between One Person and Another': Lubanga, Local Cooperation and the Right to a Fair Trial*, 12 MELB. J. INT'L L. 1 (2011), http://mjil.law.unimelb.edu.au/go/issues/issue-archive/volume-12-1 [hereinafter De Vos, *Case Note*]. *See also* Elena Baylis, *Outsourcing Investigations* 14 UCLA J. INT'L & FOREIGN AFF. 121 (2009) [hereinafter Baylis, *Outsourcing Investigations*].

[8] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶¶ 479–80. The Chamber also dismissed the evidence of the three victims who gave evidence. *Id.* ¶¶ 485–502. However, the Chamber found accurate and reliable, the testimony of P-38, a former UPC soldier who was over 15 when he joined the UPC, as well as that of P-10 who addressed the video evidence. *Id.* ¶¶ 480–81.

[9] ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2690-Red2, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings," ¶ 126 (Mar. 7, 2011), http://www2.icc-cpi.int/iccdocs/doc/doc1036342.pdf (citing ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2678-Conf, Prosecution's Response to the Defence's "Requête de la Défense aux Fins D'arrêt Définitif des Procedures," ¶ 18 (Jan. 31, 2011) [hereinafter Lubanga, ICC-01/04-01/06-2678-Conf, Prosecution Confidential Filing]). *See also* ICC, *Draft Guidelines Governing the Relations between the Court and Intermediaries* 5 (Aug. 2011) (The Draft Guidelines define an intermediary as "someone who comes between one person and another; who facilitates contact or provides a link between one of the organs or units of the Court or Counsel on the one hand, and victims, witnesses, beneficiaries of reparations, or affected communities more broadly on the other."). The draft guidelines have been redefined in light of the Lubanga Judgment but have, to date, not been adopted by the Assembly of States Parties.

[10] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶¶ 63–220.

¶4 The judgment is scathing about the investigative failures of the Prosecutor and particularly the excessive reliance on these intermediaries.[11] Lubanga was convicted, but not on the evidence of those who were alleged to be the victims of the crimes he had committed.[12]

¶5 At the *Atrocity Crimes Litigation Year-in-Review 2011 Conference* (Review Conference), which took place as the judgement was handed down, the Prosecution Coordinator of the ICC was in no mood to accept that "lessons need to be learned" in this respect. She claimed that the judge's criticism concerning intermediaries was "overly harsh."[13] In a rather more cogent remark, Mark Harmon, former Senior Trial Prosecutor at the International Tribunal for the former Yugoslavia (ICTY), underlined the difficulties faced by investigators looking for witnesses in conflict zones with poor infrastructure.[14] "This is a raw, difficult process," he said, and the reality in the field, "actually rolling up your sleeves and having to do one of these cases" differs significantly from the reality in a courtroom in The Hague.[15]

¶6 It is hard to argue with this observation. The collection of evidence in international criminal justice is difficult.[16] More questionable is whether the ICC Office of the Prosecutor (OTP) made adequate efforts to deal with problems it encountered in conducting investigations in the *Lubanga* case. Did they "roll up their sleeves" or did they abdicate their responsibility to conduct proper investigations?

¶7 This paper considers whether the OTP's solution to its investigative difficulties—essentially the outsourcing of evidence gathering to third-party organizations or intermediaries—is justified and effective when conducting investigations in international criminal cases.

¶8 Part II examines the judges' criticism concerning the *Lubanga* investigations and looks at the Prosecutor's explanations with respect to those issues and to the context in which the investigations were conducted. Investigations in the *Lubanga* case are compared with those in the cases of *Katanga* and *Ngudjolo*, two accused who were jointly tried until November 21, 2012 when the judges severed their cases.[17] Ngudjolo was acquitted on December 18, 2012,[18] while Katanga's case is still ongoing.[19] Similarly to Lubanga's case, Katanga and Ngudjolo cases

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[11] *Id.*

[12] Lubanga's conviction was based on the evidence of FPLC soldiers over 15 years old and other witnesses, *id.* ¶¶ 645–731; as well as video material, *id.* ¶¶ 644, 710–18, 774, 779, 792–93, 860–62; and documentary evidence, *id.* ¶¶ 732–58, which included Lubanga's own speech, *id.* ¶¶ 1242–46.

[13] Transcript of Atrocities Crimes Litigation Year-In-Review (2011) Conference 41 (Mar. 14, 2012), *available at* http://www.law.northwestern.edu/legalclinic/humanrights/documents/ACL2011ConferenceTranscript.pdf (Criscitelli added that she respected the authority of the Court and that such firm public criticism is a good thing in the sense that "[i]t does send a signal that this court is not sort of a kangaroo court, it's not in the pocket of the prosecution, it's not willing to tolerate any kind of measure.").

[14] *Id.* at 46–47.

[15] *Id.* at 47.

[16] *See, e.g.*, DAVID CHUTER, WAR CRIMES: CONFRONTING ATROCITY IN THE MODERN WORLD 139–49 (2003); ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES, SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 142–59 (Cambridge Studies in International and Comparative Law ed., 2005); Graham Blewitt, *The International Criminal Tribunals for the Former Yugoslavia and Rwanda*, *in* JUSTICE FOR CRIMES AGAINST HUMANITY, 145, 150–52 (Mark Lattimer & Philippe Sands eds., 2003).

[17] *See* ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-3319-tENG/FRA, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons, ¶¶ 58–64 (Nov. 21, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1529337.pdf.

[18] ICC, Prosecutor v. Mathieu Ngudjolo Chui, ICC-01/04-02/12-3, Jugement Rendu en Application de L'article 74 du Statut (Dec. 18, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1529535.pdf [hereinafter Ngudjolo Judgment, ICC-01/04-02/12-3].

[19] By decision, the Chamber notified the parties and participants that the mode of liability under which Germain Katanga was charged was subject to legal recharacterisation on the basis of article 25(3)(d) of the Statute. Katanga & Ngudjolo, ICC-01/04-01/07-3319-tENG/FRA, Decision on Regulation 55, *supra* note 17. The parties and

concerned the conflict in the Ituri region of the eastern Democratic Republic of Congo (DRC). The discussion of the investigations in the cases of *Katanga* and *Ngudjolo* is followed by a brief analysis of other situations under investigation by the ICC. Part III addresses the security concerns raised, which the prosecution argues is the principal reason for outsourcing the investigations. Part IV suggests better solutions to the problems faced in conducting investigations.

II. PROBLEMS IN INVESTIGATIONS

A. Lubanga

¶9 On June 23 2004, the Prosecutor opened an investigation in the DRC.[20] The initial focus was on Ituri, where the fighting had been intense.[21] The investigative team of twelve was led by Bernard Lavigne, a French magistrate.[22]

¶10 The prosecution called Lavigne (P-582), as well as one of the investigators, Nicolas Sebire (P-583), to give evidence at trial.[23] Lavigne testified about the difficulties his team had encountered.[24] He testified that early investigations were particularly difficult,[25] and that external support for ICC investigations was inadequate.[26] Initially, they felt unable to visit eastern DRC

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participants were invited to file written legal and factual observations on the proposed change in January 2013. The defense for Katanga sought and was granted leave to appeal this decision. ICC, Prosecutor v. Germain Katanga, ICC-01/04-01/07-3327, Decision on the "Defence Request for Leave to Appeal the Decision 3319," (Dec. 28, 2912), http://www.icc-cpi.int/iccdocs/doc/doc1532429.pdf. On January 10, 2013, the defense submitted its appeal. ICC, Prosecutor v. Germain Katanga, ICC-01/04-01/07-3339, Defence's Document in Support of Appeal Against the Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons, (Jan. 10, 2013) http://www.icc-cpi.int/iccdocs/doc/doc1539247.pdf. The prosecution responded on January 21, 2013. ICC, Prosecutor v. Germain Katanga, ICC-01/04-01/07-3347, Prosecution Response to Defence Document in Support of Appeal Against the Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons, (Jan. 21, 2013) http://www.icc-cpi.int/iccdocs/doc/doc1543347.pdf. The proceedings before the Chamber have been suspended pending the appeal. ICC, Prosecutor v. Germain Katanga, ICC-01/04-01/07-3344, Appeals Chamber's Decision on the Request for Suspensive Effect of the Appeal against Trial Chamber II's Decision on the Implementation of Regulation 55 of the Regulations of the Court (Jan. 16, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1541349.pdf.

[20] ICC, Press Release, The Office of the Prosecutor of the International Criminal Court Opens Its First Investigation, ICC-OTP-20040623-59 (June 23, 2004), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation.aspx.

[21] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 136; EVD-OTP-00222/HRW Report, *'Le Fléau d'or - RDC'*, 2005, 0364, 0367-0369, 0379-0381, 0388; EVD-OTP-00206/MONUC, Special Report on the events in Ituri, January 2002-December 2003, ¶¶ 4, 7, 12, 16; EVD-OTP-00205/MONUC Kinshasa, Final Report of the MONUC Special Investigation Team on the Abuses Committed in Ituri from January to March 2003, June 2003, 0291 ¶ 2; EVD-OTP-00229, ICJ - Case concerning Armed Activities on the Territory of the Congo, DRC v. Uganda, 19 December 2005.

[22] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 25.

[23] ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, ¶ 146 (May 31, 2010), http://www.icc-cpi.int/iccdocs/doc/doc881407.pdf (Lavigne and Sebire were called pursuant to the Chamber's Decision on Intermediaries, ordering the prosecution to call an appropriate representative to give evidence regarding intermediaries). *See also* Lubanga Judgment, ICC-01/04-01/06-2842 *supra* note 1, ¶ 125.

[24] ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, Deposition of Witness 18-25 (Nov. 16, 2010), http://www.icc-cpi.int/iccdocs/doc/doc1298128.pdf [hereinafter Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG].

[25] *Id.* at 21–23.

[26] *Id.* at 23.

due to security problems.[27] The situation was volatile and unstable with active militia in and around Bunia, Ituri's principal town.[28] During their first mission to Bunia, in September 2004, gunshots could be heard every day.[29] There was general suspicion towards the work of the ICC and Lavigne felt it was dangerous to leave the area of Bunia, which was under the protection of the United Nations (UN).[30]

¶11 It took two years for the ICC to establish its own base in Bunia.[31] It was difficult to find public locations where they could safely meet potential witnesses without attracting attention.[32] In the absence of an ICC compound, investigators had to stay in difficult circumstances, often without a shower.[33] Investigators would generally rotate in ten-day periods, but there were thought to be too few of them to have someone in the field permanently.[34] Both Lavigne and Sebire testified that travelling outside Bunia was inhibited by the existence of roadblocks manned by armed groups with the purpose of collecting taxes.[35]

¶12 In addition, the investigators feared that informants would be subjected to threats or abduction from their own communities if it became known that they had given incriminating information against some of the still-popular militia leaders.[36] Investigators also sought to avoid creating the perception that cooperation with the ICC was risky business, since that perception might create a general reluctance to provide information.[37] Indeed, informants themselves were anxious that their identity be protected.[38]

1. The Prosecutor's Solution: Reliance on Third Parties

¶13 The OTP resolved therefore to create files for its witnesses that were reasonably accurate without causing any suspicion within their families or villages.[39] Investigators were instructed to avoid any contact with the chiefs of the localities, families, churches, local municipalities and close allies of potential witnesses, given their alleged close association with the militias under investigation.[40] Investigators were even told to stay away from the schools attended by the 'child soldier' witnesses and not to request their school records.[41] These limitations prevented the cross-checking of potential 'child soldier' witnesses' ages.[42]

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[27] *Id.* at 18.
[28] *Id.* at 21.
[29] *Id.* at 34.
[30] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶¶ 135, 139–40, 142, 151–52, 163 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 34–40).
[31] Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 72.
[32] *Id.* at 77.
[33] *Id.* at 75.
[34] *Id.*; *see also* Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶¶ 162, 165–66.
[35] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 153; Lavigne Deposition, *supra* note 24, at 35; ICC-01/04-01/06-T-334-Red2-ENG, Trial Hearing 11–12 (Nov. 22, 2010), http://www2.icc-cpi.int/iccdocs/doc/doc1343148.pdf.
[36] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶¶ 159–60 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 32–33, 47).
[37] Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 25, 39–41, 62.
[38] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 156, (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 25, 39).
[39] *Id.* ¶ 192.
[40] *Id.* ¶¶ 160, 172–73.
[41] Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 32–34.
[42] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶¶ 161, 173–74 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 17–20, 32–34).

¶14 But even with the most careful approach, it was difficult to keep the local communities in the dark about investigations.[43] Any error, the OTP felt, could easily lead to the identification of an individual, which could have immediate adverse consequences.[44] This was especially true when conducting investigations in small villages. ICC personnel stand out in such an environment, particularly when they are not of African origin and travel in convoy escorted by UN military vehicles.[45] In these circumstances, the investigators feared that it was impossible to meet informants without running unacceptable risks, particularly in the small villages outside Bunia.[46]

¶15 The OTP came up with two main solutions. First, it relied heavily on the investigations carried out by the MONUC, the UN mission charged with documenting violations of human rights in the eastern part of the DRC,[47] as well as local and international NGOs working in the region. Not only was this considered a safer method with regard to witness protection, but it also saved the Prosecutor resources.[48] Second, it employed local persons as liaison officers between the investigators and the local communities referred to as intermediaries. These intermediaries were relied upon to facilitate contact with potential witnesses, as well as to collect security information regarding the region.[49]

¶16 The use of intermediaries appeared to offer a solution to the problems described above. They often had links with NGOs, as well as the UN.[50] They could travel without raising suspicion and had a permanent base in the area.[51] Potential witnesses, selected by intermediaries, could be interviewed in safe locations outside the conflict zone.[52] Intermediaries formed an integral part of the witness protection system and their involvement was considered "best practice" during investigations.[53] The OTP began using intermediaries as early as the summer of 2004, although formal contracts between the two were not put in place until much later.[54]

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[43] Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 37–38, 62–64.

[44] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶¶ 160, 192 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 62).

[45] In eastern DRC people mostly get about on foot or motorbike. By visiting villages in a car, let alone multiple cars, UN military vehicles and personnel tend to attract attention. This is based on the author's own experience.

[46] Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 21–25, 34–37, 61–62.

[47] The Security Council mandate of MONUC includes a human rights component, and MONUC teams have on several occasions investigated allegations of specific violations. For instance, in December 2002, a MONUC team was sent to investigate allegations that grave violations had occurred in Mambasa and the surrounding area. The team interviewed over 350 eyewitnesses. *See* Secretary-General, *Thirteenth Report of the Secretary-General on MONUC*, U.N. Doc. S/2003/211 (Feb. 21, 2003). Since July 1, 2010, MONUC was renamed the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). *See* U.N. Security Council, Resolution 1925, U.N. Doc. S/RES/1925 (May 28, 2010).

[48] Julie Flint & Alex de Waal, *Case Closed: A Prosecutor Without Borders*, WORLD AFF. J. (Spring 2009), http://www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders; *see also* Baylis, *Outsourcing Investigations*, *supra* note 7, at 143–44.

[49] Lubanga, ICC-01/04-01/06-2690-Red2, Defence Application Seeking a Permanent Stay of the Proceedings ¶ 126 (citing Lubanga, ICC-01/04-01/06-2678-Conf, Prosecution Confidential Filing, *supra* note 9, ¶ 18).

[50] Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 48–50.

[51] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, at ¶ 181; Lubanga, ICC-01/04-01/06-2678-Conf, Prosecution Confidential Filing, *supra* note 9, ¶ 14.

[52] Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 50–52.

[53] Lubanga, ICC-01/04-01/06-2690-Red2, Defence Application Seeking a Permanent Stay of the Proceedings ¶ 124 (citing Lubanga, ICC-01/04-01/06-2678-Conf, Prosecution Confidential Filing, *supra* note 9, at ¶ 14).

[54] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 194 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 53).

2. *Problems with UN and NGO Evidence*

¶17 Multiple problems arose from OTP reliance on third parties. The NGOs, particularly MONUC, were only willing to share their work product with the OTP on the condition that it was not disclosed to anyone else at any stage of the proceedings.[55] Accordingly, under article 54(3)(e) of the Rome Statute,[56] the Prosecutor entered into confidentiality agreements with these organizations, agreeing not to disclose the bulk of the information it was given without the organizations' prior consent.[57]

¶18 Some of the material was, according to the OTP's own assessment, potentially exculpatory.[58] Despite this, the OTP could not make disclosure to the defense or the judges due to its article 54(3)(e) agreements with the information providers.[59] This inability to disclose prevented the Chamber from exercising its ultimate duty to assess whether the trial could still be fair if this material was not disclosed to the defense, and whether alternative measures were available to compensate the unfairness to the defense caused by the non-disclosure.[60] Eventually, the Chamber ordered a conditional stay of the proceedings.[61]

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[55] In the case of the U.N., it is right to impose such conditions as was set out in the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, ICC-ASP/3/Res.1, ¶ 18(3) (July 22, 2004), http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf. *See also* ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-T-52-ENG, Transcript of Prosecution's Oral Submissions, 14–15, 84–86 (Oct. 1, 2007), http://www.icc-cpi.int/iccdocs/doc/doc354143.pdf [hereinafter Prosecution's Oral Submissions of Oct. 1, 2007]; ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-T-55-ENG, Transcript of Prosecution's Oral Submissions, 1, 4–8 (Oct. 2, 2007), http://www.icc-cpi.int/iccdocs/doc/doc354703.pdf [hereinafter Prosecution's Oral Submissions of Oct. 2, 2007]; ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-T-86-ENG, Transcript of Prosecution's Oral Submissions, 4–8 (May 6, 2008), http://www.icc-cpi.int/iccdocs/doc/doc482425.pdf [hereinafter Prosecution's Oral Submissions of May 6, 2008]; ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-T-89-ENG, Transcript of Prosecution's Oral Submissions 5–7, 45–46 (June 10, 2008), http://www.icc-cpi.int/iccdocs/doc/doc506201.pdf [hereinafter Prosecution's Oral Submissions of June 10, 2008]. *See also* ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1267, Prosecution's Submission on Article 54(3)(e) Confidentiality Agreements (Apr. 7, 2008), http://www.icc-cpi.int/iccdocs/doc/doc469626.pdf.

[56] ICC Stature, art. 54(3)(e) (Nov. 29, 2010) (Article 54(3)(e) authorizes the Prosecutor to "[a]gree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents").

[57] *See* Prosecution's Oral Submissions of Oct. 1, 2007, *supra* note 55, at 14, 19, 85; Prosecution's Oral Submissions of June 10, 2008, *supra* note 55, at 3, 6, 7. *See also* Prosecution's Submission on Article 54(3)(e) Confidentiality Agreements, *supra* note 55, ¶ 9.

[58] *See, inter alia*, ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1248, Prosecution's Submission on Undisclosed Documents Containing Potentially Exculpatory Information, ¶¶ 8–26 (Mar. 28, 2008), http://www.icc-cpi.int/iccdocs/doc/doc462546.pdf; Prosecution's Submission on Article 54(3)(e) Confidentiality Agreements, *supra* note 55.

[59] The OTP refused disclosure notwithstanding the Trial Chamber's Order. ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1259, Order on the "Prosecution's Submission on Undisclosed Documents Containing Potentially Exculpatory Information", ¶ 3 (Apr. 3, 2008). In Prosecution's Submission on Article 54(3)(e) Confidentiality Agreements, *supra* note 55, ¶¶ 7–10, the OTP explained that it was unable to comply with the Chamber's disclosure order without the consent of the information providers.

[60] ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1401, Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together With Certain Other Issues Raised at the Status Conference on 10 June 2008, ¶¶ 44–45, 50, 60–62, 87–89 (June 13, 2008), http://www.icc-cpi.int/iccdocs/doc/doc511249.pdf.

[61] *Id.* ¶¶ 90–97. This decision was confirmed on appeal. *See* ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1486, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I Entitled "Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together With Certain Other Issues Raised at the Status Conference on 10 June 2008," (Oct. 21, 2008), http://www.icc-cpi.int/iccdocs/doc/doc578371.pdf. For further

¶19 The prosecution appealed, but the Appeals Chamber upheld the Trial Chamber's ruling and found that reliance on article 54(3)(e) of the Statute should be "exceptional" and not excessive (as it had been in the instant case).[62] The Appeals Chamber held that the OTP should concentrate its investigations on generating evidence which could be given in court, rather than collecting large volumes of material which could not be relied upon in determining the criminal liability of the accused because of confidentiality agreements.[63]

¶20 The stay of proceedings in *Lubanga* was lifted only after the UN agreed that the information could be disclosed to the Chamber for a determination on the exculpatory nature of the material and the potential need for its disclosure to the defense.[64] By now, the trial had suffered from serious delays.[65] In addition, the availability to the OTP of MONUC and NGO material created a significant inequality between the prosecution and the defense, which did not have the opportunity to sift through the material for itself.[66]

3. Problems with Intermediaries

¶21 The reliability and credibility of intermediaries became a contentious issue in the trial. It started to go wrong on day one, when the first 'child soldier' witness recanted and claimed that an intermediary had instructed him to lie.[67] Many others followed with similar allegations, affirming under oath that they lied about their age and role in the UPC on the instructions of intermediaries.[68] Some said they had received money or that they had been trained for days by intermediaries in order to build their stories.[69] For instance, witness P-0015 said of intermediary P-316:

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analysis, *see* Milan Marković, *The ICC Prosecutor's Missing Code of Conduct*, 47 TEX. INT'L L. J. 1, 213–21 (2011), http://www.tilj.org/content/journal/47/num1/Markovic201.pdf. *See also* De Vos, *Case Note*, *supra* note 7, at 4–8; and Baylis, *Outsourcing Investigations*, *supra* note 7, at 123. For a more critical view on the Chamber's decision and insight on prosecution policy and dilemmas, see Alex Whiting, *Lead Evidence & Discovery Before the International Criminal Court: The Lubanga Case*, 14 UCLA J. INT'L L. & FOREIGN AFF. 207 (2009).

[62] Lubanga, ICC-01/04-01/06-1486, Judgment on the Appeal of the Prosecutor, *supra* note 61, ¶ 55. *See also* ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo, ICC-01/04-01/07-T-77-Red, Ex-Parte Hearing With the Office of the Prosecutor, 4–18 (Nov. 17, 2009) ("in the establishment of the truth, the relevant division of the Court says that Article 54(3)(e) is exceptional").

[63] Lubanga, ICC-01/04-01/06-1486, Judgment on the Appeal of the Prosecutor, *supra* note 61, ¶ 41.

[64] *Id.* ¶ 61.

[65] The original trial date of June 23, 2008 was postponed for seven months until January 26, 2009. *See* ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1343, Agenda for Status Conference on 28 May 2008 and scheduling order, ¶ 3 (May 21, 2008) (listing the initial trial commencement date as June 23, 2008); *Democratic Republic of the Congo*, ICC WEBSITE, http://www.icc-cpi.int/EN_Menus/ICC/Situations%20and%20Cases/Situations/Situation%20ICC%200104/Pages/situation%20index.aspx (listing January 26, 2009 as the date the trial eventually commenced).

[66] *See* ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1291, Réponse de la Défense à la "Prosecution's Submissions on Undisclosed Documents Containing Potentially Exculpatory Information" Datée du 28 Mars 2008, ¶ 6 (Apr. 22, 2008). *See also* Lubanga, ICC-01/04-01/06-1486, Judgment on the Appeal of the Prosecutor *supra* note 61, ¶¶ 5, 11, 63–64, 92.

[67] Lubanga, ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, *supra* note 23, ¶ 25 (citing ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-T-236-CONF-ENG ET, Hearing, at 20–22 (Jan. 27, 2010), http://www.icc-cpi.int/iccdocs/doc/doc1264308.pdf).

[68] *See, e.g.*, Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 375 (mentioning several witnesses who had given evidence with regard to possible manipulation by intermediary P-321). *Id.* ¶ 389 (D-0004 testified that P-321 instructed him and some others to give false testimony about being enlisted into the FPLC, their names, ages and where they lived).

[69] Lubanga, ICC-01/04-01/06-2690-Red2, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings," *supra* note 9, ¶ 24 (citing ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2657-Conf-tENG, Defense Application Seeking a Permanent Stay of the Proceedings, ¶¶ 82–85 (Dec. 10, 2010),

> He said, you have to change your name, you have to change your identity. Don't give the true story that took place; in other words, there was a story that they were telling to the witnesses. And I say that they're crooks. Why is it that I say that they're crooks and swindlers? Well, instead of letting me tell the true story of what took place and instead of letting me describe all of the events that I lived through, they are inventing statements in order to manipulate the investigation.[70]

¶22 Another witness, D-0016 claimed that P-316 had persuaded him to concoct a story about children being enrolled into the UPC, as well as young girls giving birth whilst in the army.[71]

¶23 The Chamber accepted that these and similar claims of wrongdoing were properly grounded, and made several orders for the prosecution to recall witnesses whose previous testimony was called into question as well as a number of intermediaries.[72] The Chamber was particularly wary of intermediaries P-143, P-316 and P-321, all of whom it ordered to be recalled to comment on the allegations witnesses had made against them.[73]

¶24 Eventually, the defense requested a permanent stay of the proceedings, arguing that the evidence was so unreliable that a fair trial could no longer be guaranteed.[74] The Chamber accepted there were grave grounds for concern, but ruled that the trial should continue, finding that the impact of the involvement of the intermediaries on the evidence in the case, as well as any prosecutorial misconduct or negligence, would be matters for its final judgment.[75] As already noted, that final judgment revealed that, in the view of the Chamber, nine alleged 'child soldier' witnesses were not credible.[76]

¶25 The OTP's failure to verify properly the evidence it obtained through intermediaries resulted in considerable and avoidable expenses of the Court.[77] Indeed, the Chamber spent a significant amount of time and resources exploring the circumstances in which these witnesses provided their information.[78] In light of these witnesses' age, vulnerability and potential trauma

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http://www.icc-cpi.int/iccdocs/doc/doc1201067.pdf). *See also* Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶¶ 322, 353–55, 388.

[70] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 330 (citing ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-T-192-Red2-ENG, Redacted Hearing, 6 (June 16, 2009)).

[71] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶¶ 351–54 (citing ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-T-256-Red-ENG 12, Redacted Hearing, 21–22, (Mar. 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc924727.pdf and ICC-01/04-01/06-T-257-Red-ENG, Redacted Hearing, 2–4, (Mar. 9, 2010), http://212.159.242.181/iccdocs/doc/doc926790.pdf).

[72] Lubanga, ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, *supra* note 23. For instance, witness P-0015 was called back and gave additional details about the lies the intermediary told him to provide. *Id.* ¶¶ 332, 364 (citing ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-T-264-Red2-ENG, Redacted Hearing, 64–65 (Mar. 17, 2010), http://212.159.242.181/iccdocs/doc/doc1387122.pdf; ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-T-265-Red2-ENG, Redacted Hearing, 9–10 (Mar. 18, 2010).

[73] The Chamber made this order in its Decision on Intermediaries. Lubanga, ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, *supra* note 23, ¶¶ 144, 146. The Chamber was less concerned with intermediary P-31 who was not recalled. *Id.* ¶ 451. In light of his close cooperation with P-321, the Chamber treated evidence produced by P-31 with particular care. *Id.* ¶ 477. But, the Chamber found there was "insufficient evidence to support the suggestion that P-0031 persuaded, encouraged or assisted witnesses to give false testimony." *Id.* ¶ 476.

[74] *See* Lubanga, ICC-01/04-01/06-2690-Red2, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings," *supra* note 9. *See also* Prosecution's Confidential Filing, *supra* note 9.

[75] *See* Lubanga, ICC-01/04-01/06-2690-Red2, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings," *supra* note 9, ¶¶ 74–92.

[76] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 480. *See also* text accompanying *supra* note 8.

[77] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 482.

[78] *Id.* The Chamber ordered the Prosecutor to call both investigators and intermediaries to shed light on issues raised with regard to manipulation of the evidence by intermediaries. Lubanga, ICC-01/04-01/06-2434-Red2, Redacted

from the conflict, intermediaries could easily manipulate them. The Chamber observed that the risk for such manipulation to occur was increased by the OTP's lack of adequate supervision over the investigations carried out by the intermediaries.[79]

¶26 With regard to specific intermediaries, the Trial Chamber noted the consistent lack of credibility of the witnesses introduced by P-143 (P-0007, P-0008, P-0010 and P-0011) and accepted that "there is a real risk that he played a role in the markedly flawed evidence that these witnesses provided to the OTP and to the Court".[80] The Chamber concluded that P-143 probably "persuaded, encouraged, or assisted witnesses to give false evidence".[81] The Chamber also found that "a real possibility exists that P-0321 encouraged and assisted witnesses to give false evidence".[82] And as to intermediary P-316, the Chamber went even further: "there are strong reasons to believe that P-316 persuaded witnesses to lie as to their involvement as child soldiers within the UPC."[83]

¶27 OTP investigators knew that their intermediaries might be manipulative and have their own agendas.[84] However, this did not cause investigators to proceed with caution. For instance, the Prosecutor's Office had no difficulty in relying on P-316, who they knew had worked, and probably still was working, as an intelligence agent for the government of DRC.[85] The OTP was fully aware of defense allegations that the government played a significant role in the conflict.[86] They paid no heed; all that mattered to the investigators was that P-316 provided valuable information despite the risk of bias.[87] The Judges were not impressed.[88]

¶28 The investigators continued to use intermediary P-316 extensively both in *Lubanga* and the *Katanga & Ngudjolo* cases until some time in 2008, long after the investigators themselves had started to doubt his credibility.[89] As early as February 13, 2006, following the discovery that P-316 had invented an incident of harassment of three children,[90] an investigator's note stated that "[t]he investigators have decided not to establish further initial contacts with former child

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Decision on Intermediaries, *supra* note 23. The Chamber also allowed the defense considerable time to explore the issue of manipulation in cross-examination and in submissions to the Chamber. Lubanga, ICC-01/04-01/06-2690-Red2, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings," *supra* note 9.

[79] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 482.

[80] *Id.* ¶ 291.

[81] *Id.* ¶¶ 291, 483.

[82] *Id.* ¶ 483*; see also id.* ¶ 450 ("the significant possibility has been established that P-0321 improperly influenced the testimony of a number of the witnesses called by the prosecution").

[83] *Id.* ¶ 483.

[84] *Id.* ¶¶ 205, 316 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 19, 70–71).

[85] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶¶ 205, 302–04, 366–67.

[86] *See, inter alia*, the defense opening submissions on January 27, 2009. Lubanga, ICC-01/04-01/06-T-236-CONF-ENG ET, Hearing, *supra* note 67, at 27–33.

[87] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶¶ 205, 316 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 19, 70–71).

[88] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 368 ("Given the likelihood of political tension, or even animosity, between the accused and the government, *it was wholly undesirable for witnesses to be identified, introduced and handled by one or more individuals who, on account of their work or position, may not have had, to a sufficient degree or at all, the necessary qualities of independence and impartiality*. Whilst it is acceptable for individuals in this category to provide information and intelligence on an independent basis, they should not become members of the prosecution team. Moreover, *any information and intelligence they provide should be verified and scrutinised by the prosecution*, in order to avoid any manipulation or distortion of the evidence.") (emphasis added).

[89] *Id.* ¶ 294.

[90] *Id.* ¶¶ 313–19 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 3, 69, 75).

soldiers through intermediary [P-0316], as he proved to be unreliable in his approach."[91] More senior voices in the OTP decided to ignore these views.[92] Lavigne, too, appears to have been fixated on the idea that P-316 produced credible information.[93] He did not want to lose the support of a source of information he trusted on the basis of "one incident."[94]

¶29 It was not one incident. In the following years, P-316 concocted numerous other claims of threats against his assistant P-183 and himself.[95] He even asserted that P-183 and his family had been killed by rebels, and that the killers were now after him.[96] P-316 made this claim initially in October 2008 and repeated it in October 2009 and November 2010, although he changed some of the details.[97] The OTP knew that P-183 was alive.[98] Investigators' notes drafted between 2008 and 2010 reveal their skepticism and show that they did not even inform the Victims and Witnesses Unit (the "VWU") of some of his allegations of threats made to him: they knew members of P-316's family were providing conflicting accounts of the alleged incidents, but this did not stop them from continuing to rely on P-316 and continuing to put the witnesses they had gathered through him forward as witnesses of truth.[99]

¶30 Although not as uniform and explicit, investigators' reports reveal that they did not completely trust intermediary P-143, either.[100] This distrust increased over the years, but the Prosecution retained P-143 long after the reasons for distrust were apparent.[101]

¶31 The Chamber in *Lubanga* concluded that "the prosecution should not have delegated its investigative responsibilities to the intermediaries."[102]

B. Katanga and Ngudjolo

¶32 The cases of *Katanga* and *Ngudjolo*, initially a joint case but severed recently,[103] concern two militiamen who were fighting against the UPC in the eastern district of Ituri, the same conflict zone as in *Lubanga*.[104] The same problems were faced and the same methods used to overcome them.

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[91] *Id.* ¶ 317.
[92] *Id.* ¶ 315.
[93] Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 6. Ironically, the Judges came to a diametrically opposed finding in this respect. *See* Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 483.
[94] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 316 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 71–72).
[95] *Id.* ¶¶ 369–71.
[96] *Id.* ¶ 369.
[97] *Id.* ¶¶ 369–71 (citing EVD-D01-01004 at DRC-OTP-0230-0460 and 0461). The account P-0316 gave to the prosecution at a later stage differs to the extent that he said his relatives informed him, and his parents had not been killed, EVD-D01-00372, 0457-0458). When questioned on this matter in October 2009 and again in November 2010, P-0316 reiterated this claim (EVD-D01-00372, 0457-0458). *See also* T-331-Red2-ENG, 81–82; T-332-Red2-ENG, 12–17.
[98] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 369 (citing T-332-Red2-ENG, 5–6).
[99] *Id.* ¶ 370, (citing EVD-D01-01EVD-D01-01004).
[100] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 289–90, 317–19.
[101] *Id.* ¶ 219 (P-143's contract was renewed until sometime in 2010).
[102] *Id.* ¶ 482.
[103] Katanga, ICC-01/04-01/07-3319-tENG/FRA, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused persons, *supra* note 17.
[104] *See* ICC, Prosecutor v. Germain Katanga, ICC-01/04-01/07-1-US-tENG, Urgent Warrant of Arrest for Germain Katanga, 3 (July 2, 2007), http://www.icc-cpi.int/iccdocs/doc/doc349648.PDF (reclassified as public pursuant to ICC-01/04-01/07-24, Decision to Unseal the Warrant of Arrest Against Germain Katanga (Oct. 18, 2007), http://www.icc-cpi.int/iccdocs/doc/doc355559.PDF); *see also* ICC, Prosecutor v. Mathieu Ngudjolo Chui, ICC-

¶33 The Prosecutor again failed to put investigators on the ground, save on a limited number of occasions.[105] Only one investigative mission was made to the village of Bogoro before the Prosecutor requested an arrest warrant against Katanga (and later, Ngudjolo) for crimes committed in Bogoro.[106]

¶34 Following this first mission to Bogoro, which was undertaken in early 2007, the OTP did not return to Bogoro for two years.[107] Only in 2009 did the OTP conduct a forensic investigation in Bogoro, but this was too late to have any probative value.[108] The investigation team did not visit any other important village.[109] Until the judicial site visit in January 2012, months after the presentation of all evidence,[110] nobody from the OTP ever visited Aveba or Zumbe, the home villages of the two accused, with the purpose of investigating.[111] The prosecution case was that the accused were at these localities while they were preparing to commit the crimes charged from these localities.[112] Villagers in Aveba and Zumbe must have been witnesses to these preparations—if they occurred—but the OTP never troubled to ask them.[113] In the judgment of Ngudjolo, the Chamber expressed regret that the OTP had not visited Aveba and Zumbe during the course of its investigations.[114]

¶35 The purported reasons for avoiding onsite investigations were similar to those raised in *Lubanga*: the security of the OTP personnel and the safety of potential informants.[115] The chief of investigations in the *Katanga & Ngudjolo* case, who was called by the Chamber as the first witness to explain a number of issues in relation to the investigations, spoke of security and health risks, including cholera, Ebola and Malaria. These risks had, she said, delayed the

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01/04-02/07-1-tENG, Warrant of Arrest for Mathieu Ngudjolo Chui, 3 (July 6, 2007), http://www2.icc-cpi.int/iccdocs/doc/doc453054.PDF (reclassified as public pursuant to ICC-01/04-01/07-260-tENG, Decision to Unseal Warrant of Arrest Against Mathieu Ngudjolo Chui (Feb. 7, 2008), http://www.icc-cpi.int/iccdocs/doc/doc455949.PDF).

[105] ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, ¶¶ 450–54 (June 29, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1436184.pdf.

[106] ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-T-81-Red-ENG, Trial Hearing, 21, 40 (Nov. 25, 2009), http://www.icc-cpi.int/iccdocs/doc/doc787558.pdf [hereinafter Katanga & Ngudjolo Trial Hearing, ICC-01/04-01/07-T-81-Red-ENG].

[107] Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶ 454.

[108] *See* Ngudjolo Judgment, ICC-01/04-02/12-3, *supra* note 18, ¶ 118, n. 266.

[109] *Id.* ¶¶ 450–53.

[110] ICC, Press release, ICC Judges in Case Against Katanga and Ngudjolo Chui Visit Ituri, ICC-CPI-20120127-PR765 (Jan. 27, 2012), http://www2.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/press%20releases/pr765. The author participated personally in this judicial site visit.

[111] Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶¶ 450–52; ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-T-338-CONF-ENG, Closing Statements, 75–76 (May 21, 2012), http://icc-cpi.int/iccdocs/doc/doc1423314.pdf. This was confirmed by the chief investigator in the case. *See* Katanga & Chui Trial Hearing, ICC-01/04-01/07-T-81-Red-ENG, *supra* note 106, at 65–66. Luis Moreno-Ocampo visited Zumbe once, not to investigate but to reach out to the people. See *infra* notes 322–24.

[112] ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-3251-Corr-Red, Corrigendum du Mémoire Final, ¶¶ 161–62, 175–76, 209–15, 304–08, 311–19, 327–41, 520–51, 624–27 (July 3, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1436782.pdf.

[113] Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶¶ 450–52.

[114] Ngudjolo Judgment, ICC-01/04-02/12-3, *supra* note 18, ¶ 117.

[115] Katanga & Ngudjolo Trial Hearing, ICC-01/04-01/07-T-81-Red-ENG, *supra* note 106, at 8–10.

investigations.[116] Furthermore, she held it was too dangerous to travel around Ituri because there were still active militia groups around.[117] The prosecution found similar solutions as in *Lubanga*: reliance on third-party organizations and intermediaries.

1. Reliance on Third-Party Organizations

¶36 As in *Lubanga*, the prosecution relied heavily on the work product of MONUC and NGOs.[118] Similar problems as in *Lubanga* arose with regard to the excessive use by the OTP of its power to enter into confidentiality agreements.[119] The Single Judge of the Pre-Trial Chamber expressed severe criticism.[120] She held that the prosecution had "recklessly accepted, as a matter of course, thousands of documents from numerous providers" pursuant to the to article 54(3)(e) of the Statute.[121] The Single Judge marked it as an "institutional" problem and urged the prosecution to find a permanent solution.[122]

¶37 Unlike in *Lubanga*, this did not lead to a stay in *Katanga & Ngudjolo* because it occurred at the confirmation stage when no ultimate findings on the guilt or innocence of the defendants are made.[123] By the time the trial started, as in *Lubanga*, the UN had agreed to allow the Chamber to review the documents that were marked as potentially exonerating, and most of the documents were subsequently disclosed to the defense.[124]

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[116] *Id.*; *see also* Lubanga, ICC-01/04-01/06-2690-Red2, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings," *supra* note 9, ¶¶ 123–24.

[117] Katanga & Ngudjolo Trial Hearing, ICC-01/04-01/07-T-81-Red-ENG, *supra* note 106, at 9.

[118] This is apparent from, amongst others, ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-646, Decision on the 19 June 2008 Prosecution Information and Other Matters Concerning Articles 54 (3)(e) and 67 (2) of the Statute and Rule 77 of the Rules, 4 (June 25, 2008), http://www.icc-cpi.int/iccdocs/doc/doc520402.PDF [hereinafter Katanga & Ngudjolo, ICC-01/04-01/07-646, Decision on Prosecution Information]; ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-621, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, ¶¶ 1–64 (June 20, 2008), http://www.icc-cpi.int/iccdocs/doc/doc514860.pdf [hereinafter Katanga & Ngudjolo, ICC-01/04-01/07-621, Decision on Article 54(3)(e) Documents]; ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-77, Public Prosecution's Report on the Status of the Procedures Initiated Under Articles 54(3)(e), 73 and 93 in Relation to Those Items Identified as of a Potentially Exculpatory Nature Under Article 67(2) of the Statute, ¶ 1 (Nov. 14, 2007). This is also based on the author's personal participation in the proceedings against Katanga and Ngudjolo.

[119] *See* Katanga & Ngudjolo, ICC-01/04-01/07-621, Decision on Article 54(3)(e) Documents, *supra* note 118, ¶¶ 31–64; Katanga & Ngudjolo, ICC-01/04-01/07-646, Decision on Prosecution Information, *supra* note 118, ¶¶ 1–8, 10, 20–23.

[120] *See* Katanga & Ngudjolo, ICC-01/04-01/07-621, Decision on Article 54(3)(e) Documents, *supra* note 118, most notably ¶¶ 46, 102–03; Katanga & Ngudjolo, ICC-01/04-01/07-646, Decision on Prosecution Information, *supra* note 118, ¶ 7.

[121] *See* Katanga & Ngudjolo, ICC-01/04-01/07-621, Decision on Article 54(3)(e) Documents, *supra* note 118, ¶ 46.

[122] *Id*. ¶¶ 102–03. Then, four days before the confirmation hearing the Single Judge was presented by the Prosecutor with 1172 previously undisclosed items, most coming from the United Nations. The Single Judge noted that these had 'been within the Office of the Prosecutor for years.' *See* Katanga & Ngudjolo, ICC-01/04-01/07-646, Decision on Prosecution Information, *supra* note 118, ¶ 7.

[123] Katanga & Ngudjolo, ICC-01/04-01/07-621, Decision on Article 54(3)(e) Documents, *supra* note 118, ¶¶ 65–66, 70, 77–85, 93–94, 108.

[124] From personal participation in the proceedings against Katanga and Ngudjolo, the author is aware that gradually the OTP disclosed most of the exonerating material obtained under article 54(3)(e) albeit initially with many redactions. *See* ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-1661-Red2-tENG, Second Decision on Documents Obtained Pursuant to Article 54(3)(e) and Already Disclosed to the Defence in Redacted Form, (Dec. 21, 2009), http://www.icc-cpi.int/iccdocs/doc/doc1072942.pdf; ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-931-tENG, Reasons for the Oral Decision of 3 February 2009 on the Procedure for the Redaction of Documents Obtained by the Prosecutor Under Article 54(3)(e) of the Statute and Order Instructing the Prosecutor to Submit Documents to the Chamber, (Feb. 26, 2009), http://www.icc-

¶38 In the cases that came after the *Lubanga* and *Katanga* fiascos, the number of documents obtained under article 54(3)(e) has significantly reduced.[125]

2. Reliance on Intermediaries

¶39 In *Katanga & Ngudjolo,* the prosecution also employed intermediaries. Two of the intermediaries whose reliability was questioned in *Lubanga*—P-316 and P-143—were also used in this case. Fifteen of the prosecution witnesses were introduced to the investigators by these two intermediaries.[126]

¶40 In *Katanga & Ngudjolo,* there were three witnesses who were alleged to have been recruited into the militia when they were under fifteen years old (P-28, P-279, P-280). Two of them (P-279, P-280) came through intermediary P-143, who had introduced numerous alleged child soldiers to the OTP in the *Lubanga* case.[127]

¶41 Once again, the correct age of the alleged child soldier witnesses was hotly disputed.[128] Some of them, particularly P-279 and P-280, provided very confused evidence about their correct age.[129] The defense challenged the age of each alleged child soldier, introduced documentary evidence, and called defense witnesses who contradicted the witnesses with respect to their ages and alleged membership in the militia.[130] In Ngudjolo's judgment, the Chamber found that this counter-evidence, in particular the documents relating to the age of these witnesses, raised sufficient doubt about their correct age so as not to rely on any of them as 'child' soldiers.[131]

¶42 Witnesses P-279 and P-280 had grown up together and had been neighbours all their lives.[132] Evidence showed that intermediary P-143 would meet them together at the same time.[133] They were both interviewed at Beni, DRC in the same period and by the same prosecution

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cpi.int/iccdocs/doc/doc714513.pdf; ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-839-tENG, Order Instructing the Prosecutor to Provide Additional Details About Certain Disclosure Notes, Inspection Reports and the Report Dated 5 January 2009 (Regulation 28 of the Regulations of the Court), (Jan. 21, 2009), http://www.icc-cpi.int/iccdocs/doc/doc643821.pdf.

[125] Indeed, the OTP has altered its policy in this regard and claims it continues to work on improvement of the quality of its work, amongst others, by "reducing reliance on confidential information". *See* ICC Office of the Prosecutor, Prosecutorial Strategy 2009–2012, ¶ 34(b) (Feb. 1, 2010), http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf.

[126] Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶ 462.

[127] *Id.* ¶¶ 462, 487.

[128] *Id.* ¶¶ 27, 32–36, 60–68, 156, 166–71.

[129] *See* ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-T-220-Red-ENG, Trial Hearing, 25–28 (Nov. 22, 2010), http://www.icc-cpi.int/iccdocs/doc/doc983608.pdf [hereinafter Katanga & Ngudjolo, ICC-01/04-01/07-T-160-Red-ENG, Nov 22 Hearing]; ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-T-160-Red-ENG, Trial Hearing, 74–75 (June 23, 2010), http://www.icc-cpi.int/iccdocs/doc/doc922590.pdf [hereinafter Katanga & Ngudjolo, ICC-01/04-01/07-T-160-Red-ENG, June 23 Hearing]; ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-T-151-Red-ENG, Trial Hearing, 22–25 (June 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc1005312.pdf [hereinafter Katanga & Ngudjolo, ICC-01/04-01/07-T-160-Red-ENG, June 8 Hearing].

[130] Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶¶ 25–94, 151–242, 487–89.

[131] Ngudjolo Judgment, ICC-01/04-02/12-3, *supra* note 18, ¶¶ 177–80, 203 (addressing P-279). *See also id.* ¶¶ 234–37 (addressing P-28).

[132] Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶¶ 26, 92.

[133] *Id.* ¶ 487 (citing D2-147-T-261, at 42, 49, 52 and D2-146-T-264, at 42–43, 46).

investigators.[134] They were subsequently relocated and disappeared from their community at the same time.[135] Yet, they denied knowing each other.[136] Even when the defense showed P-279 a picture of himself together with P-280, P-279 denied knowing who the other person in the picture was.[137]

¶43 The testimony of P-279 was so contradictory that one of the defense teams, although unsuccessfully, requested the Chamber to order the prosecution to initiate proceedings for perjury against him.[138] The OTP later conceded that P-279 and P-280 were in fact older than fifteen at the time of their alleged recruitment into the militia and thus not child soldiers.[139] The Prosecution's new position was that these witnesses were simply mistaken about their ages and could still be relied on as witnesses of truth.[140] The defense has submitted otherwise.[141] The Chamber agreed with the defense and found generally that P-279 and P-280 gave such inconsistent and unreliable accounts that neither of them could be relied on in determining Ngudjolo's criminal liability.[142]

¶44 Another witness, P-28, gave a detailed account of being kidnapped with four other boys by thirty-six militiamen and forced to join the militia.[143] He later accepted this account was false claiming he had acted on the instructions of another intermediary, P-183, although in an earlier interview of July 3, 2009, he denied that this intermediary told him to lie.[144] He could not explain the contradiction.[145] In court, he was firm that he had lied as instructed by P-183, stating:

> I did not look for any officers from the OTP or from the Defence teams or from any service at the ICC. I did not look for anyone. There was one person who put me in contact with the investigators, and it is that individual who told me that I had to say that I was returning from school, to give this account about the school.

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[134] Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶ 487 (citing P-279-T-151, at 51; P-279-T-152, at 47–48; and P-280-T-161, at 26).

[135] *Id.* ¶¶ 26, 492 (citing D2-147-T-261, at 57–58).

[136] *Id.* ¶ 487 (citing P-279-T-151, at 48–51). In the Ngudjolo Judgment, ICC-01/04-02/12-3, *supra* note 18, ¶ 181, the Chamber found that this denial undermined the credibility of these witnesses.

[137] Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶ 487 (citing P-279-T-152, at 43–46).

[138] ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-2243-Red, Requête de la Défense de Mathieu Ngudjolo Aux Fins de Solliciter le Déclenchement des Poursuites Judiciaires à Charge du Témoin P-279 de l'Accusation Pour Atteintes à L'administration de la Justice Article 70(1)(a) (b) du Statut de Rome (Sept. 22, 2010). The initial confidential application was filed on June 14, 2010. *See* ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-2195-Conf., Confidential Application (June 14, 2010). This application was subsequently dismissed by oral decision on September 22, 2010. ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-T-190-Red-ENG, Trial Hearing, 1–5, (Sept. 22, 2010) http://212.159.242.181/iccdocs/doc/doc941333.pdf.

[139] Katanga & Ngudjolo, ICC-01/04-01/07-3251-Corr-Red, Corrigendum du Mémoire Final, *supra* note 112, ¶¶ 781, 788.

[140] *Id.*

[141] Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶ 27.

[142] Ngudjolo Judgment, ICC-01/04-02/12-3, *supra* note 18, ¶¶ 177–79, 189–90, 192, 203, 218–19.

[143] Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶¶ 180–85.

[144] *Id.* ¶¶ 183–87.

[145] *Id.* ¶ 481 (citing P-28-T-221, at 25–32, 38–39).

> I am not the one who made it up. I am not the person who invented all of this. It was an account that I was told to relate.[146]

¶45 Proceedings in *Katanga* are still ongoing. But the Chamber recently acquitted Ngudjolo. Although the Chamber did not specifically address the role of intermediaries in this judgment, it found that none of the 'child' soldiers or other witnesses, who claimed to have been in the militia and implicated Ngudjolo, were reliable.[147] With regard to P-28, the Chamber noted his several inconsistencies and admitted lies. It therefore found his testimony unreliable with regard to his claimed role in the militia and participation in the attacks on Bogoro and Mandro. It did not rely on P-28's testimony at all in relation to Ngudjolo.[148]

¶46 It is very striking that the judges in the two judgments issued so far by the ICC, both relating to the DRC, have dismissed all 'child' soldier witnesses, as well as other witnesses allegedly in the relevant armed groups. All of these witnesses were introduced to the OTP by intermediaries, This suggests that, also in Ngudjolo's case, intermediaries encouraged the witnesses to lie about their age and other matters.

C. Other ICC Cases

¶47 There is little public information about the use of intermediaries in other ICC cases. With the exception of the *Bemba* case, which largely takes place behind closed doors, the other pending cases are not far advanced and the nature of the Prosecutor's investigations is less clear. It is too early to draw firm conclusions about the investigations in these cases. Nonetheless, a number of observations can be made on the basis of the Prosecutor's own admissions as well as defense submissions pertaining to investigation deficiencies.

¶48 With the possible exception of the situation in the Ivory Coast, the OTP's visits to the crime-base areas are sporadic and subject to strict limitations of security. As a result of their infrequent presence in the crime-base areas, many steps a diligent prosecutor anywhere in the world would be expected to take have so far not been taken.

1. North and South Kivu, DRC

¶49 In the Kivu provinces in east Congo, Callixte Mbarushimana was suspected of being criminally liable for war crimes and crimes against humanity perpetrated by members of the Democratic Forces for the Liberation of Rwanda (the "FDLR") of which he was the Executive Secretary.[149] If the OTP conducted onsite investigations in the Kivu provinces, the results were negligible. For the purpose of the confirmation hearing, the OTP relied heavily on NGO and UN reports, often one single report in relation to each attack charged.[150]

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[146] Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶ 480 (quoting P-28-T-221, at 22–23). *See also* Katanga & Ngudjolo, ICC-01/04-01/07-T-220-Red-ENG, *supra* note 129, at 55–59.

[147] Ngudolo Judgment, *supra* note 18, ¶¶ 157–59 (P-250), ¶¶ 189–90 (P-279), ¶¶ 218–19 (P-280), ¶ 254 (P-28), ¶¶ 281–83 (P-219).

[148] *Id.* ¶¶ 251, 254. The Chamber, however, left open the possibility to rely on his testimony with regard to some limited aspects concerning his life in Aveba and contacts with the militia there. The extent to which it will rely on his testimony is still to be determined in relation to Katanga. *See id.* ¶¶ 252–53.

[149] ICC, Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10-2-tENG, Warrant of Arrest for Callixte Mbarushimana, at 1, 8 (Sept. 28, 2010), http://www.icc-cpi.int/iccdocs/doc/doc954979.pdf.

[150] ICC, Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, ¶¶ 117–18, 120 (Dec. 16, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1286409.pdf.

¶50 The reasons that the OTP barely conducted its own independent investigations on the ground in the Kivu provinces are unclear. It is true that, in North Kivu, the situation has recently deteriorated, seemingly as a result of threats to arrest ICC suspect Bosco Ntaganda, who has meanwhile surrendered himself to the US embassy in Kigali and been transferred to the ICC.[151] But at the time when the OTP could and should have been conducting the investigations in the *Mbarushimana* case, the situation was relatively stable. Until recently, most towns and villages in North and South Kivu were readily accessible. There were even some tourist activities going on in and near Goma, the capital of North Kivu.[152]

¶51 Deficient investigations were partly the reason that the Pre-Trial Chamber did not confirm the case against Mbarushimana. The Chamber noted "the paucity of the information" in the reports,[153] "inconsistencies between the information [in the reports] and the Prosecution's allegations,"[154] and "the lack of any independent corroborating evidence."[155] The evidence submitted by the Prosecution was "not sufficient to establish substantial grounds to believe that the alleged attacks occurred in Ruvundi, Mutakato, or Kahole."[156] The Pre-Trial Chamber similarly found that numerous other attacks were not proven on the "sufficient grounds to believe" standard because they were not substantiated other than by assumptions or information from third parties.[157]

2. Kenya and Abu Garda

¶52 Up until the confirmation of charges hearing, the Kenyan investigations relied primarily on the investigations carried out by the Commission of Inquiry into the Post-Election Violence (also called the "Waki Commission" after its chairman, Justice Philip Waki), an initiative funded jointly by the Kenyan government and the multi-donor Trust Fund for National Dialogue and Reconciliation.[158] The Waki Commission was tasked with investigating the violence that erupted

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[151] *See* ICC, Press Release, ICC Prosecutor welcomes news of Ntaganda's transfer to the Court (Mar. 22, 2013), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/rstatement-22-03-2013.aspx; ICC, Press Release, Bosco Ntaganda in the ICC's custody (Mar. 22, 2013), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr888.aspx. On the events in eastern DRC prior to Mr. Ntaganda's surrender, see ICC, Press Release, ICC Prosecutor Fatou Bensouda on Recent Events in Eastern DRC: Bosco and Mudacumura Must Be Arrested, Now, (Nov. 11, 2012), http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/icc%20prosecutor%20fatou%20bensouda%20on%20recent%20events%20in%20eastern%20drc_%20bosco%20and%20mudacumura%20must%20be%20arrested. *See also DR Congo: M23 Rebels Committing War Crimes*, HUM. RTS. WATCH, (Sept. 11, 2012), http://www.hrw.org/news/2012/09/11/dr-congo-m23-rebels-committing-war-crimes. The fighting started in April 2012, shortly before the ICC issued a second arrest warrant against Ntaganda, following an OTP request to do so on May 14, 2012. *See* ICC, Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-36-Red, Decision on the Prosecutor's Application Under Article 58, (July 13, 2012). The suspicion is that Ntaganda, leader of the rebel group M23, is not acting alone, but with the support of Rwanda. *See M23 Rebels*, HUM. RTS. WATCH, *supra*.

[152] As late as 2012, visitors including this author (in January 2011) came to the Goma region to climb the Nyiragongo Volcano known for its lava lake, or to see the mountain gorillas in the Virunga National Park.

[153] Mbarushimana, ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, *supra* note 150, ¶ 120.

[154] *Id.*

[155] *Id.*; *see, e.g.*, *id.* ¶¶ 113–20.

[156] Mbarushimana, ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, *supra* note 150, ¶ 120.

[157] *Id.* ¶¶ 121–36.

[158] *See* WAKI REPORT: COMM'N OF INQUIRY INTO POST-ELECTION VIOLENCE (2008), EVD-PT-OTP-00004_KEN-OTP-0001-0364, http://humansecuritygateway.com/documents/WAKI_Kenya_Post-ElectionViolenceReport.pdf [hereinafter WAKI REPORT, EVD-PT-OTP-00004_KEN-OTP-0001-0364]. Named after Judge Waki, the Waki Commission was set up on May 23, 2007 and the international members of the Commission were sworn in on June 3, 2008. *Id*. at 1.

in Kenya following the disputed presidential election held in December 2007.[159] The Waki Commission compiled a report of 518 pages, including appendixes, detailing its findings based on thousands of pages of supporting materials collected over the course of nearly a year and a half.[160] The OTP received all of these materials as well as a list of names of persons potentially implicated in the post-election violence in Kenya at the end of 2007, beginning of 2008.[161] In addition, the OTP benefited from detailed reports compiled by the Kenyan National Commission on Human Rights (KNCHR), as well as by other human rights organizations such as Human Rights Watch (HRW).[162]

¶53 Unquestionably, these materials provided the OTP with an impressive starting point upon which it could have built its own cases based on its own independent investigations. Unfortunately, at least until confirmation, the OTP appears to have relied on this information gathered by third parties in lieu of, rather than in addition to, its own investigations.[163]

¶54 This reliance is clear from the Prosecutor's own submissions. In a press release on January 24, 2012, following the confirmation of the charges of four out of six Kenyan suspects, the Prosecutor himself stated that the OTP had no witnesses in Kenya and that their investigations had been carried out mainly outside Kenya.[164] He indicated that, now that the charges were confirmed, the prosecution would need to move into Kenya to investigate the crime base and engage with the victims.[165] The Prosecutor did not, however, explain why the OTP had handicapped itself in this way in preparation for the crucial confirmation hearing.[166]

¶55 Throughout the confirmation proceedings, all defense teams in the *Kenya I* and *Kenya II* cases made submissions pertaining to the Prosecutor's incomplete investigations.[167] In particular,

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[159] *Id.* (The latter was managed by the United Nations Development Programme (UNDP)).

[160] *See* WAKI REPORT, EVD-PT-OTP-00004_KEN-OTP-0001-0364, *supra* note 158. The Waki Commission handed over its report to the government on October 15, 2008. *See* Oliver Mathenge, *Waki Report To Be Handed Over*, DAILY NATION, (Oct. 14, 2008), http://www.nation.co.ke/News/politics/-/1064/480490/-/ywbs9iz/-/index.html.

[161] ICC, Press Release, ICC-OTP-20090716-PR439, Waki Commission List of Names in the Hands of ICC Prosecutor (July 16, 2009), http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/kenya/Pages/pr439.aspx.

[162] KENYAN NAT'L COMM. ON HUM. RTS. REPORT, ON THE BRINK OF THE PRECIPICE: A HUMAN RIGHTS ACCOUNT OF KENYA'S POST-2007 ELECTION VIOLENCE, EVD-PT-OTP-00001_KEN-OTP-0001-0002, (Aug. 15, 2008) http://www.knchr.org/Portals/0/Reports/KNCHR_REPORT_REPORT_ON_THE_BRINK_OF_THE_PRECIPE.pdf ; HUM. RTS. WATCH REPORT, BALLOTS TO BULLETS: ORGANIZED POLITICAL VIOLENCE AND KENYA'S CRISIS OF GOVERNMENT, (Mar. 2008) http://www.hrw.org/reports/2008/kenya0308/kenya0308web.pdf. *See, e.g.*, ICC, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang, ICC-01/09-01/11-355, William Samoei Ruto Defence Brief Following the Confirmation of Charges Hearing, ¶¶ 28–29 (Oct. 24, 2011), http://www2.icc-cpi.int/iccdocs/doc/doc1251431.pdf.

[163] This was one of the defense submissions at the Kenyan confirmation stage. *See, inter alia*, ICC, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang, ICC-01/09-01/11-355, Ruto Defence Brief, *supra* note 162, ¶¶ 6, 28; *see also* ICC, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang, ICC-01/09-01/11-354, Joshua Arap Sang Defence Brief Following the Confirmation of Charges Hearing, ¶¶ 22–27 (Oct. 24, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1251439.pdf.

[164] Press Conference held by Luis Moreno-Ocampo on January 24, 2012 relating to the Pre-Trial Chamber's decision on the confirmation of the charges in *Kenya I* and *II*, issued on January 23, 2012, *available at* http://www.youtube.com/watch?v=0-WYkNYXvug&feature=relmfu.

[165] *Id.*

[166] The OTP failed to do so despite it being raised by the defense. *See, inter alia*, Ruto, Kosgey & Sang, ICC-01/09-01/11-355, Ruto Defence Brief, *supra* note 162, ¶¶ 6, 28; *see also* Ruto, Kosgey & Sang, ICC-01/09-01/11-354, Sang Defence Brief, *supra* note 163, ¶¶ 22–27.

[167] *See* Ruto, Kosgey & Sang, ICC-01/09-01/11-355, Ruto Defence Brief, *supra* note 162, ¶¶ 4–10, 24–29; ICC, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang, ICC-01/09-01/11-T-6-Red-ENG, Redacted Confirmation of Charges Hearing, at 113–17 (Sept. 2, 2011), http://www.icc-

they complained about the Prosecutor's failures to interview any person with potentially exculpatory information,[168] to collect even the most readily available exculpatory material,[169] to collect any tangible material to corroborate the evidence from the anonymous witnesses on whom they relied,[170] and to follow up on various investigation leads.[171] In failing to take these steps, the Prosecutor had missed an opportunity to verify the accuracy of the stories of witnesses it relied on as witnesses of truth.

¶56 Similar arguments of incomplete investigations were made during the *Abu Garda* confirmation proceedings.[172] The OTP chief of investigations testified at the confirmation hearing, at defense request, to explain why certain steps had not been taken.[173] Unfortunately, the entire testimony was in closed session and thus the explanations remain unknown to the public.[174]

¶57 The Pre-Trial Chambers in *Abu Garda* and by majority in *Kenya I* and *II* have taken the position that investigative failures cannot, by themselves, be a ground to decline to confirm the

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cpi.int/iccdocs/doc/doc1230545.pdf; Ruto, Kosgey & Sang, ICC-01/09-01/11-354, Sang Defence Brief, *supra* note 163, ¶¶ 4, 16–21, 29–38; ICC, Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali, ICC-01/09-02/11-374-Red, Public Redacted Version of Final Written Observations of the Defence Team of Ambassador Francis K. Muthaura on the Confirmation of Charges Hearing, ¶¶ 69–72 (Dec. 2, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1252614.pdf [herinafter Muthaura, Kenyatta & Ali, ICC-01/09-02/11-374-Red, Final Written Observations]; ICC, Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali, ICC-01/09-02/11-373-Red, Redacted Version of General Mohammed Hussein Ali's Final Submissions on the Confirmation Charges Hearing, ¶ 14 (Dec. 2, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1280619.pdf [hereinafter Muthaura, Kenyatta & Ali, ICC-01/09-02/11-373-Red, General Mohammed Hussain Ali's Final Submissions].

[168] Muthaura, Kenyatta & Ali, ICC-01/09-02/11-374-Red, Final Written Observations, *supra* note 167, ¶¶ 71–72.

[169] For instance, the Ruto defense argued that evidence of Ruto's absence at alleged meetings because he was elsewhere, was readily available. *See* Ruto, Kosgey & Sang, ICC-01/09-01/11-355, Ruto Defence Brief, *supra* note 162, ¶ 7; Ruto, Kosgey & Sang, ICC-01/09-01/11-T-6-Red-ENG, Redacted Confirmation of Charges Hearing, *supra* note 167, at 62–72. General Ali's defense complained that the Prosecution had completely failed to exploit the police efforts to stop the violence and Ali's personal efforts to combat the Mungiki. *See* Muthaura, Kenyatta & Ali, ICC-01/09-02/11-373-Red, General Mohammed Hussain Ali's Final Submissions, *supra* note 167, ¶¶ 23, 27–30, 46.

[170] For instance, the Ruto defense complained that the prosecution had not made any efforts to obtain purchase receipts, bank transfers or other tangible evidence to corroborate allegations of purchasing weapons. *See, inter alia*, ICC, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11-T-12-ENG, Confirmation of Charges Hearing, at 41–45 (Sept. 8, 2011), http://www2.icc-cpi.int/iccdocs/doc/doc1228849.pdf.

[171] For instance, the Ruto defense alleged that the prosecution failed to search for the recording of an alleged inciting speech that was recorded according to the prosecution evidence. *See* Ruto, Kosgey, & Sang, ICC-01/09-01/11-355, Ruto Defence Brief, *supra* note 162, ¶ 22. Both the Ruto and Sang defense complained that the Prosecutor failed to search for any radio broadcasts of Sang's and others' alleged inciting comments notwithstanding that the relevant radio station KASS FM broadcasted from Nairobi. *See* Ruto, Kosgey, & Sang, ICC-01/09-01/11-T-6-Red-ENG, Redacted Confirmation of Charges Hearing, *supra* note 167, at 147–49; *see also* ICC, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang, ICC-01/09-01/11-T-8-Red-ENG, Ex Parte Hearing, at 51–57 (Sept. 5, 2011). The Ruto defense also complained about the Prosecutor's failure to follow up the allegation of coaching and inducing witnesses to implicate Ruto, made by two persons who worked for organizations the Prosecutor relied on. *See* Ruto, Kosgey, & Sang, ICC-01/09-01/11-355, Ruto Defence Brief, *supra* note 162, ¶¶ 19–21; *see also* Ruto, Kosgey & Sang, ICC-01/09-01/11-354, Sang Defence Brief, *supra* note 163, ¶¶ 34–35.

[172] ICC, Prosecutor v. Bahar Idriss Abu Garda, ICC-02/05-02/09-243-Red, Decision on the Confirmation of the Charges, ¶¶ 46–47 (Feb. 8, 2010), http://www.worldcourts.com/icc/eng/decisions/2010.02.08_Prosecutor_v_Abu_Garda.pdf.

[173] ICC, Prosecutor v. Bahar Idriss Abu Garda, ICC-02/05-02/09-186, Decision on Witness to be Called by the Defence at the Confirmation Hearing (Oct. 19, 2009), http://www.icc-cpi.int/iccdocs/doc/doc761072.pdf.

[174] *Id.* at 7–8. His testimony was heard in private session on October 27, 2009. *See* ICC, Prosecutor v. Bahar Idriss Abu Garda, ICC-02/05-02/09-T-18-Red-ENG, Confirmation of Charges Hearing (Oct. 27, 2009), http://www.icc-cpi.int/iccdocs/doc/doc771525.pdf.

charges, but "may have an impact on the Chamber's assessment of whether the Prosecutor's evidence as a whole has met the 'substantial grounds to believe' threshold."[175]

¶58 Indeed, these failures led in part to the non-confirmation of the cases against Abu Garda and two of the Kenyan defendants (Henry Kiprono Kosgey and Mohammed Hussein Ali). These cases were not confirmed due to insufficient evidence or inherent contradictions and inconsistencies between witness statements.[176] Recently, the case against Francis Kirimi Muthaura was withdrawn as well, essentially because the key witness against him had recanted a crucial part of his evidence. The Prosecution was already in possession of this witness's recanting statement at the time the confirmation was held, but had failed to make timely disclosure thereof to the defence.[177]

¶59 At the *Review Conference*, when the author raised the issue of apparent failure to investigate thoroughly, the Prosecution Coordinator's response was, since the prosecution cannot undertake any activity without the state's approval, "a private defense lawyer has, oddly enough, a lot more leeway in terms of investigating than the prosecution does."[178] By way of an example, she said the OTP "can't just go to radio stations in Kenya" as such action requires the consent of

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[175] *See* Abu Garda, ICC-02/05-02/09-243-Red, Decision on Confirmation of Charges, *supra* note 172, ¶ 48; ICC, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶¶ 51–52 (Jan. 23, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf; ICC, Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohammed Hussein Ali, ICC-01/09-02/11-382-Red, Redacted Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶¶ 63–64 (Jan. 23, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf. In *Kenya I* and *II*, dissenting Judge Kaul expressed his disagreement with the majority ruling that this issue does not fall within the scope of the confirmation hearing. He pointed out article 54 required of the Prosecution investigations to cover all incriminating and exonerating facts and evidence. In his view, these requirements are fundamental and must be respected at the confirmation stage. *See* ICC, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey & Joshua Arap Sang, ICC-01/09-02/11-373-Red, Redacted Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Dissenting Opinion of Judge Kaul, ¶¶ 50-52 (Jan. 23, 2012); *see also* Muthaura, Kenyatta & Ali, ICC-01/09-02/11-382-Red, Redacted Decision on Confirmation of Charges, Dissenting Opinion of Judge Kaul, *supra* note 175, ¶ 62.

[176] *See, e.g.*, Abu Garda, ICC-02/05-02/09-243-Red, Decision on Confirmation of Charges, *supra* note 172, ¶¶ 173–236; Ruto, Kosgey & Sang, ICC-01/09-02/11-373-Red, Dissenting Opinion of Judge Kaul, *supra* note 175, ¶¶ 293–300; Muthaura, Kenyatta & Ali, ICC-01/09-02/11-382-Red, Dissenting Opinion of Judge Kaul, *supra* note 175, ¶¶ 420–27.

[177] The defence has alleged bad faith on the part of the Prosecution, but the Prosecution maintains the non-disclosure was in error but not in bad faith. The Prosecution asserts it was the result of a failure " to appreciate that the affidavit contained an inconsistent statement and was thus disclosable as impeachment material". *See, e.g.*, ICC, Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, ICC-01/09-02/11-664-Red2, Public redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statue to refer the confirmation decision back to the Pre-Trial Chamber, ¶¶ 7–9, 41, 44–46 (Feb. 26, 2013). Mr. Kenyatta was also affected by this witness and asked that his case be referred back to the Pre-Trial Chamber for a new confirmation hearing, given that the evidentiary basis for confirming the charges had significantly changed now that the recanting witness could no longer be relied upon. *See, e.g.*, ICC, Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, ICC-01/09-02/11-622, Defence Application to the Trial Chamber Pursuant to Article 64(4) of the Rome Statute to Refer the Preliminary Issue of the Confirmation Decision to the Pre-Trial Chamber for Reconsideration (Feb. 5, 2013). The Chamber has not yet ruled on this issue, nor has it yet determined whether the Prosecution acted with bad faith. It, however, confirmed the Prosecution's subsequent notification of withdrawal of the charges against Mr. Muthaura. *See* ICC, Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, ICC-01/09-02/11-687, Prosecution Notification of Withdrawal of the charges against Francis Kirimi Muthaura (Mar. 11, 2013); ICC, Press Release, Statement by ICC Prosecutor on the Notice to withdraw charges against Mr. Muthaura (Mar. 11, 2013), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/OTP-statement-11-03-2013.aspx; ICC, Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta, ICC-01/09-02/11-696, Decision on the withdrawal of charges against Mr Muthaura (Mar. 18, 2013).

[178] Transcript, *supra* note 13, at 109.

the Kenyan authorities.[179] She did not, however, explain why the OTP needed the consent of the Kenyan authorities to visit a public radio station that operates independently of the Kenyan government. Nor did she explain why then they failed to obtain that consent in a case concerning a radio operator whose main crime was what he allegedly said on the radio. At least up until confirmation, the OTP did not once suggest that it had actually tried – with or without the Kenyan government's authorization – to gather radio transcripts or other tangible evidence which could corroborate the allegations made by witnesses. This, notwithstanding the Prosecutor's continued express position that the Kenyan government is cooperative with the ICC.[180]

3. Darfur

¶60 The OTP has not set foot in Darfur. It did not go before the arrest warrants against Omar Al-Bashir, Ahmed Haroun, and Ali Kushayb were issued, nor after Sudan closed its borders to anyone connected with the ICC following the issue of the warrants.[181]

¶61 It seems fair to accept that ever since the arrest warrants against these government officials have been issued, the situation in Sudan has reached a level of insecurity which inhibits 'on the ground' investigation. Death threats have been publicly announced against anyone who cooperates with the ICC.[182]

¶62 This has caused problems in the ongoing post confirmation proceedings against Abdallah Banda and Saleh Jerbo, two opposition rebels. All parties to the proceedings have been refused entrance into the country. As a result, the defense filed a motion for a temporary stay of proceedings, arguing that a fair trial of the matter was impossible.[183] The defense argued that

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[179] *Id.*

[180] *See* ICC, Prosecutor Fatou Bensouda, Statement at the Press Conference at the Conclusion of Nairobi Segment of ICC Prosecutor's Visit to Kenya, Nairobi, *available at* http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/otpstatement251012 (expressing gratitude to the Kenyan government for their cooperation); see also Former Chief Prosecutor Moreno-Ocampo's address to the Assembly of States Parties, confirming that the Kenyan government was willing to cooperate: "I am particularly grateful for the respect and support Kenyan leaders have demonstrated for our independent role. Since our first meeting, I have been impressed by the commitment of President Kibaki and Prime Minister Odinga to find solutions to past conflicts." In his address to the Assembly of States Parties, former chief Prosecutor Moreno-Ocampo confirmed that the Kenyan government was willing to cooperate: "I am particularly grateful for the respect and support Kenyan leaders have demonstrated for our independent role. Since our first meeting, I have been impressed by the commitment of President Kibaki and Prime Minister Odinga to find solutions to past conflicts." *See* Luis Moreno-Ocampo, Address to the Assembly of States Parties, Ninth Session of the Assembly of States Parties, Speech, New York, 4 (Dec. 6, 2010). This cooperation is further demonstrated by the fact that two candidates of the forthcoming presidential elections (Ruto and Kenyatta) have voluntarily attended all hearings in their respective cases before the ICC. Also, the Kenyan government funded in part the establishment of the WAKI Commission, discussed *supra* note 158, which had the task to investigate the post election violence that occurred at the end of 2007, the beginning of 2008.

[181] The OTP conducted four missions in Khartoum and interviewed two senior officials of the government of Sudan, but did not visit Darfur. *See* ICC, Situation in Darfur, Sudan, ICC-02/05-16, Prosecutor's Responses to Cassese's Observation on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC, ¶ 20 (Sept. 11, 2006), http://www.icc-cpi.int/iccdocs/doc/doc259764.pdf.

[182] *See* ICC, Prosecutor v. Ahmad Harun & Ali Kushayb, ICC-02/05-01/07-48-Red, "Prosecution Request for a Finding on the Non-Cooperation of the Government of the Sudan in the Case of The Prosecutor v. Ahmad Harun and Ali Kushayb, Pursuant to Article 87 of the Rome Statute," ¶¶ 33–36 (Apr. 19, 2010), http://www.icc-cpi.int/iccdocs/doc/doc860985.pdf (quoting Sudanese Director of Intelligence, Salah Gosh's, announcement on February 22, 2009 that "*anyone who attempts to put up his hands to execute [ICC] plans we will cut off his hands, head and parts because it is a non-negotiable issue*.") (emphasis added).

[183] ICC, Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus, ICC-02/05-03/09-274, Defence Request for a Temporary Stay of Proceedings, ¶¶ 18–35, 40–47 (Jan. 6, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1296602.pdf.

they could not prepare an effective defense due to the ongoing insecurity in Darfur and their inability to enter the country.[184] In addition, the defense relied on a public and apparently official death threat against anyone cooperating with the ICC.[185] In particular, the motion asserted that the said death threats resulted in severe restrictions on the ability of the defense to secure evidence, access documents, and ensure the safety of witnesses even when they are contacted by telephone.[186] The prosecution would evidently suffer from similar restrictions.[187]

¶63 Recently the Chamber dismissed the defense motion.[188] Whilst accepting the assertion that onsite investigations were impossible, it held that "the Statute does not include an absolute and an all-encompassing right by the prosecution and the defence to on-site investigations."[189] Accordingly, the Chamber held, it "should not automatically conclude that a trial is unfair, and stay proceedings as a matter of law, in circumstances where States would not allow defence (or prosecution) investigations in the field even if, as a result, some potentially relevant evidence were to become unavailable."[190] Indeed, in the Chamber's view, "the investigation and prosecution of the most serious crimes of international concern should not become contingent upon a States' choice to cooperate or not cooperate with the Court."[191] The Chamber rejected defense arguments on the ground that it had failed to "properly substantiate" its allegation that the lack of access to Sudan rendered impossible the securing of certain lines of defence and exculpatory evidence.[192] Instead, the Chamber decided that the case should proceed to trial and that the defense complaints be dealt with, if need be, during or after the presentation of the evidence.[193]

¶64 Given the impossibility of conducting complete and thorough investigations without the ability to visit the crime scenes,[194] it is debatable whether the Chamber took the correct approach. But the impossibility for either party to visit Sudan is not in dispute.

¶65 However, even before the borders were closed, the OTP position was that the danger—for investigators and informants—was too great to merit a visit to Sudan.[195]

¶66 The reasonableness of this position is questionable. In 2006, the UN High Commissioner for Human Rights, Louise Arbour, and the Chairman of the UN Commission of Inquiry on Darfur, Antonio Cassese, both of whom had experience in Darfur, expressed the view that it should be possible for the Prosecutor to send investigators to Darfur to conduct investigations

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[184] *Id.* ¶¶ 24–35, 44.
[185] *See* Harun & Kushayb, ICC-02/05-01/07-48-Red, Request for Finding on Non-Cooperation, *supra* note 182, ¶¶ 33–36.
[186] *See* Banda & Jerbo, ICC-02/05-03/09-274, Defence Request for Temporary Stay, *supra* note 183, ¶¶ 8–15.
[187] As confirmed by Whiting, *Lead Evidence & Discovery*, *supra* note 61, at 230.
[188] ICC, Prosecutor v. Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus**,** ICC-02/05-03/09-410, Decision on the Defence Request for a Temporary Stay of Proceedings (Oct. 26, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1498141.pdf.
[189] *Id.* ¶ 99.
[190] *Id.* ¶ 100.
[191] *Id.*
[192] *Id.* ¶¶ 102, 108, 110, 112–14.
[193] *Id.* ¶¶ 155–56, 159.
[194] Indeed, without visiting the crime scenes, the parties miss the opportunity to meet with the witnesses closest to the events.
[195] *See* ICC, Situation in Darfur, Sudan, ICC-02/05-16, Prosecutor's Responses to Cassese's Observation, *supra* note 181; *see also* ICC, Situation in Darfur, Sudan, ICC-02/05-21, Prosecutor's Response to Arbour's Observations of the United Nations High Commissioner for Human Rights Invited in Application of Rule 103 of the Rules of Procedure and Evidence (Oct. 19, 2006), http://www.icc-cpi.int/iccdocs/doc/doc259773.PDF.

without increasing the risk for witnesses.[196] Based on her own experience in the region and as a former chief Prosecutor of the ICTY and ICTR, Arbour acknowledged that "[r]isks can never be eliminated absolutely" but added that security threats in Sudan were caused more by the ongoing conflict than by their interaction with human rights investigators, which would be the same for the ICC.[197] The Prosecutor contested this assertion in the strongest terms and did not follow their advice.[198] Events following the issue of arrest warrants have effectively stymied ICC activity in Sudan, but that is no justification for the failure to conduct effective on-site investigations at a time when it was, in the view of those with the experience and the information to be able to judge, perfectly possible.

¶67 This failure to investigate has led to the prosecution's reliance on statements of witnesses and informants outside Sudan, as well as third-party evidence, including documents provided by the UN International Commission of Inquiry on Darfur.[199]

4. Libya

¶68 On February 15, 2011, the Security Council referred the Libyan situation to the ICC.[200] Three months later, on May 16, 2011, without ever visiting the place, the OTP sought arrest warrants for Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi on two counts of crimes against humanity.[201] Pre-Trial Chamber I issued the arrest warrants on June 27, 2011.[202] On October 20, 2011, the Gaddafi regime collapsed.[203] Proceedings against Gaddafi have been terminated following his death.[204] The other two are currently detained in Libya.[205] They are awaiting a decision from the Pre-Trial Chamber as to whether the two detainees in Libya should be tried in Libya or The Hague.[206]

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[196] ICC, Situation in Darfur, ICC-02/05-19, Observations of the United Nations High Commissioner for Human Rights Invited in Application of Rule 103 of the Rules of Procedure and Evidence (Oct. 10, 2006), http://www.icc-cpi.int/iccdocs/doc/doc259768.PDF; ICC, Situation in Darfur, ICC-02/05-14, Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC (Aug. 25, 2006), http://www.icc-cpi.int/iccdocs/doc/doc259762.PDF; *see also* Antonio Cassese, *Is the ICC Still Having Teething Problems?*, 4 J. INT'L CRIM. JUST. 434 (2006).

[197] ICC, Situation in Darfur, ICC-02/05-19, Observations of UN High Commissioner, *supra* note 196, ¶¶ 62, 64, 68.

[198] ICC, Situation in Darfur, Sudan, ICC-02/05-16, Prosecutor's Responses to Cassese's Observation, *supra* note 181; ICC, Situation in Darfur, Sudan, ICC-02/05-21, Prosecutor's Response to Arbour's Observations, *supra* note 195.

[199] ICC, Situation in Darfur, Sudan, ICC-02/05-16, Prosecutor's Responses to Cassese's Observation, *supra* note 181 at ¶ 20.

[200] U.N. Security Council, Security Council Resolution 1970, S/RES/1970 (Feb. 26, 2011), http://www.unhcr.org/refworld/docid/4d6ce9742.html [hereinafter UNSCR 1970].

[201] ICC, Situation in the Libyan Arab Jamahiriya, ICC-01/11-01/11-1, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi & Abdullah Al-Senussi," ¶ 1 (June 27, 2011), http://www.iclklamberg.com/Caselaw/Libya/Gaddafietal/PTCI/1.pdf (citing ICC, Situation in Libya, ICC-Ol/ll-4-Conf-Exp, Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi & Abdullah Al-Senussi, (June 27, 2011)).

[202] *Id.*

[203] *See, inter alia*, Joshua Gleis, *Fall of the Gaddafi Regime: A Brief Analysis*, HUFFINGTON POST (Oct. 20, 2011), http://www.huffingtonpost.com/joshua-gleis/fall-of-the-gaddafi-regim_b_1063041.html.

[204] ICC, Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi & Abdullah Al-Senussi, ICC-01/11-01/11-28, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi (Nov. 22, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1274559.pdf.

[205] Saif Al-Islam Gaddafi is detained by the Zintan brigade, an autonomous group acting independently of the government in Libya. The Zintan has thus far refused to surrender him to the Libyan authorities. *See* Marie-Louise Gumuchian, *Prisoner of Zintan: Gaddafi Son in Libyan Limbo*, REUTERS (Feb. 24, 2012), http://www.reuters.com/article/2012/02/24/us-libya-saif-idUSTRE81N11J20120224. Al-Senussi was surrendered by

¶69 While NGOs such as Amnesty International (AI) and HRW entered Libya immediately after the fall of the Gaddafi regime and the UN Commission of Enquiry already had people on the ground during the war, the ICC OTP did not move for several weeks.[207] On November 2, 2011, the Prosecutor issued a report to the Security Council announcing that the OTP would benefit from the work of the UN Commission of Inquiry, as well as other institutions including the National Transitional Council.[208] The Prosecutor's report also states the following:

> In the light of changed conditions on the ground, the Office is assessing the possibility of investigations on the ground. The NTC has committed to full cooperation in this regard. The Office will undertake all necessary precautions to ensure that adequate and appropriate protection for victims and witnesses in line with the Office's statutory obligations is in place before commencing investigations on the ground.[209]

¶70 From the Prosecutor's next report on Libya, issued on May 16, 2012, it appears that several investigative missions have been conducted in Libya since November 2, 2011.[210] Nonetheless, this report clearly suggests that, at least up until then, the OTP primarily relied on evidence gathered by other bodies, most notably the UN Commission of Inquiry.[211] The OTP's own investigation period was short-lived, as it suspended investigations in respect to the two suspects pending Libya's admissibility challenge.[212] The OTP was required to do so under article 19(7) of the ICC Statute.[213]

Mauritania to the Libyan authorities in Tripoli on September 5, 2012. *See Mauritania Deports Libya Spy Chief Abdullah al-Senussi*, BBC NEWS (Sept. 5, 2012), http://www.bbc.co.uk/news/world-africa-19487228. This surrender to Libya, rather than the ICC, has led to controversy. *See* ICC, Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi, ICC-01/11-01/11-204, Request to Submit Observations Pursuant to Regulation 77(4) of the Regulations of the Court (Sept. 6, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1466144.pdf. *See also* Geoffrey Robertson, *Extradition of Abdullah al-Senussi is a Blow to International Justice*, GUARDIAN (Sept. 5, 2012), http://www.guardian.co.uk/commentisfree/2012/sep/05/extradition-abdullah-al-senussi-justice.

[206] It was the Prosecutor who invited the Libyan authorities to challenge the admissibility of the case of Saif Al Islam Gaddafi & Abdullah al Senussi. *See* ICC, Prosecutor v. Saif Al Islam Gaddafi & Abdullah al Senussi, ICC-01/11-01/11-31, Prosecution's Submissions on the Prosecutor's Recent Trip to Libya, ¶¶ 7–8, 11–13 (Nov. 25, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1276955.pdf.

[207] The Prosecutor made his first official mission to Libya on November 22, 2011, following the arrest of Saif Gaddafi. *See id.* ¶¶ 2–3. *See also* ICC, Press Release, ICC-OTP-20111122-PR745, ICC Prosecutor arrives in Libya (Nov. 22, 2011), http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2011)/pr745.

[208] SECOND REPORT OF ICC PROSECUTOR TO UN SECURITY COUNCIL PURSUANT TO UNSCR 1970, ¶¶ 36, 38–39 (Nov. 2, 2011), http://www.icc-cpi.int/NR/rdonlyres/7D520377-EA90-4605-80EF-E7E111B4C92F/283921/UNSCreportLibyaNov2011ENG1.pdf.

[209] *Id.* ¶ 58.

[210] THIRD REPORT OF ICC PROSECUTOR TO UN SECURITY COUNCIL PURSUANT TO UNSCR 1970, ¶ 11 (May 16, 2012), http://www.icc-cpi.int/NR/rdonlyres/D313B617-6A86-4D64-88AD-A89375C18FB9/0/UNSCreportLibyaMay2012Eng.pdf.

[211] *Id.* ¶¶ 32–35, 47–58. For instance, in this report, the OTP relies exclusively on the findings of the UN Commission of Inquiry in determining that it has no information suggesting that NATO was implicated in committing war crimes. *Id.* ¶¶ 51–58. Further, the report notes the UN Commission's finding that Misratan militias have committed crimes against perceived Gaddafi loyalists including the Tawerghans. *Id.* ¶¶ 47–50.

[212] *Id.* ¶ 30. This has also been confirmed in the Fourth Report. FOURTH REPORT OF ICC PROSECUTOR TO UN SECURITY COUNCIL PURSUANT TO UNSCR 1970, ¶ 12 (Nov. 7, 2012), http://www.icc-cpi.int/NR/rdonlyres/C88D601E-E112-4E87-A162-AD530F467E64/285082/UNSCreportLibyaNov2012_english1.pdf.

[213] Article 19(7) provides: "If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17."

¶71 The Prosecutor nonetheless stated that the OTP would continue to investigate gender-based crimes committed by other possible suspects outside Libya, as identified by the UN Commission of Inquiry.[214] The Prosecutor also mentioned that the OTP was collecting information about "the activities outside Libya of high-level Gaddafi officials who were allegedly involved in Rome Statute crimes and who reportedly continue to seek to destabilize the situation of Libya."[215]

¶72 The Prosecutor's Fourth Report, issued in November 2012 says that the Libyan authorities have generally permitted the OTP to conduct onsite investigations in Libya.[216] The Prosecutor also praised the Libyan authorities for ensuring the security of the OTP while investigating in Libya.[217] The onsite investigations were, however, again interrupted during the detention lasting 26 days of four officers of the Court in Zintan in June 2012.[218] During that period, the OTP "limited its own presence and activities in Libya."[219]

¶73 As of September 11, 2012, the Libyan authorities formally renewed their cooperation commitment to the Court and the OTP resumed its investigations in Libya.[220] On November 7, 2012, a year after the OTP commenced its onsite investigations in Libya, the Prosecutor announced that her office is contemplating bringing a second Libyan case before the ICC but has not yet decided on the focus of that case.[221]

¶74 Overall, it is apparent that the OTP made a slow start in conducting effective and independent investigations in Libya. And even after, the OTP onsite investigations were suspended in relation to the pending ICC case, and interrupted in relation to other potential ICC cases. Accordingly, the OTP has had to rely heavily on information collected by third parties. Even if currently, the OTP relies on its own investigative product, a lot of valuable evidence may already be lost or destroyed.[222]

D. Problems in Relying on Third Parties

1. Reliance on UN and NGOs

¶75 The support of third-party organizations, in particular the UN and NGOs, can be helpful and necessary for a successful criminal investigation. Many of them were present in the area concerned long before the ICC investigators arrived. These entities tend to have a permanent presence there, making them generally more familiar with the territory than ICC investigators. Their assistance can be useful in providing details regarding potential witnesses, documentary or

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See ICC Statute, art. 19(7) (Nov. 29, 2010).

[214] THIRD REPORT, *supra* note 210, ¶¶ 32–35. This has also been confirmed in the FOURTH REPORT, *supra* note 212, ¶¶ 21–23.

[215] ICC, Prosecutor Luis Moreno-Ocampo, Statement to the United Nations Security Council on the Situation in the Libyan Arab Jamahiriya, Pursuant to UNSCR 1970, ¶ 14 (May 16, 2012), http://www.icc-cpi.int/NR/rdonlyres/FAF0EA25-AE2F-445B-A879-D82EDE7E3BAD/284668/OTP16052012Eng.pdf.

[216] FOURTH REPORT, *supra* note 212, ¶ 9.

[217] ICC, Prosecutor Luis Moreno-Ocampo, Statement to the United Nations Security Council on the Situation in Libya, Pursuant to UNSCR 1970, ¶ 11 (Nov. 7, 2012), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/icc%20weekly%20update/Documents/ED150_ENG.pdf.

[218] FOURTH REPORT, *supra* note 212, ¶¶ 9, 22.

[219] *Id*. ¶ 9.

[220] *Id.*

[221] Prosecutor Statement on Nov. 7, 2012, *supra* note 217, ¶ 11.

[222] Cassese made a similar observation in relation to the Prosecutor's failure to visit Darfur in 2006. *See* Situation in Darfur, ICC-02/05-14, Observations on Issues Concerning Protection of Victims, *supra* note 196, at 9–10.

other evidence.[223] They may orient the investigators and bring to their attention the most serious crimes committed in a particular region. They may even suggest the names of alleged perpetrators.[224]

¶76 However, while helpful, this evidence is not looked upon highly, and for good reason.[225] Indeed, ICC Judges generally view NGO and UN reports with scepticism. They tend to decline to admit them into evidence or accredit them little, if any, evidential weight.[226]

¶77 As illustrated above, the OTP has nonetheless made substantial use of UN and NGO work product.[227] The prosecution has relied on these entities much more than their own investigations. But these organizations have a very different mandate, and do not apply the standard of proof beyond reasonable doubt.[228] Nor do they share the Prosecutor's obligation to "investigate incriminating and exonerating circumstances equally."[229] In addition, the UN and NGOs are generally reluctant to provide the defense with any material, which increases the gap of resources between the two parties.[230] It is no surprise therefore, that the OTP's reliance on their investigations, in lieu of its own, has proved problematic.[231]

¶78 In addition, UN and NGO fact-finders are not accountable to any judicial body, and no standardized methods of gathering the information exist, which makes it hard to test the validity of the research and conclusions.[232] This is so particularly when the methodology applied is not

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[223] *See, e.g.*, Lyal S. Sunga, *How Can UN Human Rights Special Procedures Sharpen ICC Fact-Finding?*, 15 INT'L J. HUM. RTS. 2, 188 (2011); HUM. RTS. FIRST, THE ROLE OF HUMAN RIGHTS NGOS IN RELATION TO ICC INVESTIGATIONS, at 4–5 (Sept. 2004), http://www.iccnow.org/documents/HRF-NGO_RoleInvestigations_0904.pdf.

[224] *See, e.g.*, De Vos, *Case Note*, *supra* note 7, at 17; Baylis, *Outsourcing Investigations*, *supra* note 7, at 142; HUM. RTS. FIRST, HUM. RTS. NGOS, *supra* note 223, at 5.

[225] *See, e.g.*, ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-3184, Decision on the Bar Table Motion of the Defence of Germain Katanga, ¶¶ 8, 16–17 (Oct. 21, 2011), http://www.worldcourts.com/icc/eng/decisions/2011.10.21_Prosecutor_v_Katanga.pdf; ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-2635, Decision on the Prosecutor's Bar Table Motions, ¶¶ 14, 28–31 (Dec. 17, 2010), http://www.worldcourts.com/icc/eng/decisions/2010.12.17_Prosecutor_v_Katanga.pdf; Mbarushimana, ICC-01/04-01/10-465-Red, Decision on the Confirmation of Charges, *supra* note 150, ¶ 78; Abu Garda, ICC-02/05-02/09-243-Red, Decision on Confirmation of Charges, *supra* note 172, ¶¶ 50–52; ICC, Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-802, Decision on the Admissibility and Abuse of Process Challenges, ¶¶ 235, 254–55 (June 24, 2010), http://www.worldcourts.com/icc/eng/decisions/2010.06.24_Prosecutor_v_Bemba.pdf.

[226] In the Special Court for Sierra Leone, Justice Robertson Q.C. said the following, which is rightly on point: "Courts must guard against allowing prosecutions to present evidence which amounts to no more than hearsay demonisation of defendants by human rights groups and the media. The right of sources to protection is not a charter for lazy prosecutors to make a case based on second-hand media reports and human rights publications." SCSL, Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu, SCSL-04-16-AR73-506, Separate and Concurring Opinion of Hon. Justice Geoffrey Robertson, QC, Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify without Being Compelled to Answer Questions on Grounds of Confidentiality, ¶ 35 (May 26, 2006), http://www.sc-sl.org/LinkClick.aspx?fileticket=mkkX0rrspuk%3d&tabid=197.

[227] *See, e.g.*, Katanga & Ngudjolo, ICC-01/04-01/07-3184, Decision on Bar Table Motion of Defence of Germain Katanga, *supra* note 225.

[228] Sunga, *How?*, *supra* note 223, at 189–90.

[229] ICC Statute, art. 54(1)(a) (Nov. 29, 2010).

[230] The author has personally experienced difficulties in securing the cooperation from UN or NGOs, not only in DRC but also in other countries under investigation. *See also* Caroline Buisman, *Defence and Fair Trial*, *in* SUPRANATIONAL CRIMINAL LAW: A SYSTEM SUI GENERIS 167, 198–205 (Roelof Haveman, Olga Kavran & Julian Nicholls eds., Intersentia 2003); *see also* Baylis, *Outsourcing Investigations*, *supra* note 7, at 145.

[231] De Vos, *Case Note*, *supra* note 7, at 18; Baylis, *Outsourcing Investigations*, *supra* note 7, at 145.

[232] M. Cherif Bassiouni, *The UN and Protection of Human Rights: Appraising UN Justice-Related Fact-Finding Missions*, 5 WASH. U. J.L. POL'Y 35, 37 (2001).

clearly described, which is frequently the case.[233] In addition, the fact-finders' knowledge of events is often limited, and they are not always neutral.[234]

¶79 For instance, MONUC played an active role in negotiating and implementing peace initiatives in DRC.[235] In that capacity, it had frequent contact with members of the warring parties including the suspects and their allies, potentially leading to firm views regarding the conduct of the defendants.[236]

¶80 Moreover, the bulk of UN and NGO material constitutes first- or even second-hand hearsay, or relies on dubious anonymous sources.[237] Accordingly, the OTP's heavy reliance on UN and NGO investigations clearly diminishes the quality of the investigations and compromises its independence.[238]

2. Reliance on Intermediaries

a) Usefulness

¶81 In the view of Christian De Vos, which is shared by this author, "it makes great sense for the OTP to develop contacts with actors on the ground, given constraints on its time and resources."[239] They understand the local culture, language and people, which are opaque to foreign investigators. They ensure that doors open that would otherwise be closed. They are the bridge between the international staff and the local communities and introduce witnesses to the investigators. No one suggests that the involvement of a local person, not officially employed by the ICC, in putting a witness in contact with a party necessarily renders the witness unreliable. This involvement, in itself, is not problematic and may be beneficial.[240]

¶82 It can safely be assumed that ICTY and ICTR investigators also worked with local people acting as liaisons between them and the local communities, even if the practice was never exposed to the extent it has been at the ICC. These people might not have been referred to as intermediaries and their activities may have been more *ad hoc* in nature, but they certainly played at least a limited role in putting the investigators in contact with potential witnesses.[241]

¶83 Defense teams also use local people in their search for evidence. Every defense team deploys local investigators who have connections in the field that they can use to contact informants or potential witnesses. Sometimes potential witnesses will only cooperate with prior

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[233] *See* Katanga & Ngudjolo, ICC-01/04-01/07-2635, Decision on Prosecutor's Bar Table Motions, *supra* note 225, ¶¶ 28–31 (excluding a large number of proposed UN and NGO reports on the ground that the methodology was unknown). *See also* Sunga, *How?*, *supra* note 223, at 190 ("human rights fact-finding is usually more general and less rigorous than fact-finding required for criminal prosecutions").

[234] The lack of neutrality of some NGOs is apparent from their joint letter to the ICC Prosecutor (July 31, 2006), http://www.iccnow.org/documents/DRC_joint_letter_eng.PDF; *see also* Baylis, *Outsourcing Investigations*, *supra* note 7, at 144–145.

[235] U.N., MONUC Mandate http://www.un.org/en/peacekeeping/missions/monuc/mandate.shtml.

[236] The author acquired this information as a member of the Katanga defense team.

[237] The International Court of Justice in DRC v. Uganda declined to rely on a MONUC report tendered by DRC government, because of its use of second hand hearsay. See Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, 2005 ICJ Rep. 116, ¶ 159. *See also* Bassiouni, *UN & Protection of Human Rights*, *supra* note 232, at 37.

[238] Baylis, *Outsourcing Investigations*, *supra* note 7, at 144–45.

[239] De Vos, *Case Note*, *supra* note 7, at 17; *see also* Baylis, *Outsourcing Investigations*, *supra* note 7, at 144.

[240] This is based on the author's personal experience in collecting evidence.

[241] As was acknowledged by former ICTY Prosecutors at the ICC Conference. *See* 'The Law and Practice of the International Criminal Court: Achievements, Impact and Challenges' Conference, *supra* note 6.

approval of the chief of the village, and there is little doubt that that approval is best negotiated by a local investigator.[242]

¶84 How is it then that the Prosecutor received such severe criticism from the Court in *Lubanga* for relying on intermediaries? Was it fair criticism, or was it indeed "overly harsh," based on *ex post facto* determinations of witnesses' unreliability and insufficiently considerate of the realities on the ground?

¶85 The prosecution is not criticized for using intermediaries *per se*, but for the extent to and manner in which it did so.

b) The Extent of Intermediary Involvement and the Lack of Supervision

¶86 In *Lubanga*, Lavigne testified that intermediaries were excluded from the decision-making process as well as the screening of and interviews with the witnesses, save in exceptional circumstances.[243] The OTP position is that the intermediaries did not play more than "a supporting role".[244]

¶87 It is clear that intermediaries in *Lubanga* and *Katanga & Ngudjolo* played much more than merely supporting roles. They may have been excluded from the official decision-making process, but they made all of the relevant decisions on the ground. It was the intermediaries who travelled to locations, collected information, identified witnesses and established what they had to say.[245] In essence, intermediaries shaped (and tainted) the evidence before it ever reached prosecution investigators.[246] Intermediaries conducted their activities practically in lieu of the investigators officially employed by the OTP.[247]

¶88 The official investigators rarely visited the region where the investigations were conducted. On the rare occasions that they did, their movements were restricted for reason explained above.[248] No process for verifying the credibility of the witnesses introduced by intermediaries was spoken of by Lavigne. On the contrary, investigators were instructed to stay away from any location where, or person through whom, such verifications could have taken place.[249] The intermediaries carried out their activities mostly without supervision or direction.[250] The *Katanga* defense has pointed at the "systematic dangers" inherent to this process in which extensive unsupervised contact between intermediaries and potential witnesses was routine.[251]

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[242] At least, this is the case in the author's experience.
[243] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 181 (citing Prosecution's Confidential Filing, *supra* note 9, ¶ 17).
[244] *Id*. ¶ 182 (citing Prosecution's Confidential Filing, *supra* note 9, ¶ 38).
[245] *Supra*, Part II (Problems in Investigations), sections A.1 (The Prosecutor's Solution: Reliance on Third Parties); A.3 (Problems with Intermediaries); B.2 (Reliance on Intermediaries).
[246] *Id*.
[247] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 482.
[248] *See, e.g.*, *supra* notes 27–46, 115–117.
[249] *See supra* notes 39, 40.
[250] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 482.
[251] Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶ 463.

c) Lack of Scrutiny of Intermediaries

¶89 One criticism of the *Lubanga* Chamber was that the OTP did not scrutinize the background of the persons it employed as intermediaries.[252] It is clear from Lavigne's testimony that there were indeed no proper checks on the backgrounds of the intermediaries.[253] Lavigne and Sebire testified that anyone who claimed not to have been involved in the conflict or to have committed crimes was potentially able to become an intermediary.[254] Lavigne also indicated that OTP investigators were particularly interested in persons who claimed to have experience in human rights work.[255] A number of individuals approached the OTP, rather than the other way round and became intermediaries by offering to identify potential witnesses.[256] There was no formal recruitment procedure and no contracts were signed until much later.[257]

¶90 Both Lavigne and the chief of investigations in *Katanga & Ngudjolo* testified that OTP investigators tried to ascertain the reliability of the intermediaries through background checks.[258] They, however, claimed that this was difficult because the information available to them was limited.[259] Seeking to find out more about their backgrounds could expose these intermediaries and increase the risks they encountered in the field.[260] Lavigne testified that the protection of intermediaries was a primary constraint in carrying out any such checks.[261]

¶91 As has been seen above, the OTP was prepared to rely heavily on intermediaries whose credibility was seriously contested by its own investigators.[262] Nothing suggests that more careful testing of the evidence gathered by these intermediaries was instigated as a result. It is evident from the testimony of Lavigne about intermediary P-316 (see above) that the OTP was in a bind and prepared to overlook almost any evidence of falsehood and wrongdoing on the part of intermediaries, clinging to the fig-leaf that, whatever might be said about the intermediaries themselves, there was no reason to doubt the word of the witnesses they had introduced.[263] The trial process demonstrated how empty that theory was.[264] In truth, the OTP had, as the Chamber commented, "delegated its investigative responsibilities to the intermediaries."[265] There was no going back, without starting again from scratch.

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[252] *See*, *e.g.*, Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, at ¶ 368.
[253] Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 53, 55 (Nov. 16, 2010), http://www.icc-cpi.int/iccdocs/doc/doc1298128.pdf.
[254] *Id.* at 53.
[255] *Id.* at 49–51.
[256] *Id*. at 49–50.
[257] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶¶ 190–95 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 49–53).
[258] Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 55; Katanga & Ngudjolo Trial Hearing, ICC-01/04-01/07-T-81-Red-ENG, *supra* note 106, at 37–38.
[259] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶¶ 196–97 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 52–55); Katanga & Ngudjolo Trial Hearing, ICC-01/04-01/07-T-81-Red-ENG, *supra* note 106, at 37–38.
[260] Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 54.
[261] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 196 (citing *id*.).
[262] Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24.
[263] *See*, *e.g.*, Katanga & Ngudjolo, ICC-01/04-01/07-3251-Corr-Red, Corrigendum du Mémoire Final, *supra* note 112, ¶¶ 18–25; ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-T-338-Red-ENG, Closing Statements, 32 (May 21, 2012), http://www2.icc-cpi.int/iccdocs/doc/doc1423314.pdf; Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶ 463.
[264] *See* Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶ 463.
[265] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 482.

d) Non-Transparent Nature of Relationship

¶92 The nature of the relationship between the OTP and the intermediaries in the *Lubanga* and *Katanga & Ngudjolo* cases was not transparent. For years, despite many requests from the defense for disclosure, the identities of the intermediaries were withheld from the defense and the public at large.[266] Some of them still remain anonymous.[267] The Chamber's order to disclose the identity of a number of intermediaries only came once the evidence had put their credibility in question.[268] On one occasion the OTP refused to obey the Chamber's order to disclose the identity of P-143 to the defense because of security concerns.[269] Not surprisingly, the Chamber then stayed the proceedings, holding that there could not be a fair trial if the Prosecutor refused to follow the court's orders.[270] The Appeals Chamber overturned this decision finding that alternative, less drastic, measures could have been implemented to rectify the situation, such as sanctions on the prosecution.[271] It was long after the Katanga defense had discovered the identity of P-143 that the OTP disclosed his identity.[272]

¶93 This policy of non-disclosure to the defense of intermediaries' identities meant that, for the majority of trial, no questions could be asked which might lead to the identification of the intermediaries.[273] This policy significantly hampered the defense's ability to challenge the credibility and reliability of these intermediaries, and, in turn, the effect any diminished reliability or credibility may have had on the truth of the evidence from witnesses these intermediaries introduced.[274]

¶94 Moreover, the terms of the contracts between the OTP and the intermediaries, and their job descriptions, if any, remain withheld from the defense and the public.[275] The amount they have been paid is unknown.[276] The ICC Director of Courtroom Services testified in the *Katanga & Ngudjolo* case that "[t]he same intermediary may be used by five different units of the Court"; and that the OTP "may enter into confidential agreements with an intermediary… Nothing

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[266] *See, e.g.*, ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-T-312-ENG, Public Submissions and Decision, 15–22 (July 7, 2010); Lubanga, ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, *supra* note 23, at ¶¶ 5, 6, 15–16, 34, 50, 56, 66–74, 81, 85–87, 112, 115 (May 31, 2010); Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶ 473, n. 609.

[267] For instance, the identity of intermediary P-310 in the *Katanga & Ngudjolo* case has not been disclosed to the defense. In *Lubanga*, the defense is still unaware of the identities of intermediaries 81, 123, 154, 254 and 290. *See* Lubanga, ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, *supra* note 23, at ¶¶ 139, 145.

[268] Lubanga, ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, *supra* note 23, at ¶¶ 5, 6, 138–39, 150.

[269] *Id.* ¶ 143; ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2517-Red, Public Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, ¶¶ 2–17 (July 8, 2010).

[270] Lubanga, ICC-01/04-01/06-2517-Red, Public Redacted Decision, *supra* note 269, at ¶ 31.

[271] ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2582, Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, ¶¶ 45–61 (Oct. 8, 2010).

[272] The defense had obtained this information in the field before the commencement of trial. On September 13, 2010, almost a year after the start of the trial (November 24, 2009) and over three months after the Chamber ordered it to do so (June 7, 2010), the OTP finally disclosed P-143's identity to the defense by email.

[273] Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶ 474.

[274] For instance, the defence could not put P-143's name to any of the prosecution witnesses who testified before the disclosure of his identity.

[275] Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶ 476.

[276] *Id.*

governs the amount that is provided to these intermediaries. One might think that it would be between 30 and 60 dollars per day, but nothing would keep a unit from paying more or less. Furthermore, the Registry is in no way able to determine what the OTP may have paid an intermediary or what all the five various units have paid to an intermediary. There is no requirement through the agreements or through the arrangements made to disclose. That can be criticised, of course."[277]

¶95 In addition to their fees, intermediaries are reimbursed for relevant expenses. The evidence shows that both P-316 and P-143 were seeking to maximize this income.[278] As early as 2008, prosecution investigators believed that both P-316 and P-143 were inventing financial claims.[279] Seemingly, P-316's motive for inventing threats to his safety (see above) was to get more economic or other support as well as relocation.[280] The financial benefits from relocation are considerable: the Court provides a relocated person with free housing, health care, living expenses, security monitoring and education—often for his entire family—in their new location.[281] Notwithstanding the scepticism as to the veracity of P-316's security concerns, both he and his assistant P-183 (whom P-316 had claimed at one stage had been killed) are currently relocated by the Court as a protective measure.[282]

¶96 P-143 has also been relocated.[283] The reason that the Prosecutor disobeyed the Chamber's order to disclose P-143's identity to the defense was that negotiations were still ongoing regarding his protective measures. P-143 delayed the implementation of the protective measures to obtain more protection and to delay the disclosure of his identity.[284]

¶97 In light of these circumstances, it does not come as a surprise that both the *Lubanga* and *Katanga* defense teams have alleged that the intermediaries have a strong monetary incentive to find potential witnesses of alleged crimes and that this may lead them to encourage witnesses to lie.[285]

e) Financial Interests of Witnesses

¶98 There is also a benefit to witnesses in giving (false) testimony. Many of them are relocated.[286] This is a life changing experience for individuals from eastern DRC.[287] It is not surprising that suggestions have been made that the prospect of relocation undermines the credibility and reliability of witnesses.[288] The *Lubanga* Chamber, however, held that "[t]he fact

[277] ICC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo, ICC-01/04-01/07-T-180-Red-ENG WT, Trial Hearing, 8-9 (Aug. 8, 2010).
[278] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, at ¶¶ 289, 371 citing EVD-D01-01086 and EVD-D01-01004.
[279] *Id.*
[280] Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶¶ 503–04.
[281] *Id.* ¶ 505.
[282] *Id.* ¶¶ 484, 504.
[283] *Id.* ¶ 500.
[284] *Id.*
[285] *Id.* ¶ 476.
[286] *Id.* ¶¶ 507–08.
[287] *Id.* ¶¶ 505–09.
[288] *Id.* ¶¶ 505–11; ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2773-Red-tENG, Closing Submissions of the Defence, ¶ 54 (July 15, 2011).

that a witness is in the ICC protection program does not, without more, undermine his or her credibility."[289]

¶99 But there is more. A number of witnesses in the *Lubanga* and *Katanga & Ngudjolo* cases alleged that part of their motive for giving false statements and testimony was that the intermediary promised them money, education and free re-housing.[290] For instance, relocated witness P-28 stated in the *Katanga & Ngudjolo* trial:

> I will say this gentleman raised my hopes. He said this was something very confidential and that no one would get to know about it. That is what he said. However, nothing was made up with respect to the events that took place in Bogoro. I do confirm that with respect to that statement, the statement about schooling was made up by number 14. No, it is false.[291]

¶100 Thus, it appears that P-28 lied to the prosecution to be protected, in other words relocated, and that he was reassured by the promise that nobody would hear about it. It also appears that P-28 made international relocation a condition for testifying, a demand that was ultimately granted notwithstanding VWU's assessment at the time that international relocation was unnecessary.[292]

¶101 P-279, another relocated witness in the *Katanga & Ngudjolo* trial, testified that intermediary P-143 had told him that he would benefit from protective measures if he gave a statement to the prosecution.[293] Defense witnesses D2-146 and D2-147 testified that P-143 informed them that P-279 and P-280 were going to study,[294] and that it was P-143's business to go around picking up children to enrol them into a white man's study program somewhere.[295] It is noteworthy that the Chamber did not consider either of these witnesses credible.[296]

¶102 Lavigne acknowledged that word spread in Bunia that a witness whose safety was at risk could be relocated, and that this was considered by some individuals as an opportunity to secure free re-housing.[297] In this regard, it is noteworthy that eight of the twelve relocated witnesses in the *Katanga & Ngudjolo* case were in contact with P-143 or P-316.[298] Relocation was undoubtedly one of the tools that contributed significantly to the emerging culture of corruption of the evidence in Ituri.

¶103 In sum, the severe but well-deserved criticism from the judges was based, not on the use of intermediaries *per se*, but on a succession of failures in conducting the investigations, most importantly the lack of supervision by the OTP over the activities of the intermediaries.

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[289] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 347.
[290] *Id.* ¶ 293; Lubanga, ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, *supra* note 23, at ¶ 140.
[291] ICC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-T-221-Red-ENG WT, Trial Hearing, 39–40 (Nov. 23, 2010).
[292] P-28's request for international relocation was granted after a lengthy postponement of his testimony as a result of his persistent refusal to give evidence without the granting of his request. *See* Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶¶ 509–10.
[293] *Id.* ¶ 487.
[294] *Id.* ¶ 488, 492 (citing confidential pages 49–50 of transcript ICC-01/04-01/07-T-261-Red-ENG (May 17, 2011) and public page 45 of transcript ICC-01/04-01/07-T-264-Red-ENG (May 20, 2011)).
[295] *Id.* ¶ 492 (citing public page 45 of transcript ICC-01/04-01/07-T-264-Red-ENG (May 20, 2011)).
[296] *See* Ngudjolo, ICC-01/04-02/12-3, *supra* note 18, ¶¶ 189–90, 218–19.
[297] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 147 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 41).
[298] Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶ 479.

III. SECURITY CONCERNS

A. Conflicting Obligations

¶104 The Prosecutor's duties are described in article 54 of the Rome Statute. The relevant passages require him/her to "…establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating evidence equally" and "[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court …."[299] In carrying out these investigations, the Prosecutor must respect "the interests and personal circumstances of victims and witnesses…[and] …the rights of persons arising under this Statute".[300]

¶105 Some might say that this sets too high of a standard.[301] ICC Judge Kaul was apparently not of that view when he described these obligations as "fundamental requirements which set out clear, *if not high* standards for proper investigations carried out by the Prosecutor on behalf of the Court."[302]

¶106 No trial can be run effectively without proper investigations having preceded it. Adequate investigations ensure that only the best quality evidence is produced before the Court and that the credibility of the Prosecutor's own witnesses is adequately tested. It also provides the Prosecutor with material to cross-examine defense witnesses and undermine their credibility where appropriate. Without adequate investigations, the ICC cannot achieve any of the goals it has set out to achieve and deliver "meaningful justice."[303] As HRW put it, "the Office of the Prosecutor's investigations and prosecutions are the peg upon which the rest of the court's work must hang."[304]

¶107 Alongside these duties, article 54 of the Rome Statute also provides the Prosecutor with the power to "[t]ake necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence."[305] Witness protection is clearly important. If there is a genuine risk that witnesses will be intimidated or harmed, this risk will significantly affect the fairness of any trial, and the failure to combat such risks will have a chilling effect upon the willingness of any witnesses to come forward in the future. On the other hand witness protection measures (particularly anonymity) can conflict with the rights of the defense and, where the measures are life changing in their nature, unbalance the evidential picture and be the cause of injustice. A balance may be difficult to strike.

¶108 Thus far in the life of the ICC, the OTP has failed to strike a proper balance, placing far too much emphasis on protective measures and too little on conducting efficient investigations. In a number of cases, the overemphasis on protective measures has done more harm than good.

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[299] ICC Statute, art. 54(1)(a)–(b).
[300] ICC Statute, art. 54(1)(b)–(c).
[301] Lavigne considered that the Court expected unrealistically high investigation standards from the OTP, which did not correspond with the reality in the field and which could infringe on witness protection. Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 196 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 54).
[302] ICC-01/09-02/11-373-Red, Judge Kaul Dissenting Opinion, *supra* note 175, at ¶ 46 (emphasis added).
[303] *Closing Gaps in the Selection of ICC Cases* 46, HUM. RTS. WATCH, (Sept. 2011), http://www.hrw.org/sites/default/files/reports/icc0911webwcover.pdf.
[304] *Id.*
[305] ICC Statute, art. 54(3)(f) (Nov. 29, 2010).

¶109 The suggestion that the OTP has not struck a proper balance is based on two propositions. First, that the security situation in a number of the locations in which the ICC operates is far less inhibiting than the OTP claims. Second, that even if the security concerns were entirely genuine, they would not justify the Prosecution's solution of outsourcing the bulk of its investigations to third parties, thereby undermining the OTP's efficiency and neutrality.

B. Security Concerns: Genuine or Exaggerated?

¶110 At a recent conference on the law and practice of the ICC,[306] it was suggested that the OTP was risk-averse in conducting investigations.[307] The ICC representative conceded that the OTP, though not risk-averse, was cautious. But with good cause, he claimed, because the OTP has to deal with genuine security issues on a regular basis.[308]

¶111 It seems indeed indisputable that some level of caution in conducting investigations is appropriate and necessary. Particularly when the government of a state in which the OTP would wish to carry out investigations is hostile towards the ICC, the safety of the ICC personnel and potential witnesses is genuinely in question. This is so because the ICC relies on the state authorities to offer protection to Court employees as well as anyone assisting the Court.[309] The author nonetheless suggests that the OTP's approach to date has been an overly cautious approach, resulting in significant gaps in the investigations.

1. Security of Prosecution Personnel

¶112 As has been addressed above, ever since the public announcements of the arrest warrants of government members of Sudan, nobody associated with the ICC has been able to enter the country. Even if they could, it would be unwise, even irresponsible, to do so in light of the death threats that have been announced against anyone who cooperates with the ICC.[310]

¶113 Although not to the same extent as Sudan, the security situation in Libya is also genuinely volatile.[311] Security risks for OTP personnel were particularly serious while the war was still going on. But also after the end of the war, the security situation in Libya has remained unpredictable. This is evidenced by the recent detention lasting several weeks of four officers of the Court who were in Libya to visit Saif Al-Islam Gaddafi, one of those officers being Saif's counsel in proceedings before the ICC.[312] Recently, there have also been fatal attacks on the US ambassador and others from the US consulate in Benghazi.[313] Though unrelated to the ICC proceedings, this incident may add to the overall perception of lack of security in Libya, which may undermine the ability to conduct investigations on the ground. It does not help that the

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[306] ICC Conference, *supra* note 6.

[307] This suggestion was made by Joseph Powderly, Assistant Professor of Public International Law at the Grotius Centre for International Legal Studies, The Hague.

[308] Observations of Alex Whiting, OTP Prosecution Coordinator, at ICC Conference, *supra* note 6.

[309] *See* section III.D (A Comparison with the *ad-hoc* Tribunals).

[310] *Supra* notes 178–82.

[311] *See supra*, sections II.C.3 (Darfur) and II.C.4 (Libya).

[312] They were arrested on June 7, 2012 and detained until July 2, 2012 while visiting Saif Al-Islam Gaddafi in prison in Zintan as part of a privileged visit by the ICC Office of the Public Counsel for the Defence, currently appointed to represent him in the pending ICC case against him. *See* ICC-CPI-20120702-PR821, *The Four ICC Staff Members, Released Today, Have Left Tripoli* (July 2, 2012), *available at* http://www.icc-cpi.int/NR/exeres/CBD6C497-C5CB-470B-A443-06B04218DA80.htm.

[313] Matt Spetalnick & Hadeel Al Shalchi, *Obama Vows to Track Down Ambassador's Killers*, REUTERS (Sept. 12, 2012), http://www.reuters.com/article/2012/09/12/us-libya-usa-attack-idUSBRE88B0EI20120912.

Libyan government is not in control of large parts of the country.[314] The level of insecurity in post-war Libya has not, however, reached that in Sudan to date. Nor does the OTP suggest it has. In fact, the OTP reports that it enjoys good cooperation from the Libyan government and other actors on the ground.[315] Thus, at present, security concerns do not form an obstacle to conducting onsite investigations.

¶114 In the Kivu provinces in east DRC, the security situation has drastically deteriorated since the beginning of the conflict in North Kivu in April 2012.[316] However, before the commencement of the war, there appears to have been no compelling reason to avoid conducting onsite investigations in this region.[317]

¶115 As to the DRC, the author is in a position to speak from personal experience over the course of four and a half years, having spoken to approximately 250 persons of different ethnic origins and positions living particularly in the eastern part of the country. Both the UN and the ICC security department consider the situation in Ituri to be volatile varying between UN Security Phase III and IV.[318] Travels to Security Phases III and IV areas are subject to security restrictions and Phase IV requires prior authorization from the Registrar.[319] Travelling around Ituri is thus not risk-free. There still is an active militia in the area, although the militiamen are mostly fighting with the Congolese army and reside in remote forest areas. From time to time, the militia appears on the forefront and launches small attacks, mostly around Aveba, Katanga's hometown, interrupting travel plans to that particular area, which is remote from Bunia.[320] More often than not, however, one can travel around notwithstanding the perceived security risks.

¶116 Both the *Lubanga* and *Katanga* defense teams traveled around and visited all the relevant villages, including those in far remote areas, on numerous occasions without insurmountable difficulties.[321] On one occasion there was an incident in Aveba, very close to the location where members of Katanga's defense team were interviewing people.[322] Apart from some other minor safety difficulties,[323] the investigative missions were conducted in a relatively smooth fashion. When the need arises, the UN is prepared to offer security items, such as radios, protective outfits, tanks and escorts. The ICC itself offers bulletproof cars on missions.[324]

¶117 One cannot automatically conclude that, because the defense was in a position to travel around Ituri without placing anyone's safety at excessive risk, the prosecution would have been

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[314] *See*, *e.g.*, Dario Cristiani, *Hot Issue – The Zintan Militia and the Fragmented Libyan State*, JAMESTOWN FOUNDATION (Jan. 19, 2012, 11:00 AM), http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=38899.

[315] THIRD REPORT, *supra* note 210, ¶¶ 10–12; FOURTH REPORT, *supra* note 201, ¶ 9.

[316] *Supra* note 147.

[317] *See supra* notes 151, 152.

[318] *See*, for instance, ICC Security Briefing DRC (Oct. 17, 2008), (internal ICC document, on file with the author).

[319] *See*, for instance, ICC Security Updates DRC (Nov. 20, 2008; Apr. 8, 2009; May 6, 2009; July 16, 2009; Oct. 14, 2009) (internal ICC documents, on file with the author).

[320] By car, it takes approximately 4 to 5 hours to reach Aveba from Bunia.

[321] At times, it is difficult to visit any place outside Bogoro, and particularly Aveba. At such times, missions are not approved. However, more often than not it was considered safe enough to travel around in Ituri.

[322] Germain Katanga made reference to this incident in his final address to the Chamber. *See* ICC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-T-340-ENG, Closing Statements, 50 (May 23, 2012).

[323] On a few occasions, the Katanga defense team had to negotiate with drunk soldiers from the Congolese army who were manning roadblocks on the way to Aveba. In addition, the Katanga defense encountered difficulties with the community of the co-accused.

[324] This is based on the author's personal experience in conducting investigations. While traveling with UN escorts is undoubtedly safer, it can undermine the efficiency of the investigations, as people are less inclined to trust you and speak with you freely if you arrive with UN tanks.

able to do the same. After all, the prosecution is the one going after people allegedly with power and influence in this region. In particular, the areas in Ituri where the defendants had their strongholds—in this case in and around the villages of Zumbe and Aveba[325]—might be more accessible to the defense than to the prosecution.

¶118 But differential treatment between the defense and prosecution should not be overestimated. As Lavigne himself pointed out in regard to the DRC, many people hardly make a distinction between different branches of the ICC.[326] And it is not just in the DRC that many people would be hard pressed to explain the functioning of the court or to distinguish between the roles of prosecution and defense.[327]

¶119 Also, in many situations, it is the reverse. Where the defendant is an opponent of the government, the defense has little chance of counting on the cooperation of the government.[328] This has been an issue in the DRC for all defendants.[329] Even if the local populations in some of the investigation areas are more welcoming to the defense than to the prosecution, the defense still has to face the Congolese army which is present all around these areas.[330] The defense also has to travel through areas where other defendants have their strongholds. Defendants and/or their allies do not always cooperate with each other, particularly where they supported opposite sides during the conflict or where their interests clash.[331]

¶120 In any event, there is only one way of testing the level of cooperation of local communities, and that is by visiting their places. This is precisely what the OTP failed to do in most instances.

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[325] Zumbe, which is located in the Bedu-Ezekele grouping in the Djugu territory, north of Bunia, is the home base of Mathieu Ngudjolo. This area is predominantly inhabited by people of the Lendu-Tatsi ethnic group. *See, e.g.*, International Crisis Group, *Congo: Four Priorities for Sustainable Peace in Ituri, Africa Report N°140 – 13 May 2008*, 27, 32, 25 (May 13, 2008), http://www.crisisgroup.org/~/media/Files/africa/central-africa/dr-congo/Congo%20Four%20Priorities%20for%20Sustainable%20Peace%20in%20Ituri. Aveba, which is located in the Walendu-Bindi Collectivity, south of Bunia, is the home base of Germain Katanga. The Walendu-Bindi Collectivity is largely inhabited by people of the Ngiti ethnic group. *See, e.g.*, Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶ 550, n. 720. *See also* Katanga & Ngudjolo, ICC-01/04-01/07-3251-Corr-Red, Corrigendum du Mémoire Final, *supra* note 112, ¶ 2.

[326] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 154 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 37–38).

[327] The author has often been perceived as working for the prosecution. For instance, during a visit to Parliament in Nairobi before the names of the suspects were announced, a Minister walked in and asked, "Did you come to arrest me?"

[328] The author has personally experienced numerous difficulties in this regard *inter alia* in DRC. See further Mischa Wladimiroff, *Position of the Defence: The Role of Defence Counsel before the ICTY and the ICTR*, in An Independent Defence before the International Criminal Court 39-40 (H. Bevers & C. Joubert eds., 2000), where the author, a defence attorney with experience in the ICTY and the ICTR, speaks about his own difficulties in obtaining evidence in the *Tadić* case at the ICTY, and the *Musema* case at the ICTR without the cooperation of the state.

[329] For instance, members of the Katanga defense team, including this author, were refused access to potential defence witnesses detained in the Kinshasa central prison. This refusal lasted two weeks and was repeated on a subsequent mission. The defense raised this before the Trial Chamber: ICC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07-T-56-ENG, 49-51 (Feb. 3, 2009). *See also*, ICC-01/04-01/07-2709-Red, Katanga Defence Request for Leave to Meet Four Defence Witnesses in The Hague Prior to Their Testimony, (Feb. 17, 2001); ICC-01/04-01/07-2755-Red, Décision sur la requête de la Défense de Germain Katanga aux fins d'être autorisée à rencontrer des témoins à La Haye (article 64-6-f du Statut), (Mar. 4, 2011).

[330] The author has personal experience in entering into difficulties with the Congolese army. As noted above, *supra* note 323, on a number of occasions, the author had to negotiate with drunk soldiers manning roadblocks on the way to her destination.

[331] The author has personally faced difficulties in areas where other defendants had their stronghold. Most notably, dealings with the community of the co-accused were challenging at times.

¶121 Assuming it is even true that the defense investigators would benefit from greater cooperation from the local communities in places such as Zumbe and Aveba than OTP investigators, this does not mean that the latter had no access to these areas at all. The Prosecutor's personal visit to Zumbe, Ngudjolo's militia base on July 10, 2009 is elucidating in this regard. He arrived by UN helicopter and was well received. The entire visit was videotaped and watched in the course of the *Katanga & Ngudjolo* trial, and a picture of Ocampo's arrival in Zumbe is hanging in the ICC building.[332] The purpose of his visit was to listen to the views and sufferings of the local Zumbe communities, not to investigate.[333] The local authorities were content that he had made the effort to arrive at Zumbe.[334] If the Prosecutor himself was welcomed with open arms, why would the OTP investigators not be?

¶122 In addition, on January 18, 2012, in the course of the first judicial site visit of the Court, representatives of the Registry, defense, victims, prosecution and the judges all visited Zumbe, Aveba and Bogoro without difficulty.[335] Prior to this visit, members of the Registry had visited the areas in question to arrange logistics and to assess the security situation. In doing so, they did not have particular difficulties and were well received, which further demonstrates that these areas were not only accessible to members of defense teams.[336]

¶123 The judicial site visit shows two things. First, security likely was not a good reason for not going to Zumbe and Aveba. Second, the fact that judges deemed these locations to be of such importance that they wished to see them with their own eyes makes the prosecution's failure to visit these sites during their investigations incomprehensible.

¶124 If any counterarguments can still be made by the Prosecution in respect to accessibility of the Zumbe and Aveba areas, the same cannot be made in respect to Bogoro. The village of Bogoro is at the heart of the *Katanga & Ngudjolo* case and the crimes charged are alleged to have been committed there.[337] It seems inexplicable that the defense teams have visited this location far more frequently than the OTP. There would not have been a grave risk to visit Bogoro, which is geographically much closer to Bunia than the other villages (45 minutes by car) and in a better-secured area with a MONUC base at the edge of the village. So the risk of getting there is significantly lower.[338] Outside Bunia, Bogoro is probably the most-visited village by members of the ICC, in particular the Registry. The inhabitants are thus fully accustomed to receiving ICC visits.[339] Potential witnesses are able speak to the OTP without fearing revenge

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[332] This picture can be viewed when entering the public audience of Courtroom I.

[333] Katanga, ICC-01/04-01/07-3124, DRC-OTP-1063-0002, EVD-D03-00101, EVD-D03-00102 (Prosecution Video about Ocampo visit to Zumbe, July 10, 2009).

[334] This is based on personal interviews in the field with the representatives of the communities who had attended the meeting with Ocampo. They produced a document listing the concerns they had addressed with the Prosecution (document on file with the author). In general, the people were content that he had come to listen to their views and observations.

[335] ICC, Press Release, *ICC judges in case against Katanga and Ngudjolo Chui visit Ituri*, ICC-CPI-20120127-PR765 (Jan. 27, 2012). The author personally participated in this judicial site visit.

[336] Registry's communication to participants of the judicial site visit. The Chamber was persuaded that security concerns should not have prevented the OTP from visiting Aveba and Zumbe. *See* Ngudjolo Judgment, ICC-01/04-02/12-3, *supra* note 18, ¶ 118.

[337] Between 2008 and 2012, the author participated in multiple defense missions to Bogoro, Aveba, Zumbe and other villages in Ituri.

[338] Indeed, it is rare that missions to Bogoro are cancelled due to security concerns. The more insecure route is between Bogoro and Aveba. ICC personnel are often required to travel with escorts and tanks on the Bogoro-Aveba road, but not on the Bunia-Bogoro road.

[339] This is based on the author's personal experience and observation in Bogoro, as well as her communication with Bogoro villagers.

from other villagers. The villagers of Bogoro, being the victims of the alleged crimes, have no complaint at the prospect of the perpetrators being prosecuted. Thus, it can be fairly concluded that the OTP investigators' unwillingness to visit Bogoro more frequently suggests misjudgement of the security situation, which presence on the ground would quickly have dispelled.

¶125 It may well be that in past years the situation was much more delicate. The author's experience does not pre-date 2008, but as Lavigne himself conceded, the situation has improved significantly over the years, particularly since the establishment of the ICC compound.[340] With good security and Internet facilities, it should have been a convenient place for an OTP investigator to stay long-term. Yet, even as the security situation improved and the compound was built, OTP investigators did not alter their ways. In fact, their presence in the region was increasingly sporadic.[341] While in 2006, the OTP reported that it had carried out seventy missions in and outside the DRC since July 2004,[342] significantly fewer missions were carried out in the following years.[343] The most likely explanation is that the focus turned to other situations under investigation of the ICC. This is regrettable because ample work in east DRC has been left unfinished.[344]

2. Security of Persons Assisting the Prosecution

¶126 Understandably, the Prosecutor's principal concern is the safety of their witnesses. To protect witnesses adequately, the Court can impose a range of protective measures, varying from non-disclosure of their identity to the defense and/or the public at large, to relocation.[345] This protective measures scheme is a benefit the Court has over other fact-finding bodies and makes informants and potential witnesses less reluctant to cooperate.[346]

¶127 There is, however, a counter-side to the implementation of protective measures. It has already been noted that the security threat to potential witnesses and intermediaries can be exaggerated or invented in the hope of extracting economic benefits, most notably relocation.[347]

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[340] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 165 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 75).

[341] *See supra* notes 107–14.

[342] ICC, OTP, REPORT ON THE ACTIVITIES PERFORMED DURING THE FIRST THREE YEARS, 11 (June 2003–June 2006), (Sept. 12, 2006), http://www.iccnow.org/documents/3YearReport%20_06Sep14.pdf.

[343] *See supra* notes 107–14.

[344] HRW, *supra* note 303, at 1–2, 8, 47 ("In our view, the most pressing needs remain in the DRC, and we urge the prosecutor to look first at his strategy for continuing the Ituri investigations and ensuring investigation of all armed groups responsible for crimes committed in the Kivus"). The more situations the OTP takes on, the more likely it will "do less and less in each situation to square demand with limited resources". However, "the opposite is required—more investigations and prosecutions are needed in each of these situations in order to deliver on the court's mandate." *Id.* at 1–2. *See also* Gregory Townsend, *Structure and Management*, *in* INTERNATIONAL PROSECUTORS 292–93 (L. Reydams, J. Wouters & C. Ryngaert eds., 2012).

[345] *See* ICC Statute, art. 43(6), 68 (1)–(2) (Nov. 29, 2010); ICC RPE, Rules 87–88 (Sep. 10, 2002); Regulations of the Registry Regulations 92–96.

[346] *See*, *e.g.*, P-28 affirming in the *Katanga & Ngudjolo* trial that the promise that "no one would get to know about it" and that his identity would not be disclosed to the public convinced him to come forward with his story. *See* P-28-T-221, at 39–40; P-28-T-223, at 8–10 (FRA-p.7-l.27-28-p.8-l.1-20). *See also* Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶¶ 482–83.

[347] See above. Another notable example is the false allegation of witness P-219 that during a telephone conversation with Katanga from the ICC prison, the latter had begged him to give false testimony in Katanga's defense before the ICC and that Katanga cried. Fortunately for Katanga, the said conversation was registered. It turned out that Katanga never asked him to give false testimony or cried. P-219's motivation for making up his allegation is not clear, but could well have been to receive greater protection for himself and his family. *See* Ngudjolo, *supra* note 18, at ¶ 280.

This might then color the real security situation on the ground, which is difficult to assess for judges far remote.

¶128 Because relocation is the last resort in the Court's overall protection scheme, it should be used only in the most exceptional circumstances where no other protective measures are available which can achieve the same result.[348] But in reality, resort to this measure has become the rule rather than the exception. Is this because there is a genuine need for protection or rather for an improvement of the economic status of the witnesses and intermediaries concerned? This section looks at this question in greater detail.

¶129 To be considered for relocation, it is necessary to demonstrate that, as a result of a person's cooperation with the Court, the "concrete likelihood" exists that the person would be threatened if he or she continued to reside in the region.[349] Intermediary P-316 was particularly persistent in making up stories alleging his and other people's lives were endangered.[350] Ironically, the Prosecution relied on P-316 for information about the security situation in Ituri.[351] It is no wonder, then, that the Prosecution's assessment of the dangers in that area often differed drastically from that of others, including the VWU.[352]

¶130 ICC relocation has run rampant. In the *Katanga & Ngudjolo* confirmation proceedings, the Pre-Trial Chamber referred to the number of relocated prosecution witnesses as "unprecedented."[353] In total, twelve prosecution witnesses were relocated in that case alone.[354] In *Lubanga*, the number of relocated witnesses was also very high.[355] And in *Kenya I* and *II*, every single prosecution witness relied upon in the confirmation proceeding has been relocated to a third country.[356]

¶131 A number of these witnesses were relocated against the advice of the VWU,[357] even though the VWU has the authority and expertise to decide on matters of relocation and other protective measures for witnesses at trial.[358]

¶132 The prosecution has frequently relocated their witnesses preventively while waiting for a decision from the VWU.[359] The prosecution sought no prior authorisation from the Chamber to

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[348] ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo, ICC-01/04-01/07-428-Corr, Urgent Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, ¶¶ 45–47 (Apr. 25, 2008).

[349] *Id.* ¶ 46.

[350] *See supra* notes 95–99.

[351] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, at ¶ 310 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 68).

[352] *Id.* ¶ 158 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 44) (Lavigne saying the prosecution and VWU often disagree on the necessity of the imposition of a particular protective measure).

[353] Katanga, ICC-01/04-01/07-428-Corr, *supra* note 348, ¶ 14.

[354] Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶ 508.

[355] As was frequently pointed out by the *Lubanga* defense. *See, e.g.*, ICC, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-2773-Red-tENG, Closing Submissions of the Defence, ¶ 54 (July 15, 2011).

[356] Press Conference held by Ocampo on 24 January 2012 relating to the Pre-Trial Chamber's decision on the confirmation of the charges in Kenya I and II, issued on January 23, 2012, YOUTUBE.COM, http://www.youtube.com/watch?v=0-WYkNYXvug&feature=relmfu.

[357] *See, e.g.*, Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶¶ 509–10, n. 686 (citing a Chamber's confidential decision where the Chamber expresses its surprise with regard to the international relocation of P-28 notwithstanding the VWU's assessment that P-28's security concerns did not warrant this measure). *See also* Katanga, ICC-01/04-01/07-428-Corr, *supra* note 348, ¶¶ 41–52.

[358] Katanga, ICC-01/04-01/07-428-Corr, *supra* note 348, ¶¶ 9, 12, 15, 18–19, 22.

[359] *Id.* ¶¶ 11–52.

implement this measure, nor is there any statutory mandate to do so.[360] This practice of "preventive relocation" forces the issue of permanent relocation and thus effectively shifts the power to decide whether relocation is necessary from a neutral organ within the Registry to the prosecution.[361] Indeed, in the view of the Pre-Trial Chamber, once a witness has been relocated, his or her return to his or her former residence "would be disruptive for the witness and his or her family and would also most likely put them at risk."[362] Accordingly, the practice of unilateral preventive relocation has been forbidden by the Statute, as confirmed by the Pre-Trial Chamber and Appeals Chamber.[363]

¶133 The Pre-Trial Chamber and Appeals Chamber also criticized the prosecution's "reactive relocation," *i.e.*, the relocating of witnesses whose request for relocation was rejected by the VWU. Reactive relocation was found to infringe on the decision of the competent organ of the Court to decide upon witness relocation.[364] In cases of disagreement between the assessment of the VWU and the Prosecutor, "the ultimate arbiter of whether the serious measure of relocation be undertaken is the Chamber."[365] This practice has led to the exclusion of the statements of two prosecution witnesses at the confirmation hearing of Katanga and Ngudjolo.[366]

¶134 The high number of relocations, including both "preventive" and "reactive" relocation (which has since been banned), leaves the impression that the ICC has relocated many witnesses even where this was not absolutely necessary. Doubts about its necessity in many cases increase when a comparison is made with the practice of the ICTY and the International Criminal Tribunal for Rwanda (ICTR). At the ICTY, which began operations when the war in Yugoslavia was still ongoing and where ethnic tensions were still strong, "[l]ess than a fraction of one per cent of witnesses have been granted long-term protection such as relocation to third countries."[367] At the ICTR, dealing with an equally tense situation, relocation of witnesses is also "highly exceptional."[368]

¶135 It is also not the case that witnesses being identified by their communities before they testify will necessarily incur harm or danger warranting relocation. Most people are simply eager to make a living and have no interest in threatening or harming potential witnesses. It is true that, particularly in small villages, local people are often aware of the identities of prosecution witnesses even before the defense is. Word spreads quickly.[369] Not infrequently, the witnesses themselves speak about it.[370] This, however, does not mean that someone's security is immediately threatened or that life in their home village becomes dangerous for them, even if neighbours or family members disagree with a witness's choice to testify for the prosecution. At

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[360] *Id.* ¶¶ 21–31.
[361] *Id.* ¶¶ 25, 32.
[362] *Id.* ¶ 25.
[363] *Id.* ¶¶ 20–37; Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-776, Judgment on the Appeal of the Prosecutor Against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I, ¶¶ 1–2, 64–104 (Nov. 26, 2008).
[364] Katanga, ICC-01/04-01/07-428-Corr, *supra* note 348, ¶ 25; Katanga & Ngudjolo, ICC-01/04-01/07-776, Judgment on Appeal of Prosecutor, *supra* note 363, ¶¶ 91–92.
[365] Katanga & Ngudjolo, ICC-01/04-01/07-776, Judgment on Appeal of Prosecutor, *supra* note 363, ¶ 2.
[366] Katanga & Ngudjolo, ICC-01/04-01/07-3266-Corr2-Red, Second Corrigendum to the Defence Closing Brief, *supra* note 105, ¶ 508.
[367] *Witness Statistics*, ICTY WEBSITE, http://www.icty.org/sid/10175.
[368] *See* NANCY COMBS, FACT-FINDING WITHOUT FACTS, THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS 141 (2010).
[369] This is based on the author's personal observation and experience.
[370] *Id.*

least one example proves this point. A witness who testified in the case of *Katanga & Ngudjolo* and was relocated for security reasons returned to his community against OTP and VWU advice.[371] He has not faced any difficulties since his return although it is generally known in the community that he testified as a witness for the prosecution.[372]

¶136 In this regard, it is noteworthy that, in the course of time, many ICC defendants lose their strongholds in their home country, even if not their popularity.[373]

¶137 All of this suggests that the security concerns tend to be exaggerated and cannot be measured by looking at the number of witnesses who were considered in need of protection.

C. Security Concerns Do Not Justify the Method Chosen

¶138 Even if the OTP's security concerns both for OTP personnel and for people assisting the OTP were entirely legitimate, those concerns would still not justify the outsourcing of the bulk of the investigations to third parties such as intermediaries, the UN and NGOs. In outsourcing the investigations, the prosecution simultaneously transfers the responsibility to solve security issues to third parties. Witnesses' risks do not diminish simply because investigative responsibility has been delegated to others.

¶139 In DRC, the OTP took the firm position that reliance on intermediaries would help circumvent security risks for OTP personnel as well as potential witnesses and informants.[374] However, it does not take small communities very long to figure out that an intermediary works for the OTP, which then defeats the purpose of using such an intermediary.[375] Where security risks are genuine, they would then equally affect informants and potential witnesses who are in contact with the intermediary in question, as well as the intermediary himself.[376] And an intermediary does not enjoy the same protection from the ICC as OTP personnel.[377]

¶140 With regard to the UN and NGOs, the prosecution takes the position that it is safer for these organizations to be present in volatile situations than for OTP personnel, given that these organizations do not have a mandate to issue warrants of arrest against suspected war criminals.[378] On this logic, it would thus be safer for potential witnesses and informants to speak to the UN and NGOs than to the ICC OTP.[379]

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[371] ICC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo, ICC-01/04-01/07-2711-Conf, Version Publique de la Décision Relative à la Requête du Bureau du Procureur aux Fins de Communiquer Avec le Témoin, P-250, (Feb. 18 2011), ICC-01/04-01/07-2711-Red (Mar. 10, 2011).

[372] *Id.*

[373] This particularly holds true for Germain Katanga and Thomas Lubanga who were both detained in Kinshasa for a significant period of time before being transferred to the ICC. They were both arrested in Kinshasa on February 26, 2005. They were both replaced as chiefs of their politico-military organisations (FRPI and UPC respectively). Germain Katanga left Ituri at the end of 2004, received the grade of general in the national Congolese army in Kisangani in January 2005 and then arrived in Kinshasa in January 2005. With the exception of his family and intimate friends, he has been out of touch with his community since. *See, e.g.*, ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-1666-Red-tENG, Public Redacted Version of the "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings" of 20 November 2009 (ICC-01/04-01/07-1666-Conf-Exp), ¶¶ 2, 16–22 (Dec. 3, 2009).

[374] *See, e.g.*, *supra* notes 49–53.

[375] This is based on the author's personal experience and observations in the field.

[376] This was the concern expressed by Déirdre Clancy at the ICC Conference, *supra* note 6. Clancy has been dealing with intermediaries who were not relocated despite their claim that their security has been jeopardized as a result of their cooperation with the ICC.

[377] *Id.*

[378] *See, e.g.*, ICC-02/05-21, *supra* note 195, ¶¶ 16–18.

[379] *Id.*

¶141 This argument is unconvincing. NGOs mandated to uncover human rights abuses including HRW and AI frequently submit highly critical reports condemning human rights abuses and calling out for prosecutions of the alleged perpetrators.[380] NGO reports sometimes even identify alleged individual perpetrators by name.[381] These reports often serve as the basis for subsequent ICC investigations and prosecutions.[382]

¶142 NGOs have expressed concern that their cooperation with the ICC, if known to the public, may impair "their ability to play a role in future conflicts."[383] Yet, some NGOs do little to hide their cooperation with the ICC prosecution and even refer to it on their website.[384] As well, in an *amicus* brief, submitted in the DRC situation, the Womens' Institute for Gender Justice broadcasted to the entire world the fact that it had conducted interviews in the DRC, and transmitted its findings to the ICC Prosecutor.[385]

¶143 The Prosecutor also regularly and publicly provides the names of the organizations that cooperate with the OTP.[386] Not that such references are needed for the public at large to understand that an NGO like HRW or the UN is cooperating with the ICC prosecution. In light of their shared mandate of uncovering human rights violations, this is obvious and natural.

¶144 There is then no apparent reason why it would be safer for the UN and NGOs than for the ICC OTP to be present in any conflict zone. Nor would witnesses and informants who speak to NGOs or the UN necessarily be safer than those who speak to the ICC OTP directly. It might even be the other way round, as the ICC has greater powers to protect witnesses than NGOs or the UN.

¶145 In any event, investigations in war-torn or violent societies will always involve some level of risk no matter how much one seeks to reduce it: this cannot be allowed to reduce the quality of the investigation to the extent the OTP has done so far. As Arbour says: "security challenges particular to investigation of international crimes while an armed conflict is ongoing should not per se prevent the Court from acting in pursuance of its international mandate towards timely and effective individual criminal accountability."[387]

¶146 Investigations are generally most efficient when conducted in the immediate aftermath of the commission of the crimes. When there is an ongoing conflict, the best investigations are those conducted during the conflict rather than after it is over, by which time evidence may be lost or destroyed by interested parties.[388] In relation to Darfur in 2006, Cassese warned that

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[380] *See, e.g., D.R. Congo: Army Should Not Appoint War Criminals* 1, HUM. RTS. WATCH, (January 2005), http://www.hrw.org/news/2005/01/13/dr-congo-army-should-not-appoint-war-criminals.

[381] *Id.* at 1, naming as Jérôme Kakwavu, Floribert Kisembo, Bosco Ntaganda and Germain Katanga as persons "alleged to have committed serious human rights abuses including war crimes and crimes against humanity." *See also supra* note 214.

[382] This is apparent, for instance, from the Prosecutor's Second Report. SECOND REPORT, *supra* note 208, ¶ 58. See also the joint public letter from NGOs addressed to the ICC Prosecutor, (July 31, 2006) http://www.iccnow.org/documents/DRC_joint_letter_eng.PDF.

[383] HUMAN RIGHTS FIRST, *supra* note 224, at 1.

[384] *See, e.g., Objectives*, WOMEN'S INITIATIVE FOR GEND. JUSTICE http://www.iccwomen.org/aboutus/mission.php (last visited Feb. 7, 2013) (citing as one of its objectives "ensuring sexualized violence and gender based crimes are a priority in the investigations and prosecutions of the ICC"). It is also worthy to note that the ICC Prosecutor recently appointed the Executive Director of the Women's Initiatives for Gender Justice, as the Special Gender Advisor. *ICC Prosecutor Appoints Brigid Inder as Special Gender Advisor*, WOMEN'S INITIATIVE FOR GEND. JUSTICE (Aug. 22, 2012), http://www.iccwomen.org/news/berichtdetail.php?we_objectID=168.

[385] *See* ICC, Situation in the Democratic Republic of Congo, ICC-01/04-373 (Aug. 20, 2007).

[386] *Supra* note 373.

[387] ICC-02/05-19, *supra* note 196, ¶ 76 (Oct. 10, 2006).

[388] See however Whiting's sensible observation that some evidence does not become available until a significant period after the conflict. According to Whiting, with time, informants may be more inclined to offer information,

valuable testimonial evidence, as well as documents, such as minutes of security meetings, flight records and orders issued by the military authorities in Khartoum to the military authorities in Darfur, would perish if investigations were not carried out immediately.[389] The same can be said about other situations.

D. A Comparison with the ad-hoc Tribunals

¶147 The security concerns outlined above are not new to the ICC. Investigators from other international criminal tribunals have had to carry out investigations in difficult and volatile circumstances. This particularly holds true for the ICTY investigators, who had to operate while the war was still ongoing in parts of the former Yugoslavia. Neither their limited numbers, nor fears for themselves or potential witnesses stopped the ICTY investigators from conducting efficient investigations.[390] Investigators gathered thousands of pages of documentary, forensic, and testimonial evidence.[391] The ICTY was also successful in that all its suspects from all warring parties have eventually been surrendered to it.[392] The ICTR was similarly successful in managing to try most indictees (although on many other fronts, the ICTR is not exemplary).[393]

¶148 Alex Whiting, former ICTY and current ICC prosecutor, expressed the view that the ICC cannot fairly be compared with the ad-hoc Tribunals because the ICC faces "substantial additional challenges."[394] In light of those challenges, Whiting stated that "[t]here is a risk in thinking that since the ad-hoc Tribunals performed beyond expectations, somehow the ICC will do as well."[395]

¶149 Why would the ICC not perform as well as the ad-hoc Tribunals? What are those challenges preventing the ICC from doing so?

¶150 It is often suggested that the *ad-hoc* Tribunals had an easier task than the ICC because they had more means than the ICC to enforce cooperation on unwilling states. Having been

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"either because they in time recognize that it is in their self-interest to do so, or because passions have sufficiently cooled to make cooperation possible. Accordingly, the passage of time can result in a more complete and truer picture of the circumstances of the alleged crime." Alex Whiting, *In International Criminal Law, Justice Delayed Can Be Justice Delivered*, 50 HARV. INT'L L. J. 323, 327 (2009).

[389] ICC, Situation in Darfur, ICC-02/05-14, Observations on Issues Concerning Protection of Victims, *supra* note 196.

[390] At the *Review Conference*, former ICTY Prosecutor Mark Harmon emphasised that the ICTY investigators were very few in numbers by comparing the ICTY investigations into the Srebenica massacre in 1995 with the US investigations into a domestic terrorist attack on the Oklahoma federal court house in that same year resulting in 168 deaths. In Sebrenica, only five investigators were available to investigate while the war was still ongoing. In Oklahoma, over 2500 agents had been assigned to investigate the case. *See* Transcript of Atrocity Crimes Litigation Year-In-Review Conference, 46–47 (Mar. 14, 2012).

[391] *See, e.g.*, ICTY, Prosecutor v. Ante Gotovina, Ivan Čermak & Mladen Markač, IT-06-90-T, Judgment, ¶¶ 45, 74–84, 94–100, 454, 456, 465, 509–20, 1399, 1465 (Apr. 15, 2011); ICTY, Prosecutor v. Vujadin Popović, Ljubiša Beara, Drago Nikolić, Ljubomir Borovčanin, Radivoje Miletić, Milan Gvero & Vinko Pandurević, IT-05-88-T, Judgment ¶¶ 237, 367, 372, 411–12, 502, 523, 544, 550, 565–66, 598, 607 (June 10, 2010).

[392] Patrick Lopez-Terres, *Arrest and Transfer of Indictees: The Experience of the ICTY* (Dec. 15, 2006) (on file with author) (paper presented by then-Chief of Investigations at the ICTY to the ICC Office of the Prosecutor). *See also* CARLA DEL PONTE & CHUCK SUDETIC, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY (2009).

[393] *See, e.g., Accused at Large*, ICTR WEBSITE, http://www.unictr.org/Cases/tabid/77/Default.aspx?id=12&mnid=12. The ICTR has, however, been criticized for indicting only one party to the conflict. *See, e.g.*, Leslie Haskell & Lars Waldorf, *The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences*, 34 HASTINGS INT'L & COMP. L. REV., 70–76 (2011).

[394] Whiting, *supra* note 61, at 230.

[395] *Id.*

established by the Security Council under chapter VII of the United Nations Charter, the ICTY and ICTR have primary jurisdiction in respect to crimes described in their Statutes committed in the former Yugoslavia and Rwanda respectively.[396] All states are under a statutory duty to cooperate fully with the ICTY and ICTR.[397] These *ad-hoc* Tribunals can report any refusal of states to cooperate fully to the Security Council, which can then take measures against these uncooperative states.[398]

¶151 The ICC, on the other hand, has concurrent jurisdiction and was established on the basis of a treaty.[399] The ICC has no effective power to take compulsory measures against states that fail to abide by their obligations, which, according to Kress and Prost, "constitutes a serious weakness" of the ICC.[400]

¶152 In reality, this distinction between the ICC and the ad-hoc Tribunals is more academic than profound. Irrespective of their status, all international criminal courts and tribunals are fully dependent on the cooperation of states, be it for allowing the parties to investigate on the ground, obtaining state security documents or securing arrests.[401]

¶153 Even if, on paper, the ICTY and ICTR have more enforcement powers than the ICC, they can only put them into effect with the support of the powerful states willing and able to put economic and/or political pressure on non-cooperative states.[402] In the case of the ICTY, the powerful states were prepared to condition aid programs and admission to international organizations upon the cooperation of states with the ICTY. Unquestionably, this was an essential reason for the ICTY's success. Though initially thoroughly unwilling to cooperate with the ICTY, the Yugoslav authorities eventually gave in to significant political and financial bargains.[403] The ICTY had an additional advantage of benefiting from the assistance from NATO forces deployed in Bosnia-Herzegovina in arresting ICTY suspects.[404]

¶154 In the case of the ICTR, on the other hand, the powerful states did not show willingness to challenge the current regime in Rwanda in blocking any proper investigations into crimes allegedly committed by the Rwandan Patriotic Front (RPF) whose leaders form the

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[396] ICTY Statute, art. 7(2) (Sept. 2009); ICTR Statute, art. 8(2) (Jan. 31, 2010); ICTY RPE, Rules 8, 11, 56–58 (July 24, 2009); ICTR RPE, Rules 8, 11, 56–58 (Oct. 1, 2009). *See also* Cryer, *Prosecuting International Crimes*, *supra* note 16, at 127–42.

[397] ICTY Statute, art. 29 (Sept. 2009); ICTR Statute, art. 28 (Jan. 31, 2010).

[398] Where State authorities fail to comply with an obligation under any of the Rules in conjunction with article 29 of the ICTY Statute or article 28 of the ICTR Statute, the President may report the matter to the Security Council if satisfied that this is indeed the case. ICTY RPE, Rules 7*bis*, 11, 59(B); ICTR RPE, Rules 7*bis*, 11, 59(B).

[399] ICC Statute, arts. 12, 17 (Nov. 29, 2010).

[400] Claus Kress & Kimberly Prost, *Article 93*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVER'S NOTES, ARTICLE BY ARTICLE 1576 (Otto Triffterer ed., 2nd ed. 2008). *See also* Gilbert Bitti, *Article 64*, in COMMENTARY, *supra* at 1213. This was one of the arguments raised by the Defence for Germain Katanga in support of its submission that the ICC may not be able to offer the accused a fair trial. See ICC, Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, ICC-01/04-01/07-949, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, Pursuant to Article 19(2)(a) of the Statute, ¶ 24 (Mar. 11, 2009).

[401] ICTY Statute, art. 7(2) (Sept. 2009); ICTR Statute, art. 8(2) (Jan. 31, 2010); ICTY RPE, Rules 8, 11, 56–58 (July 24, 2009); ICTR RPE, Rules 8, 11, 56–58 (Oct. 1, 2009); ICC Statute, Part IX (Nov. 29, 2010).

[402] As Carla Del Ponte pointed out, despite the legal obligation on States to cooperate, this is not always enforceable in reality. Carla Del Ponte calls this lack of political independence the greatest weakness of international criminal justice. See Del Ponte's observations expressed at the *Tribunal Penal International Pour le Rwanda: Modele ou Contre-Modele pour la Justice Internationale? Le Point de Vue des Acteurs*, Conference held in Geneva in May 2009.

[403] *See* Lopez-Terres, *supra* note 392.

[404] This was made possible by the adoption of a new Rule 59*bis*, explicitly allowing peacekeeping forces deployed in Bosnia-Herzegovina to arrest ICTY indictees. *See id.*

government.[405] Carla Del Ponte who pushed hard to initiate such investigations was soon lifted from her position as the chief Prosecutor of the ICTR.[406] Until today, these alleged crimes have been left untouched.[407] This clearly demonstrates that the success of an international court or tribunal does not depend on its legal status, but rather on the political willpower to take action against uncooperative governments.

¶155 There is no reason why pressure cannot be put on uncooperative governments within the context of ICC proceedings. In signing the Rome Statute, States Parties have committed themselves to cooperate fully with the Court.[408] Failure to do so can be reported to the Assembly of States Parties.[409] If the political will is strong enough, the States Parties, supported by powerful non-party states like the US, can put political and economic pressure on unwilling states in the same fashion as they could in the case of the ICTY.

¶156 Moreover, the legal distinction between the ICC and the ad-hoc Tribunals disappears completely in ICC situations based on Security Council referrals.[410] The status is then similar to the ad-hoc Tribunals in that the ICC can impose its jurisdiction on an unwilling non-party state and that the Security Council can take measures against uncooperative states.[411] However, that is not to say that the cooperation of an unwilling state can be enforced so easily, as is apparent in the case of Sudan. The willingness and ability to put pressure on uncooperative states will vary from situation to situation depending on the political context.

¶157 Another suggested difference between the ICC and the ad-hoc Tribunals is that, because the ICC is a permanent institution, states and organizations will be more cautious in offering assistance to it than to the ad-hoc Tribunals. The reason for a more cautious approach would be that such assistance would not necessarily be sought on a one-off basis only and might have implications for their work in future conflicts.[412] So far, this clearly did not make the NGOs more cautious in their cooperation with the Court. They continue to cooperate fully, and quite openly too.[413] The Prosecutor often expresses gratitude for the continuous cooperation from the UN, NGOs and governments.[414]

¶158 A more compelling argument is that the ICTY and ICTR had the luxury of being able to focus on one conflict only over the course of many years. Only with time did they manage to get access to the important documents and crime scenes.[415] The ICC has a much wider geographical scope, and must therefore spread its focus and resources over numerous unrelated situations simultaneously. As HRW observed, "[t]his risks the adoption of a shallow approach" because "the practical difficulties" and "resource constraints" in each situation are "considerable" and "real."[416] The task of the ICC Prosecutor is, therefore, "even more complex" than that of the ICTY or ICTR Prosecutor.[417]

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[405] *See* Haskell, *supra* note 393.
[406] *See* Carla Del Ponte's Observations at the Geneva Conference, *supra* note 402.
[407] *See id.*; *see also* Haskell, *supra* note 393.
[408] ICC Statute, Part IX (Nov. 29, 2010).
[409] ICC Statute, art. 87(7) (Nov. 29, 2010).
[410] ICC Statute, art. 13(b) (Nov. 29, 2010).
[411] This is so because, in referring a situation to the ICC, the Security Council is acting under Chapter VII of the Charter of the United Nations. *See id.*
[412] Whiting, *supra* note 61, at 228–29.
[413] *See supra* notes 380–86.
[414] THIRD REPORT, *supra* note 210, ¶¶ 10–12; FOURTH REPORT, *supra* note 201, ¶ 9.
[415] Whiting, *supra* note 61, at 230.
[416] HRW, *supra* note 304, at 8.
[417] *Id.*

¶159 This is a valid point, but it is outweighed by several others. First, the ICC has had ten years to overcome initial difficulties and set in place a sustainable and responsible investigatory strategy. Second, the ICC has certain advantages over the ICTY and ICTR. The ICC can learn from the experience of the ad-hoc Tribunals in dealing with similar difficulties, as well as their mistakes. The ICTY and ICTR did not have the luxury of modern precedent. Third, the ICC has more legitimacy given that it is based on a treaty signed by consenting states. The creation of the ad-hoc Tribunals was much more controversial and subject to criticism.[418] The ICC has 121 member states and this number still increases. This signifies that the ICC continues to have wide support.

¶160 Thus, the ICC has all the potential to become an effective court fully backed by a large number of states, the UN, NGOs and other organizations. There is, then, no apparent reason why the ICC could not be as efficient as the *ad hocs*.

¶161 It would appear that the future success of the ICC depends on the willingness of the international community to support the Court, as well as on its own attitude and the efforts it is willing to make to achieve efficiency. The ICTY had to fight hard to overcome many obstacles in the way to its success. Initially, the ICTY investigators had a rough time in acquiring access to certain crime-base areas and crucial witnesses, particularly in the Republika Srpska within Bosnia and Herzegovina.[419] However, with time and persistence, they eventually managed to investigate the bulk of the most significant crimes committed by all sides, including Serbs, Croats and Muslims throughout the former Yugoslavia.[420] The ICTY succeeded in doing so because it took its investigations seriously and had pride in its achievements. It took a tough approach to uncooperative governments. It did not bend to pressure from the Yugoslav authorities, but rather sought the support of the EU and the US to pressure them into cooperation.[421]

¶162 The ICC's strategy has been different: when four officers of the court were detained in Zintan, Libya for nearly a month, only one public request was made for their immediate release.[422] Then the ICC made a statement that can be interpreted as an apology to the Libyan authorities with the purpose of getting the ICC officials released.[423] Upon their release, the ICC President thanked both the Libyan and the Zintan authorities for their cooperation.[424]

¶163 What cooperation? Can this be the right message to send to uncooperative authorities; namely that they can frustrate the work of the Court without fearing any consequences?

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[418] Lopez-Terres, *supra* note 392.

[419] *Id.*

[420] There has even been a case against two citizens of Macedonia for crimes committed against ethnic Albanians. This case concerned two accused: Ljube Boškoski and Johan Tarčulovski. Ljube Boškoski was acquitted and Johan Tarčulovski was sentenced to 12 years. *See* ICTY, Prosecutor v. Ljube Boškoski & Johan Tarčulovski, IT-04-82-T, Judgment (July 10, 2008).

[421] Lopez-Terres, *supra* note 392.

[422] ICC, Press Release, Four ICC Staff Members Detained in Libya, ICC-CPI-20120609-PR805 (June 9, 2012), http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr805. One more statement was made by the President of the Assembly of States Parties, expressing concern about their continued detention. *See* President of the Assembly, Statement on the Situation of ICC staff in Libya, ICC-ASP-20120612-PR807, (June 12, 2012), http://www.icc-cpi.int/NR/exeres/51827832-C129-40B1-869D-A76FA85DC36B.htm.

[423] ICC, Press Release, Statement on the Detention of Four ICC staff members, ICC-CPI-20120622-PR815 (June 22, 2012), http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr815.

[424] ICC, Press Release, The Four ICC Staff Members Released in Libya, ICC-CPI-20120702-PR820 (July 2, 2012), http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr820.

IV. SUGGESTIONS FOR IMPROVEMENT

A. Revision of Vision

¶164 In light of the above, it is clear that there are systematic problems with the OTP investigation strategy that need to be addressed. Elena Baylis, [425] Chris de Vos, [426] and Brenda Hollis,[427] prosecutor at the Special Court for Sierra Leone, have all suggested adoption of guidelines governing relations between the court and third parties. Julie Flint and Alex de Waal suggest that the Prosecutor should increase the investigation budget and employ more investigators to carry out more thorough investigations.[428] These are sensible suggestions that may help to ensure that, in future cases, the OTP complies with the highest investigation standards, keeps greater control over the method of the investigations and provides more clarity about its relationship with third parties.[429]

¶165 The implementation of any of these suggestions can, however, only be successful if the OTP radically changes its approach vis-à-vis investigations. To date, the greatest concern is an apparent lack of genuine interest in the higher reaches of the ICC OTP in more efficient investigations. Indeed, the fair-minded observer easily gains the impression that security concerns or budget restraints are used as a shield to justify deficiencies in the investigations. For instance, in Kenya, even the most obvious steps such as the obtaining of transcripts or videos of public speeches were not taken. No security threat or budget restraint would have stood in the way of investigators obtaining such material.

¶166 In the Darfur situation, the Prosecutor expressed the view that the OTP was perfectly able to conduct meaningful investigations without stepping foot in Darfur.[430] Whilst undoubtedly some effective steps can be taken outside the situation country, an investigation cannot be complete—and it cannot focus on incriminating and exonerating circumstances equally—without visiting the crime scene. Cassese and Arbour understood this; the former ICC Prosecutor did not.

¶167 In the DRC, the Executive Committee of the Prosecutor's Office was of the view that the witnesses' own testimony was sufficient evidence of their age.[431] Thus, it was considered unnecessary to double-check information from witnesses. In *Lubanga*, intermediary P-143 provided some documents to identify whether the children, in terms of age, could be linked with particular classes of students within identified age ranges but was instructed not to attempt to obtain birth certificates at the Mayor's Office in Bunia or Mudzipela.[432] For similar reasons, no attempts were made to obtain their identity cards from the Independent Electoral Commission.[433]

¶168 Inefficient investigations have led, in part, to the non-confirmation of four out of fourteen cases and the acquittal of one accused. And unless there is a radical change in attitude, the lack of interest in effective investigations may result in more acquittals of individuals who should otherwise have been convicted. It is unprecedented for the second accused before an

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[425] Baylis, *Outsourcing Investigations*, *supra* note 7, at 145–47.
[426] De Vos, *Case Note*, *supra* note 7, at 17–19.
[427] See observations of Brenda Hollis at ICC Conference, *supra* note 6.
[428] Flint & de Waal, *supra* note 48, at 23, 30–31.
[429] *Supra*, section II.D.2.d (Non-Transparent Nature of Relationship).
[430] ICC-02/05-19, *supra* note 196, ¶¶ 20–22; Situation in Darfur, ICC-02/05-14, Observations on Issues Concerning Protection of Victims, *supra* note 196, ¶ 19.
[431] Lubanga Judgment, ICC-01/04-01/06-2842, *supra* note 1, ¶ 170 (citing Lavigne Deposition, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, *supra* note 24, at 15–16).
[432] *Id.* ¶ 173.
[433] *Id.* ¶ 175.

international criminal court or tribunal to be acquitted. The case against Ngudjolo fell apart because it was built upon unreliable witnesses. This is a striking outcome.

¶169 Fortunately, there is reason to hope that this attitude may change. During a meeting held at the American Society of International Law on September 21, 2012, the new Prosecutor, Fatou Bensouda, said it was one of her priorities to improve investigations.[434] Similarly, at a recent conference in The Hague, the representative of the ICC prosecution conceded that some of the criticism with regard to the OTP's investigations was legitimate and that, within the bounds of budgetary restraints, the OTP was working towards an improved investigation policy.[435] This is promising, and a clear departure from the ICC Prosecution Coordinator's initial reaction expressed at the *Review Conference* that the *Lubanga* judges had been "overly harsh" in their criticism.[436] It remains to be seen whether the improvements that are put in place will be sufficiently radical to repair the very serious deficiencies in the OTP investigations.

B. Increased or Improved Management of Investigation Budget

¶170 To increase the efficiency of the investigations, it is important that a sufficient number of investigators are employed for each situation. The author agrees with Flint and de Waal that, if the OTP does not have a large enough pool of investigators to address each situation adequately, new investigators should be recruited. At least some of them should have experience in conducting criminal investigations and expertise in collecting forensic evidence, little of which has been done so far.[437] Investigators should further be provided with sufficient funds to cover their travel and other expenses made in the course of the investigations. To do so, it might be necessary to increase or improve the management of the investigation budget. Conducting effective investigations is an expensive business. In 2009, Whiting stated that additional funds were required for the ICC to be as successful as the *ad hoc* Tribunals in investigating and prosecuting suspected war criminals.[438]

¶171 It is conceded that acquiring additional funds in a situation of worldly financial crisis is not a simple task. Currently, the budget is frozen. The states parties are unwilling to raise their financial contributions although the number of ICC situations is increasing.[439] The current Prosecutor has indicated that she will do her best to seek to persuade the states parties to increase the budget by making them realize that insufficient funding undermines the quality of the investigations.[440]

¶172 If unsuccessful and if genuinely impossible to improve the quality of the investigations without a budget increase, the OTP may have to take a step back and concentrate on fewer

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[434] *The International Criminal Court: A New Approach to International Relations* (video), COUNCIL ON FOREIGN RELATIONS, http://www.cfr.org/international-criminal-courts-and-tribunals/international-criminal-court-new-approach-international-relations-video/p29067?utm_medium=feed&utm_campaign=Feed:+cfr_main+(CFR.org+-+Main+Site+Feed)&utm_source=buffer&buffer_share=f538f.

[435] *See* observations of Alex Whiting at ICC Conference, *supra* note 6.

[436] Transcript of Atrocity Crimes Litigation Year-In-Review Conference, 14 (Mar. 14, 2012), *per* Sara Criscitelli. She however added that she respected the authority of the Court and that such firm public criticism is a good thing in the sense that "[i]t does send a signal that this court is not sort of a kangaroo court, it's not in the pocket of the prosecution, it's not willing to tolerate any kind of measure."

[437] As noted by Trial Chamber II in the Ngudjolo Judgment, ICC-01/04-02/12-3, *supra* note 18, ¶ 118, in that case there was a clear absence of medical or other forensic evidence to identify the victims. The OTP had conducted only one forensic mission in 2009 (*id.* at n. 266) but that was too late to have any probative value.

[438] Whiting, *supra* note 61, at 230.

[439] HRW, *supra* note 304, at 47. *See also* Bensouda, *supra* note 423.

[440] *See* Bensouda, *supra* note 423.

situations. Arguably, it is better to investigate fewer situations thoroughly than more situations in a "shallow" fashion.[441]

¶173 This author, however, suspects that none of this is necessary; that the funds currently available to the OTP are sufficient to conduct effective investigations. Apparently, the OTP currently has forty-five investigators, which, although on the lower side, should be a sufficient number to conduct efficient investigations in seven situations simultaneously.[442] This is all the more obvious if compared with the means available to the defense. A defense team ordinarily has one or two investigators and a significantly lower investigation budget than the prosecution.[443] Yet, they succeeded in paying regular visits to the crime sites and other important locations, obtaining relevant documents and interviewing a significant number of potential witnesses and informants.[444]

¶174 The defense situation suggests that the funds available to the prosecution may simply have to be managed more economically while prioritizing the quality of the investigations. A higher percentage of the overall prosecution budget might have to be allocated to investigations.[445]

¶175 Whatever the best solution is, budgetary restraints should not be allowed to prevent the OTP from conducting effective investigations.[446] In this regard, Bensouda rightly stated that one should aspire to a "case-driven" court rather than a "resource-driven" court.[447]

C. Review of Investigation Strategy

¶176 It is also time for a wholesale review of the OTP investigation strategy. HRW has expressed serious criticism with regard to the Prosecutor's investigation strategy. According to HRW, the OTP "simply 'doesn't get' what is needed to redress the serious crimes committed."[448] Along with other observers,[449] HRW stated that there is a need for "more coherent and effective strategies in each situation."[450]

¶177 The main aspect of investigation strategy in need of revision is the policy of focused investigations. Pursuant to this policy, the OTP "will investigate and prosecute those who bear the greatest responsibility for the most serious crimes based on the evidence that emerges in the course of an investigation."[451] The OTP selects a limited number of persons "situated at the

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[441] HRW, *supra* note 304, at 1–2, 8. *See also* Townsend, *supra* note 334, at 293.

[442] See observations of Alex Whiting at ICC Conference, *supra* note 6.

[443] In March 2012, the ICC decreased its legal aid budget. This decrease resulted in a cut in the salaries of members of defense teams and victim representatives. After heavy negotiations with defense counsel, the defense investigation budget has remained untouched. However, until now, there was significant leeway to request for additional funds in conducting investigations, provided such request was justified. The defense in *Lubanga* and *Katanga & Ngudjolo* sought and received further funds on at least two occasions. With the budget limitations, it is questionable whether such requests will be approved in the future. *See* internal ICC documents, on file with author.

[444] This is based on the author's own experience. In *Lubanga*, the defense succeeded in bringing to light the misconduct of certain intermediaries because it spent sufficient time in Ituri. Also, as noted by Trial Chamber II in the judgment of Ngudjolo, *supra* note 18, ¶ 121, it was the defense, rather than the prosecution, which produced most documents relating to the age of the witnesses.

[445] See, however, Bensouda's observation that the OTP is already doing all it can to operate within the budgetary restraints. Bensouda, *supra* note 423.

[446] *See* HRW, *supra* note 304, at 46.

[447] Bensouda, *supra* note 423.

[448] HRW, *supra* note 304, at 46.

[449] *See, e.g.*, Katy Glassborow, *ICC Investigative Strategy Under Fire*, INST. FOR WAR & PEACE REPORTING (Oct. 17, 2008), http://iwpr.net/report-news/icc-investigative-strategy-under-fire.

[450] HRW, *supra* note 304, at 46.

[451] *Prosecutorial Strategy, 2009–2012*, ICC WEBSITE, ¶ 19 (Feb. 1, 2010), http://www.icc-

highest echelons of responsibility"[452] and a limited number of incidents.[453] This policy was put in place and continues to be in effect because it enables the OTP "to carry out short investigations; to limit the number of persons put at risk by reason of their interaction with the Office; and to propose expeditious trials while aiming to represent the entire range of victimization."[454] The OTP does not perceive its task to include the establishment of "comprehensive historical records for a given conflict."[455] Rather, "incidents are selected to provide a sample that is reflective of the gravest incidents and the main types of victimization."[456]

¶178 This policy is strongly supported by some senior OTP members who see it as a means to accelerate the investigations and help the OTP bring cases faster, rather than dragging on investigations for years.[457]

¶179 In principle, there is nothing objectionable about this policy; prosecutors in international justice cannot prosecute everyone and focus on all alleged crimes committed. The Prosecutor should not be, and is not here, criticized for pursuing the persons bearing greatest responsibility for the most serious crimes.

¶180 This article is concerned with how those people and incidents are chosen. Regrettably, it appears the focus is determined not in consultation with the OTP investigators after conducting field investigations, but rather by the Prosecutor based on a review of preliminary information gathered by third parties.[458] Consequently, upon arrival, investigators are to focus strictly on previously selected incidents and perpetrators and ignore any other evidence they come across in the course of their investigations. In the case of *Lubanga*, former investigators apparently had been collecting evidence of various crimes in the course of a year and a half but were then told to focus on child soldiers only.[459]

¶181 This is troubling. The focus on specific crimes and perpetrators cannot be determined properly before a thorough field-investigation has taken place. It should be the OTP's own independent investigation that determines the focus, not the other way round. If the ultimate focus were determined solely on third party evidence, the Prosecutor would act in violation of his statutory duty to conduct independent investigations. Perhaps as a result of a too quick determination of the focus,[460] the selection so far of the alleged crimes and perpetrators, particularly in the DRC, has been criticized.[461] In selecting the focus and generally in stipulating the investigation policy, it is important that the Prosecutor listen closely to those with experience on the ground—the investigators.[462]

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cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf.

[452] *Id.*

[453] *Id.* ¶ 20.

[454] *Id.*

[455] *Id.*

[456] *Id.*

[457] Glassborow, *supra* note 449 (citing an interview with Le Fraper du Hellen).

[458] *Id.* (citing interviews with former investigators).

[459] *Id.*

[460] Former investigators reportedly told IWPR that the Prosecutor was so rushed to bring cases before the ICC that insufficient analysis of information gathered through other sources was done before investigators were sent out on missions. As a consequence, they felt ill prepared. *See* Glassborow, *supra* note 449.

[461] HRW questions the OTP's independence and impartiality in selecting the defendants. *See* HRW, *supra* note 304, at 11–12.

[462] The ICC lost a number of high quality investigators because they were frustrated by the fact that the Prosecutor attached so little importance to the investigations or the voice of experience in the way they were carried out. *See* Glassborow, *supra* note 449.

¶182 The OTP's practice of "sequencing" investigations has also raised concerns, because it indicates that the OTP investigates the culpability of one warrant party at a particular time before moving to another. The OTP believes this to be a more efficient investigation method.[463] HRW doubts this assertion and correctly points out that sequencing "has posed a significant challenge to maintaining perceptions of impartiality."[464] In addition, sequencing increases the safety risks for witnesses and informants by making the identity of the person against whom witnesses are providing information to the OTP more obvious.

¶183 If sequencing is necessary to use the limited resources effectively, it would be better to sequence entire situations rather than one side of the conflict before the other. Furthermore, sequencing entire situations would allow the OTP to wrap up its "unfinished business," which continues to plague most of the situations.[465]

D. Permanent Presence in the Region

¶184 The author agrees with the observation made by HRW that the OTP "must improve its field presence and the involvement of its field-based staff in policy setting."[466] The author suggests that at least one international investigator should be present in the region under investigation on a permanent basis.

¶185 Gaining the trust of local communities takes time and involvement. Once gained, that trust genuinely facilitates the work of the investigators. Engendering trust may require simple gestures such as paying a visit to the local chief. For these and other reasons, there is no substitute for human contact between familiar faces in conducting investigations. Through a permanent presence, the investigator(s) could attain knowledge and interest in the history of the conflict, local culture and, ideally, language.[467] If third party activity is necessary in certain activities within an investigation, the permanent investigator(s) could ensure there is sufficient supervision and scrutiny over those activities. The permanent investigator(s) could cooperate closely with local and international NGOs, as well as the UN—without outsourcing the investigations *in toto*.

¶186 The permanent presence of one or more investigators could also improve security in the region. Individuals or groups seeking to discourage potential witnesses from testifying might think twice before doing so if immediate action by the ICC was a possibility. Moreover, Arbour has expressed the view that the presence of the OTP in a volatile region could be an effective part of an investigation strategy and have a positive impact on the human rights situation.[468] Instead of relocating nearly everyone perceived to be in danger, the ICC could collaborate with the local police to ensure more forceful reactions to any *actual* threats or violence. The permanent presence of one or more investigators would be a key element in such a mechanism.

E. Verification of the Evidence

¶187 The practice of presuming the veracity of a witness's account, or simply failing to buttress it with other evidence, should stop. Investigators must diligently scrutinize this information.[469]

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[463] *See* observations of Alex Whiting at ICC Conference, *supra* note 6.
[464] HRW, *supra* note 304, at 19.
[465] *Id.* at 46–49.
[466] *Id.* at 46.
[467] HRW acknowledged that these are important ingredients of conducting thorough investigations. *See id.* at 8.
[468] ICC-02/05-19, *supra* note 196, ¶¶ 70, 78.
[469] As the prosecution alleges it does. *See* Katanga & Ngudjolo Trial Hearing, ICC-01/04-01/07-T-81-Red-ENG, *supra* note 196, at 37–38. However, as noted by Trial Chamber II in the Ngudjolo Judgment, ICC-01/04-02/12-3,

To do so effectively, investigators must be allowed—even encouraged—to contact family members and other close allies, neighbours, employers, teachers, fellow students or employees, village chiefs, church leaders or other people with relevant information about the potential prosecution witnesses. There are ways to do so without putting any witness at risk, and investigators either should be trained accordingly, or, in the more likely scenario, should be allowed to act on their prior training. This is particularly easy when witnesses are relocated, because the risk to witnesses largely ceases at that point.

¶188 There is no good reason not to verify the records. Even if witnesses are not relocated, questions about them can be asked in a manner that does not disclose that the questions relate to witnesses for the prosecution. For instance, a classic technique probably known by all OTP investigators is to ask similar questions about non-witnesses. Skilled and trained investigators should be able to strike the right balance between obtaining necessary information and witness protection. If the OTP hires the right investigators, those individuals should then be given more leeway to make these and other determinations on the basis of their experience in the field.[470]

F. Clear Guidelines

¶189 The main view appears to be that the recruitment of intermediaries is essential for successful investigations. The principal concern, therefore, is the method and extent to which intermediaries have been deployed thus far. The solution proposed by the court and others is the adoption of clear guidelines governing the relationship with intermediaries. It might not be necessary to recruit intermediaries in the manner described. Rather than relying on intermediaries, the OTP could employ local persons directly as investigators (or "resource persons" as they are called by the defense). They would be accountable and their activities, role and mandates would be transparent. As investigators, the local recruits would work directly with the Prosecutor's Office. Investigators could work with local informants on an *ad hoc* basis without disclosing their identity unless this becomes a contentious issue.[471] Their title is irrelevant. A number of strict conditions should be applied. Their backgrounds should be screened carefully and they should operate under the strict supervision and control of the international investigators.

¶190 Additionally, there should be proper scrutiny and audit of the work done and the methods used, as well as a clear understanding of disciplinary procedures in the case of misconduct. They should be asked to sign confidentiality agreements and be made aware of the ethical and legal obligations imposed on staff members of the Prosecutor's Office. And, of course, they should be trained properly.[472]

¶191 There should be full transparency about their relationship with the OTP and their identity should be disclosed to the defense. This is particularly important if they are used frequently, as they were in *Lubanga* and *Katanga & Ngudjolo*. On that note, it is also important that any draft guidelines on the relationship with local recruits incorporate these suggestions and be finalized and put into practice as soon as possible.

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supra note 18, ¶ 121, the OTP failed to verify the age and military status of its witnesses. Rather, it was the defense which collected the school bulletins of the prosecution witnesses, and other documents relevant to their age.

[470] *See* Glassborow, *supra* note 449.

[471] As Whiting put it, disclosure could be done "as a last resort," *supra* note 61.

[472] *See* Observations of International Prosecutors at ICC Conference, *supra* note 6.

G. Cooperation

¶192 Rather than bowing its head to uncooperative governments, groups or individuals, the ICC should adopt a "carrot and stick" approach to cooperation. Incentives for cooperation could, through liaison with international trade organizations, be financial in nature. Additionally, the ICC should consider creating a mechanism to ensure that those who obstruct the operation of the Court face consequences. When dealing with individuals or local armed groups, like in the DRC, the ICC should seek the cooperation from the local or state authorities or other organizations such as the UN to investigate and penalize such conduct. When dealing with obstructionist states, the ICC should seek international cooperation to put political or economic pressure on the government in question. This is not an easy task, and its implementation will take time and effort. But, as the ICTY has demonstrated in successfully implementing such a strategy, it can work.[473]

V. CONCLUSION

¶193 One should not forget what is at stake. The crimes which are the subject of the OTP's investigations are "the most serious crimes of concern to the international community as a whole" committed in the world's most vulnerable locations.[474] To outsource the responsibility for investigations not only undermines the legitimacy of the ICC as an institution, it also deprives the victims of accountability.

¶194 Within the world of international justice there is an overwhelming focus on the fact that there was an arrest, there was a trial, and someone was convicted. It is not enough simply to applaud the fact that there was a trial. When an individual is tried and sentenced on the basis of investigations as flawed as those carried out in the *Lubanga* case, the principal losers are the victims, who are entitled to a better quality of justice.

¶195 Lubanga was convicted of enlisting and conscripting child soldiers and using them to fight his battles. These child soldiers were the victims of the offences he is found to have committed. But the Chamber was not satisfied that even a single one of the witnesses whom the prosecution called purporting to be victims had, in fact, been child soldiers. In other words, not a single one of Lubanga's victims ever got a chance to tell his or her story to the court and have it count. That is not a victory; for the OTP, that is a shameful outcome. For the rest of the world, it is a troubling one. Now that Ngudjolo has also been acquitted, the OTP should not be surprised if it receives severe, but well-deserved criticism with respect to its investigative failures.

[473] *See supra* section III.D (A Comparison with the *ad-hoc* Tribunals).
[474] ICC Statute, Preamble (Nov. 29, 2010).