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NO WITNESS, NO CASE: AN ASSESSMENT OF THE CONDUCT AND QUALITY OF ICC INVESTIGATIONS

*Dermot Groome**

INTRODUCTION

The Prosecution's conduct of investigations has come under increasing scrutiny and criticism from judges on the International Criminal Court. Criticisms are directed at some of the investigative methods used as well as the quality of some of the evidence presented at proceedings.

To date, the Office of the Prosecutor ("OTP", "the Prosecutor", "the Prosecution") has completed investigations into seven situations resulting in requests for 30 arrest warrants or summonses.[1] The charges against 15 accused have been the subject of confirmation proceedings pursuant to Article 61 of the Rome Statute. Judges have confirmed the charges against ten individuals

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[1] Under Article 58 of the Rome Statute, the Prosecution can request either an arrest warrant or a summons to appear. Rome Statute of the International Criminal Court art. 58, July 17, 1998, 2187 U.N.T.S. 38544, http://www.un.org/law/icc/index.html [hereinafter Rome Statute].

and have declined against four on the grounds of insufficient evidence.[2] In one case, the confirmation hearing was adjourned for additional investigation after the Chamber found the evidence presented was insufficient to sustain the charges.[3] The inability to sustain any of the charges at the standard required for confirmation in itself indicates infirmities in the investigation.[4] Of the ten confirmed cases, one accused has been acquitted after trial and the Prosecution withdrew charges against another citing the loss of several witnesses.[5] Recently, the Prosecution notified the *Kenyatta* Chamber that it was removing a key witness from its case after

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[2] Accused against whom charges have been confirmed: Democratic Republic of Congo (DRC): Lubanga (1/29/2007); Katanga and Chui (9/30/2008); Sudan: Abakaer Nourain and Jerbo Jamus (3/7/2011); Central African Republic (CAR): Bemba (6/15/2009); Kenya: Ruto, Sang, Kenyatta, and Muthaura (1/23/2012). On March 18, 2013 the Prosecution withdrew the charges against Muthaura. Ngudjolo Chui was acquitted after trial. Chambers declined to confirm the charges against the following accused: DRC: Mbarushimana (2/16/2011); Sudan: Abu Garda (2/8/2010); Kenya: Kosgey, Hussein Ali (1/23/2012).

[3] Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute (June 3, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1599831.pdf [hereinafter Gbagbo Adjournment Decision]. The Chamber directed the Prosecution to file an amended Document Containing the Charges ("DCC") by November 15, 2013 with resumption of the confirmation hearing to follow.

[4] The legal standard of sufficiency for the issuance of an arrest warrant is "reasonable grounds" that a crime under the Rome Statute has been committed. The standard for confirmation of the charges is "substantial grounds to believe," something more than reasonable grounds but less than "proof beyond a reasonable doubt." In *Lubanga,* the Pre-Trial Chamber explicated this standard as requiring the Prosecutor to "offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations" against an accused. The Chamber must "[a]fter an exacting scrutiny of all the evidence, . . .determine whether it is thoroughly satisfied that the Prosecution's allegations are sufficiently strong to commit [the accused] for trial." Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-803, Decision on the Confirmation of Charges, para. 39 (Jan. 29, 2007), http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF.

[5] *See* Prosecutor v. Ngudjolo, Case No. ICC-01/04-02/12, Judgment Pursuant to Article 74 of the Statute (Dec. 18, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1579080.pdf; Prosecutor v. Muthaura, Case No. ICC-01-09-02/11, Prosecution Notification of Withdrawal of the Charges against Francis Kirimi Muthaura (Mar. 11, 2013), http://www.icc-cpi.int/iccdocs/doc/ICC-01-09-02-11-687.pdf [hereinafter Muthaura Notice].

learning he had fabricated his evidence. It also asked for a delay in the start of the trial to consider whether it could sustain its burden at trial.[6]

On my first day as a prosecutor in the Manhattan District Attorney's Office, my bureau chief, Warren J. Murray Jr., began our training by introducing us to a few of his well-known prosecutorial maxims or "rules." Rule number one, his first and most important was: "No witness—no case." He was making the somewhat obvious but often forgotten point that the most essential aspect of a prosecutor's work is to identify and secure evidence (most often in the form of eyewitness testimony).[7] Credible and reliable evidence is the foundation of a criminal case; it underlies each and every aspect of the case that follows an arrest. Without it, there is no viable case. The goal of a criminal investigation is to identify and collect evidence. Investigations must be thorough, conducted methodically using recognized procedures and methods, and must explore all investigative avenues, including those that suggest innocence as well as guilt. A successful investigation requires trained and experienced staff, a clear investigation plan, and access to where such evidence may be located.

Article 42 of the Rome Statute charges the Office of the Prosecutor with the responsibility of receiving and examining information of crimes and initiating investigations when appropriate.[8] Articles 53 to 56 set out general principles regarding the conduct of investigations. Investigations can be initiated upon the request of a State Party or by a referral from the U.N. Security Council exercising its Chapter VII authority. OTP can also initiate preliminary investigations on its own initiative pursuant to its authority under Article 15.

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[6] *See* Prosecutor v. Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, Notification of the Removal of a Witness from the Prosecution's Witness List and Application for an Adjournment of the Provisional Trial Date (Dec. 19, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1703998.pdf.

[7] In this essay, I will use the word "evidence" to include all types of proof accepted in court proceedings, including physical evidence, witness testimony, documentary evidence, video, audio, and metadata.

[8] Rome Statute, *supra* note 1, at art. 42(1).

Article 54 sets out the basic structure of an investigation and the principles upon which it should proceed. Most notable is subsection 1(a) which charges OTP with the duty to investigate "all facts" to determine criminal responsibility and to "investigate incriminating and exonerating circumstances equally." The ICC Rules of Procedure and Evidence ("Rules") and the Prosecutor's Regulations expound on the conduct of investigations.[9]

Most prosecutors learn the vital importance of a good investigation early in their career, hopefully with a minor crime. A prosecution will not succeed if the investigation underlying it is seriously flawed. OTP's failure to adhere to "rule number one" has drawn criticism from the Court and resulted in the faltering of some of its prosecutions, and the failing of others.

THE PROBLEMS IDENTIFIED BY THE ICC JUDGES

To date, judges at the ICC have leveled criticism and expressed concern with respect to several aspects of the OTP's investigative practices:

- The failure to adequately discharge the Prosecution's obligation under Article 54 to investigate exculpatory information equally.
- The timing and length of investigations.
- The quality of the evidence collected during the investigation and presented in court.
- The inappropriate delegation of investigative functions; *i.e.,* the use of intermediaries.
- The failure to properly analyze evidence and disclose potentially exculpatory material.

[9] Rules 46 to 50 elaborate the Prosecution's authority under Article 15. *See* INT'L CRIMINAL COURT, *Regulations of the Office of the Prosecutor*, ICC-BD/05-01-09, (Apr. 23, 2009), http://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf.

In the remainder of this essay I will address and analyze each of these criticisms in turn.

A. The Failure to Adequately Discharge the Prosecution's Obligation Under Article 54 to Investigate Exculpatory Information Equally

Defense counsel have regularly asserted that OTP fails to conduct its investigations in accordance with Rule 54.[10] The Pre-Trial Chamber tasked with considering the charges in the Kenya situation was troubled by evidence indicating the Prosecution had not met its obligation to conduct a fair investigation. The Chamber, in declining to confirm the charges against Callixte Mbarushimana in the Democratic Republic of Congo (DRC) situation, expressed its concern regarding interview techniques used by investigators which "seem[ed] utterly inappropriate when viewed in light of the objective, set out in Article 54(1)(a), to establish the truth by 'investigating incriminating and exonerating circumstances equally.'"[11] The Chamber was concerned with how the transcripts of investigative interviews repeatedly demonstrated that the investigators conducting the interviews relied heavily on leading questions, belying their theory of events, and showing "resentment, impatience or disappointment" when witnesses did not provide the answer they had hoped to hear.[12]

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[10] *See, e.g.,* Prosecutor v. Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09, Confirmation Hearing, T.72 (Oct. 30, 2009), http://www.icc-cpi.int/iccdocs/doc/doc773555.pdf; Prosecutor v. Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11-728, Decision on Defense Application Pursuant to Article 64(4) and Related Requests, para. 112 (Apr. 26, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1585619.pdf [hereinafter Kenyatta Article 64 Decision].

[11] Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, para. 51 (Dec. 16, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1286409.pdf [hereinafter Mbarushimana Confirmation Decision]. The Chamber went further to state "[T]he Chamber cannot refrain from deprecating such techniques and from highlighting that as a consequence, the probative value of evidence obtained by these means may be significantly weakened."

[12] The Chamber noted that the conduct of the investigators was "hardly reconcilable with a professional and impartial technique of witness questioning." *Id.*

The Chamber noted the objectionable practice in the interviews of three witnesses.[13]

A witness interview is a process of carefully recording a witness's factual observations, ordinarily through employing open-ended and non-leading questions.[14] The process described by the Chamber indicates that investigators may have been suggesting the Prosecution's case theory to witnesses rather than asking neutral questions and objectively recording their evidence. This objective process should have continued by verifying the veracity of the information provided and allowing the case theory to emerge from the totality of reliable evidence. Experienced professional investigators know that the type of interview described by the Chamber should rarely, if ever, be conducted. If a witness is truly adverse or is being deceptive, the investigator may decide to conduct a second interview to follow-up on the initial non-leading interview by confronting the witness with some of the inconsistencies in the first interview or with some of the trusted evidence that contradicts his or her account.[15] If the methods described by the Chamber are pervasive, and not simply the work of a few inexperienced investigators, OTP must urgently reconsider how it conducts witness interviews.

B. The Timing and Length of Investigations

Judges have also been concerned with the continuation of investigations long after the commencement of proceedings. Some defense teams have accused the Prosecution of changing their case theory in response to newly acquired witnesses and evidence late into the case.[16] While the Prosecution must always seek the most reliable

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[13] *Id.* (discussing "utterly inappropriate" techniques of the Prosecution's investigators).

[14] For a detailed explanation of the purpose and method of conducting a witness interview, see DERMOT GROOME, HANDBOOK OF HUMAN RIGHTS INVESTIGATION 173-205 (2011).

[15] This two-step approach can also be incorporated in the same interview by separating the interview into two parts.

[16] *See, e.g.,* Prosecutor v. Francis Muthaura and Uhuru Kenyatta, Case No. ICC-01/09-02/11, Corrigendum to Observations on the Conduct, Extent and Impact of the Prosecution's Investigation and Disclosure on the Defence's Ability

evidence and should not ignore important investigative leads, this goal must not undermine the right of the accused to know the charges against him or her and to prepare a defense.

The short interval of time spent investigating cases before seeking arrest warrants is perhaps one of the causes of this phenomenon. The Prosecution's case theory will inevitably develop in response to new evidence and commencing a case on a limited understanding of events is likely to result in an evolving theory that departs from the original hypothesis.

Conducting an international criminal investigation is a time consuming endeavor. The crimes are both serious and complex and require detailed and careful investigation. The investigation of the actual crime itself (*i.e.,* the victim, the direct perpetrators, and the primary crime scene if available) must be conducted as carefully as, and to the same high standards as, those applied by professional national police services. Often central to an international criminal investigation is the question of whether senior officials participated in the crime. These cases require investigators to perform the additional task of investigating and determining which officials within the chain of command structure bear responsibility. This task adds levels of complexity rarely found in domestic crimes. It is a task that requires careful study of the legal relationships between senior officials, the direct perpetrators, and all those who lie in a chain of causality between the two. As such, investigators must conduct a time-consuming process of accessing and analyzing archival material which may shed light on the governmental structures used in the commission of the crime.

International prosecutors also have the burden of establishing the contextual or *chapeau* elements of international crimes. For example, establishing that a crime against humanity was perpetrated requires that the subject crime was part of a widespread or systematic attack against a civilian population. As such, investigations into

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to Prepare for Trial with Confidential Annex A, Public Annex B, Public Annex A1 (Feb. 20, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1556211.pdf [hereinafter Kenyatta Corrigendum].

crimes against humanity require probing into not only the subject crime, but also into the other crimes forming the relevant context.

In addition to these conceptual differences, there are significant operational challenges faced by international investigators. Witnesses are most often located in places far from The Hague. If they are still living in their homes, they are likely to be in a place that is insecure and polarized about the work of the investigators. Very often victims and witnesses will have fled their permanent residences, sometimes seeking refuge in countries far away. Locating these witnesses and obtaining permission to interview them from the government where they currently reside adds an unavoidable delay to the process.

Before investigators can work effectively they must inform themselves about the historical precursors to the conflict as well as the culture and practices of the people they will interview. Investigators may also be unable to speak the language of the victims and witnesses and may need to identify and train competent interpreters.

Before an investigation arrives at its final conclusions, it has undergone a cyclical process in which evidence is gathered, verified and analyzed, and tentative theories formed, which are in turn tested through additional investigation. New evidence is gathered with an increased focus, guided by a growing base of verified facts. Nascent factual and legal theories may be contradicted, confirmed, or refined by successive trips to the field to interview additional witnesses and collect more evidence. Over time, the focus of the investigation sharpens in a process that is driven by the evidence itself. Eventually the credible and reliable evidence excludes all hypotheses but one. At this point, additional legal analysis is required to determine whether each element of the possible crimes (including contextual elements) can be established beyond reasonable doubt. In most cases, it will be necessary to conduct further investigation to locate specific evidence necessary to corroborate an important witness or to more firmly establish a particularly important point. I have supervised numerous investigations of international crimes over the course of my career as an international prosecutor—each took a minimum of one year.

In light of these challenges, it is surprising that OTP requested arrest warrants in the Côte d'Ivoire situation only 22 days after commencing the investigation, and only after 74 days in the Libya situation.[17] While recognizing the importance of interrupting ongoing crimes by taking high-level perpetrators into custody, it is difficult to imagine even the most rudimentary international investigation being completed within these time frames.

In the Côte d'Ivoire situation, the Pre-Trial Chamber spent more time evaluating the evidence than the OTP spent collecting it. The Prosecution received authorization to commence an investigation on October 3, 2011 and applied for an arrest warrant on October 25, 2011. A warrant was issued on November 23, 2011 after the Pre-Trial Chamber found reasonable grounds to believe that Laurent Gbagbo had committed international crimes. Gbagbo surrendered to the Court two days later.

The infirmities of this apparently hurried investigation was the subject of scrutiny by the Pre-Trial Chamber considering whether to confirm the charges. After a considerable delay, caused in part by a defense application asserting that Gbagbo was unfit to stand trial, the

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[17] In the Côte d'Ivoire situation, OTP opened its investigation on October 3, 2011 and requested an arrest warrant on October 25, 2011. In the Libya situation, OTP opened its investigation on March 3, 2011 and requested an arrest warrant on May 16, 2011. *See* Prosecutor v. Laurent Gbagbo, Case No. ICC-02/11, Warrant of Arrest for Laurent Koudou Gbagbo, paras. 2-3 (Nov. 23. 2011), http://www.icc-cpi.int/iccdocs/doc/doc1276751.pdf; Prosecutor v. Muammar Gaddafi, Case No. ICC-01/11/11-1, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Alsenussi, para. 3 (June 27, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1099314.pdf.

In fairness to the Prosecution, there are indications that it was receiving information and conducting preliminary inquiries in the Côte d'Ivoire situation as early as April 2009. *See* Fatou Bensouda, Deputy Prosecutor of the Int'l Criminal Court, Statement on an Overview of Situations and Cases Before the ICC (Apr. 14, 2009), http://www.icc-cpi.int/NR/rdonlyres/CF9DFD80-5E15-4AA8-BA0D-7E728F0D86DF/280265/140409Capetown.pdf. *See also* Luis Moreno-Ocampo, ICC Prosecutor's Speech to the Eighth Session of the Assembly of States Parties (Nov. 18, 2009), http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-statements-OTP-ENG.pdf.

confirmation hearing was held in February 2013. The legal standard for confirming charges against an accused is somewhat elevated from the "reasonable grounds" standard for an arrest warrant, but still well below the standard of "proof beyond reasonable doubt" at trial. Article 61(7) of the Rome Statute requires the Pre-Trial Chamber to determine "whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged."[18] This standard serves a gate-keeping function, ensuring that only those charges which merit a full trial are allowed to proceed to one. Article 61(7) gives a pre-trial chamber three options: a) to confirm the charges; b) to decline to confirm the charges; or c) to adjourn the hearing and request the Prosecution to provide additional evidence or amend the charges.[19]

The Chamber, having assessed the evidence, came to the view that the Prosecution's case was insufficient to meet the substantial grounds test. It reasoned that although the evidence was insufficient it did not "appear to be so lacking in relevance and probative value that it leaves the Chamber with no choice but to decline to confirm the charges under Article 67(7)(b)." The Chamber decided that the proper course of action was to adjourn the case and request that the Prosecution conduct more detailed investigations.[20] The Chamber could "not exclude that the Prosecutor might be able to present or collect further evidence and is therefore, out of fairness, prepared to

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[18] Gbagbo Adjournment Decision, *supra* note 3. See *supra* note 4, for the definition of "substantial grounds" articulated in *Lubanga*. The Appeals Chamber has stated that, in the application of this standard, a "Pre-Trial Chamber may evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses." Prosecutor v. Callixte Mbarushimana, Case No. ICC-01.04-01/10 OA 4, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I of 16 Dec. 2011 entitled "Decision on the Confirmation of Charges" (Mar. 3, 2012).

[19] Rome Statute, *supra* note 1, at art. 61(7).

[20] The Chamber in applying the gate-keeping threshold of Article 61(7) considered that the Prosecution must have presented its strongest case resulting from a largely completed investigation. Thus, the appropriate course of action was to adjourn the case for additional investigations. Gbagbo Adjournment Decision, *supra* note 3, at para. 25.

give her a limited amount of additional time to do so."[21] The Chamber enumerated the avenues of investigation the Prosecution should pursue.[22] The Chamber gave the Prosecution five months to continue its investigation and present a new Document Containing the Charges (DCC).[23]

It is clear that OTP's practice of initiating criminal proceedings prior to substantially completing its investigation has resulted in extensive investigations continuing after an arrest warrant was requested, and, in some cases, after the confirmation of the charges. In *Mbarushimana,* the Chamber criticized the Prosecution's broad language in the DCC, which, when specifying the location of crimes used the language "include but are not limited to . . . ."[24] The Chamber expressed its concern that this was an attempt by the Prosecution to keep open the possibility of broadening the case should additional evidence become available later as a result of continued investigations. The Chamber assessed the phrase as meaningless.[25]

The Defense in *Kenyatta* recently took issue with the large number of new witnesses that were identified by the Prosecution after the confirmation hearing, asserting that they resulted in

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[21] Gbagbo Adjournment Decision, *supra* note 3, at para. 37. The Chamber went on to find that giving the Prosecution this opportunity did not unduly infringe on Gbagbo's right to be tried without due delay.

[22] Regulation 35 of the Prosecutor's Regulations requires a series of planning documents before investigative activities commence. These planning documents, taken together, would form a comprehensive investigation plan.

[23] Gbagbo Adjournment Decision, *supra* note 3, at para. 23. It is important to note that one member of the Pre-Trial Chamber I wrote an articulate and persuasive dissent from the majority's decision. Judge Silvia Fernández de Gurmendi took the view that the majority's decision was based on an erroneous understanding of the applicable evidentiary standard for the confirmation of charges. She went further to take issue with the Chamber's application of the evidentiary standard to the contextual elements of crimes against humanity. Finally, Judge Gurmendi found that the majority's request to the Prosecution to deal with specific "questions" and "issues" was both irrelevant and inappropriate.

[24] Mbarushimana Confirmation Decision, *supra* note 11, at paras. 82-83.

[25] *Id.* at paras. 79-83.

"radically altered" allegations.[26] The Chamber in large part rejected this assertion and reaffirmed that the Prosecution was not required to rely on the same evidence at trial that it had adduced during the confirmation process.[27] Nevertheless, the Chamber expressed its concern regarding the "substantial volume of new evidence that was gathered by the Prosecution [after confirmation]."[28] The Chamber, citing the *Mbarushimana* Appeal Decision, reminded the Prosecution that the investigation should be largely completed by the time of the confirmation hearing.[29] Judge Van den Wyngaert, in her concurring opinion, was particularly troubled by the large number of witnesses who were identified as such only after the confirmation hearing. She stated that "there are serious questions as to whether the Prosecution conducted a full and thorough investigation of the case against the accused prior to confirmation."[30] The *Kenyatta* Chamber introduced the legal requirement that all investigations that could have reasonably been completed before confirmation must be. The Chamber went further stating that the defense will have remedies available with respect to failures to do this.[31] It remains to be seen whether the unspecified remedies referred to by the *Kenyatta*

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[26] Kenyatta Corrigendum, *supra* note 16, at para. 11 ("The nature of the Prosecution's ongoing and protracted investigation and the manner in which the Prosecution has sought to disclose its evidence have required the Defense to expend considerable investigative resources in order to attempt to deal with an ever-shifting case…").

[27] Kenyatta Article 64 Decision, *supra* note 10, at paras. 110-11.

[28] *Id.* at para. 112.

[29] *Id.* at para. 119 ("The Prosecution should not seek to have the charges against a suspect confirmed before having conducted a full and thorough investigation in order to have a sufficient overview of the evidence available and the theory of the case.").

[30] *Id.* at Anx 2, para. 1 (Van den Wyngaert, J., concurring).

[31] *See* Kenyatta Article 64 Decision, *supra* note 10, at para. 121. However, the Majority is of the view that the Prosecution should not continue investigating post-confirmation for the purpose of collecting evidence which it could reasonably have been expected to have collected prior to confirmation. If a Trial Chamber finds that this has occurred, it would need to determine the appropriate remedy based on the circumstances of the case.

Although the Chamber does not limit the application of this principle to inculpatory evidence, that is likely what it intended. It would be inconsistent with general principles of justice and fairness for the Prosecution's obligations under Article 54 to cease upon the confirmation of charges.

Chamber will have the teeth to compel a change in the OTP's investigative practices, but the Prosecutor is certainly on notice that in the future Chambers are likely to be less forgiving when investigations prove to be inadequate or tardy.

While the concerns addressed by the *Kenyatta* Chamber focused on the procedural unfairness caused by an investigation that continues after confirmation, a failure to adequately investigate a case before commencing a criminal process risks a case that is flawed and that may ultimately have to be withdrawn.

This precise situation arose for Kenyatta's co-defendant, Francis Muthaura, for whom charges were also confirmed in January 2012. On March 11, 2013, OTP filed a notice withdrawing all charges against Muthaura.[32] In the filing, OTP informed the Chamber that having considered all of the available evidence, "there is no reasonable prospect of conviction in the case."[33] When explaining the underlying reasons for the withdrawal, the Prosecution pointed to the fact that several witnesses had died, were killed or had become uncooperative.[34] It informed the Chamber that one witness recanted his testimony after receiving bribes from representatives of the accused.[35] It is difficult to assess the extent to which these problems were foreseeable and could have been overcome by identifying additional witnesses and evidence during the investigation.

One clearly troubling aspect of the Prosecution's submission is its explanation that one reason the case collapsed was that the Kenyan government "failed to assist it in uncovering evidence that would have been crucial."[36] This suggests that the Prosecution may

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[32] Muthaura Notice, *supra* note 5. The Statute and Rules are silent on whether the Prosecution can withdraw charges without leave during the interval between the confirmation of charges and the start of trial. On March 18, 2013, the Trial Chamber decided that the leave of the Chamber was required and granted the Prosecution permission to withdraw the charges.

[33] *Id.* at para. 9.

[34] *Id.* at para. 11.

[35] To date, there has been no public record of Article 70 proceedings (Offenses Against the Administration of Justice) having been instituted against the person who allegedly bribed the witness.

[36] Muthaura Notice, *supra* note 5, at para. 11.

have known at the time of confirmation that it had insufficient evidence for conviction, but proceeded in the hope that such evidence would come into its possession before the start of trial.[37]

Many national jurisdictions charge the prosecutor with the responsibility of assessing the probability of conviction on the evidence in its possession prior to committing significant public resources to a prosecution.[38] This requirement not only minimizes

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[37] *Id.* The Prosecution had acknowledged in a public statement that there were ongoing efforts to undermine its work in Kenya. *See* Fatou Bensouda, ICC Prosecutor, Statement on ICC Witnesses Undergo Rigorous Tests (Nov. 17, 2010), http://www.icc-cpi.int/NR/rdonlyres/85B705E7-5E3A-43C0-A473-7B52CA120951/282930/Kenya.pdf. In a related case, Judge Hans-Peter Kaul pointed out the significant risks that are occasioned by such an incremental investigation:

> [S]uch an approach, as tempting as it might be for the Prosecutor, would be risky, if not irresponsible: if after the confirmation of the charges it turns out as impossible to gather further evidence to attain the decisive threshold of "beyond reasonable doubt," the case in question may become very difficult or may eventually collapse at trial, and then with many serious consequences, including for the entire Court and the victims who have placed great hopes in this institution.

Prosecutor v. William Samoei Ruto et al., Case No. 01/09-01/11, Decision on Confirmation of Charges Pursuant to art. 67(7)(a) and (b) of the Rome Statute, para. 47 (Jan. 23, 2012) (Kaul, J., dissenting), http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf.

[38] *See, e.g.,* PROSECUTION POLICY OF THE COMMONWEALTH: GUIDELINES FOR MAKING DECISIONS IN THE PROSECUTION PROCESS § 2.5, (Austl.) http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf (last visited Dec. 10, 2013).

> When deciding whether the evidence is sufficient to justify the institution or continuation of a prosecution the existence of a bare prima facie case is not sufficient to justify the prosecution. . . .[I]t is then necessary to give consideration to the prospects of conviction. A prosecution should not proceed if there is no reasonable prospect of a conviction being secured.

See also NAT'L DIST. ATT'Y ASS'N, NATIONAL PROSECUTION STANDARDS 53 (3d ed.), http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf (last visited Jan. 28, 2014).

> While commencing a prosecution is permitted by most ethical standards upon a determination that probable cause exists to

the waste of public resources on prosecutions that are unlikely to result in convictions, but also protects those accused from facing the jeopardy of a trial based on flimsy evidence. Given the significant resources implicated by an international criminal case and the jeopardy it places upon an accused, a decision to proceed in the hopes of acquiring "crucial" evidence demonstrates poor prosecutorial judgment.

In both the Libya and Côte d'Ivoire situations there were legitimate international interests in conducting expedient investigations and securing the arrest of men believed to be still perpetrating crimes. Using the ICC as a means of interrupting ongoing crimes brings with it the risk that hastily investigated and constructed cases will ultimately fail.

International criminal investigations in conflict areas are unique in that evidence that was unavailable at the start of the investigation may become available as time passes and the conflict subsides. Changes in security, disposition towards the court, and reaction to court proceedings can all prompt new witnesses to come forward. Over the course of a case there may be better access to witnesses, crime scenes, and archives.[39] Although the Prosecution must always seek the most reliable and probative evidence, this goal must be balanced against the accused's right to know the case against him and to prepare a defense.

> believe that a crime has been committed and that the defendant has committed it, th[is] standard prescribes a higher standard for filing a criminal charge. To suggest that the charging standard should be the prosecutor's reasonable belief that the charges can be substantiated by admissible evidence at trial is recognition of the powerful effects of the initiation of criminal charges. Pursuant to the prosecution's duty to seek justice, the protection of the rights of all (even the prospective defendant) is required.

[39] During the trial of Slobodan Miloševič, it was a frequent occurrence for previously unknown witnesses to come forward and identify themselves in the ICTY's field offices in response to something they saw in the broadcast of the trial. *See* Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 HARV. INT'L L.J. 323 (2009).

ICTY judges have developed criteria to help strike the appropriate balance between these competing concerns whenever the Prosecution seeks to add evidence after it has filed its witness and exhibit lists. These criteria include:

- The relevance and importance of the new evidence;
- Whether there is good cause for the late addition of the evidence;
- Whether the Prosecution exercised due diligence in identifying the new evidence; and
- Whether allowing the use of the new evidence will result in prejudice to the accused.

Trial Chambers consider and balance these factors to determine whether the interests of justice are best served by the either allowing or disallowing the new evidence.[40]

Judges are correct in imposing a standard requiring that the investigation ordinarily be substantially complete before the confirmation of the charges. If substantial investigations continue, the Prosecution should have the obligation of explaining why the evidence was previously unknown or unavailable, and the burden of establishing that the interests of justice are best served by permitting the use of the new evidence.

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[40] *See* Prosecutor v. Jovica Stanišić and Franko Simatović, Case No. IT-03-69-T, Decision on Eleventh, Twelfth and Thirteenth Prosecution Motions for Leave to Amend its Rule 65*ter* Exhibit List (Feb. 10, 2010), http://www.icty.org/x/cases/stanisic_simatovic/tdec/en/100210.pdf; Prosecutor v. Mićo Stanišić and Stojan Župljanin, Case No. IT-09-91-T, Decision Granting in Part Mićo Stanišić's Motion for Leave to Amend his Rule 65*ter* Exhibit List (July 19, 2011), http://www.icty.org/x/cases/zupljanin_stanisicm/tdec/en/110719.pdf; Prosecutor v. Momčilo Perišić, Case No. IT-04-81-T, Decision on Defense Motion to Amend 65*ter* List and Second Bar Table (Dec. 1, 2010), http://www.icty.org/x/cases/perisic/tdec/en/101201a.pdf.

C. The Quality of the Evidence Collected During the Investigation and Presented in Court

Commencing a prosecution before completing a comprehensive investigation directly impacts the quantum and quality of the evidence available to a chamber. One of the criticisms of the *Gbagbo* Chamber was the Prosecution's heavy reliance on anonymous hearsay. Criticisms noted the lower probative value of such evidence as well as the implications for the right of an accused to know who is providing evidence against him or her.[41] The Chamber also took issue with the Prosecution's reliance on documentary and summary evidence, such as press articles and reports from non-governmental organizations, and noted that unless the Prosecution was to conduct additional investigations there was little prospect of the evidence being accepted at trial.[42] The Chamber expressed its "serious concern" about the quality of the evidence presented during the confirmation hearing.[43]

The *Mbarushimana* Chamber also indicated that the anonymous hearsay evidence contained in Human Rights Watch reports would, as a general rule, be "given a low probative value."[44] The *Garda* Chamber followed a similar approach with respect to

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[41] Rome Statute, *supra* note 1, at art. 67 (addressing Rights of the Accused).

[42] The *Gbagbo* Chamber stated: "In light of the above considerations, the Chamber notes with serious concern that in this case the Prosecution relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity." Gbagbo Adjournment Decision, *supra* note 3, at para. 35.

[43] *Id.* at para. 35. In addition to the four separate incidents charged by the Prosecution, it also relied on 41 other incidents to establish the contextual or *chapeau* elements of crimes against humanity. The Chamber found that for the majority of these 45 incidents, the only evidence adduced during the confirmation hearing was anonymous hearsay from NGO reports, U.N. reports, and press articles.

[44] Mbarushimana Confirmation Decision, *supra* note 11, at para. 78. This is in keeping with law in many national courts, which are reluctant to find probable or reasonable cause based on anonymous information alone. *See, e.g.,* Illinois v. Gates, 462 U.S. 213 (1983).

anonymous evidence and summary statements that the Prosecution tendered in support of its case.[45]

Anonymous hearsay can be of great assistance in the early stages of an investigation by providing important leads to identify witnesses and evidence as well as providing background to orient investigators to the context and nature of the crimes. Many of the investigations at the International Criminal Tribunal for the former Yugoslavia (ICTY) were commenced after a review of reports from the media and non-governmental human rights organizations.[46] The ICTY also had the benefit of the Bassiouni Commission, an *ad hoc* commission established by the U.N. Security Council to conduct preliminary non-judicial investigations into some of the allegations of crimes that occurred during the breakup of Yugoslavia.[47]

By contrast, anonymous hearsay should rarely, if ever, be adduced as proof to sustain the Prosecutor's burden at any stage of a criminal proceeding. It inherently lacks sufficient reliability and is very often factually inaccurate. Many international crimes occur during conflicts in which propaganda is a frequently used tool by all sides. In the context of the former Yugoslavia, a great many fantastic and false stories were spread anonymously in an effort to cause

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[45] Prosecutor v. Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges (Public Redacted Version), para. 52 (Feb. 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc819602.pdf [hereinafter Garda Confirmation Decision].

[46] *See, e.g.,* HUMAN RIGHTS WATCH, LOOKING FOR JUSTICE: WAR CRIMES IN BOSNIA-HERCEGOVINA (vol. I 1992); HUMAN RIGHTS WATCH, WAR CRIMES IN BOSNIA-HERCEGOVINA: BOSANSKI SAMAC, SIX WAR CRIMINALS NAMED BY VICTIMS (1994), http://www.hrw.org/legacy/reports/1994/bosnia/; HUMAN RIGHTS WATCH, YUGOSLAV GOVERNMENT WAR CRIMES IN RACAK (1999). *See also* AMNESTY INT'L, BOSNIA-HERZEGOVINA: "TO BURY MY BROTHERS' BONES" (1996), http://www.amnesty.org/en/library/asset/EUR63/015/1996/en/8a8a95e2-eaf8-11dd-aad1-ed57e7e5470b/eur630151996en.pdf.

[47] Comm'n of Experts' Final Report, U.N. Doc. S/1994/674 (May 27, 1994), http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf.

panic.[48] The anonymity of the information also makes it impossible for a chamber to assess the credibility and reliability of the person providing the information. OTP's heavy reliance on anonymous hearsay deprived pre-trial chambers of the ability to check the information against other known sources. A chamber that must evaluate evidence that is predominantly anonymous is unable to cross-check the evidence because it is difficult to assess whether seemingly corroborative evidence is truly corroborative, or simply another formulation of the same information from the same anonymous source.

A competent investigation requires more than aggregating several sources of such hearsay and presenting it to the court. Investigators must find the source of the hearsay and conduct their own independent interview and assessment of the witness.

Equally important is the necessity of investigating the credibility and reliability of known witnesses.[49] Ultimately, a chamber will consider the evidence they provide in light of its assessment of that witness's credibility and reliability. Many of the problems that occurred over the course of the *Lubanga* trial were the result of the Prosecution's failure to verify the information provided by witnesses.[50] An important part of any comprehensive witness

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[48] One of the more egregious reports intended to enflame passions that was proven to be false was a claim that Serb babies were being fed to the lions in the Sarajevo zoo. The original broadcast by Rada Djokić can be seen on Youtube at http://www.youtube.com/watch?v=LzUqQxNb8qw. Borislav Herak, one of the early infamous perpetrators of crimes in the Sarajevo area, claimed that he was motivated in part by the reports of Serb babies being fed to the lions at the zoo. *Politics of Rape: Brutal, degrading act a powerful weapon in violence that rends former Yugoslavia*, THE DALLAS MORNING NEWS, May 5, 1993, *available at* 1993 WLNR 4848763.

[49] Credibility is whether a witness is being honest and telling the "truth." Reliability is whether the facts described by a witness are accurate. This is an important distinction in the case of a witness who is honestly mistaken. For example, a witness may be honestly mistaken in their identification of a perpetrator. In such a case, the witness is credible but unreliable.

[50] Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, para. 483 (Mar. 14 2012), http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf [hereinafter Lubanga Judgment]. The Chamber in referring to the evidence of nine witnesses who

interview is to gather information that can assist a chamber in evaluating the witness' credibility and reliability.[51]

In addition to the poor quality of some evidence, ICC judges have expressed concern over the paucity or complete lack of evidence on important aspects of the Prosecution's case. For example, the *Gbagbo* Chamber found that the Prosecution's evidence left an "incomplete picture" with respect to the structural links between Gbagbo and the "Pro-Gbagbo Forces" which committed the crimes.[52] There was insufficient evidence to support the Prosecution's inferences with respect to the asserted liability that flowed from the direct perpetrators, to Gbagbo's inner circle, and to Gbagbo himself.[53]

In the *Lubanga* Judgment, the Chamber was critical of the Prosecution's failure to adequately investigate the age of alleged child soldiers—something of central importance to the case.[54] Similar criticisms were echoed in *Ngudjolo*, another case from the DRC. Despite the fact that the *Ngudjolo* Chamber recognized that the Prosecution faced significant challenges in conducting investigations in the DRC, it chided the Prosecution for its failure to adequately investigate the background of key witnesses.[55]

Evidence presented by the Prosecution in *Mbarushimana* was also found to be lacking. The Chamber declined to confirm the

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claimed to have been conscripted as children, "[t]he prosecution's negligence in failing to verify and scrutinize this material sufficiently before it was introduced led to significant expenditure on the part of the Court."

[51] HANDBOOK OF HUMAN RIGHTS INVESTIGATION, *supra* note 14, at 190-96.

[52] Gbagbo Adjournment Decision, *supra* note 3, at para. 36. The Chamber also noted the lack of evidence regarding the activities of the opposing forces, something it considered relevant to its inquiry.

[53] *Id.* at para. 36.

[54] Lubanga Judgment, *supra* note 50, at para. 175 ("Whilst acknowledging the difficult circumstances in the field at the time of the investigation, this failure to investigate the children's histories has significantly undermined some of the evidence called by the Prosecution.").

[55] Prosecutor v. Mathieu Ngudjolo, Case No. ICC-01/04-02/12, Judgment Pursuant to Article 74 of the Statute, para. 121 (Dec. 18 2012) [hereinafter Ngudjolo Judgment].

charges relating to alleged attacks in three villages, finding the evidence related to them to be sparse, inconsistent and insufficient to sustain the charges.[56] In some cases, the only evidence offered in support of an alleged attack was U.N. reports containing vague summaries of the events.[57] In *Garda*, the Chamber characterized the Prosecution's evidence regarding some allegations as "scant and unreliable."[58] The Chamber remarked that in some cases the evidence adduced not only failed to support the Prosecution's allegations, but instead supported the accused's contention that he did not participate in the alleged attacks.[59] The Chamber rejected the Prosecution's arguments and declined to confirm the charges against Garda.[60]

The Prosecution must give greater focus to the quantum and quality of evidence it is producing before the court. Consideration should be given to each element of the crimes charged ensuring that the Prosecution can confidentially meet its burden at each stage of the criminal process.

D. The Inappropriate Delegation of Investigative Functions

While the reliance on NGO reports has been criticized as an improper delegation of a prosecutorial function, the use of intermediaries has caused considerable debate over the appropriateness of employing external intermediaries to perform key investigative functions. This issue came dramatically to the fore when the first witness in the *Lubanga* case returned after the lunch break and recanted his earlier testimony that he had been abducted on the way home from school and conscripted into the Union of Congolese Patriots (UPC).[61] His recantation cast immediate suspicion on those involved in bringing him forward as a witness.

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[56] Mbarushimana Confirmation Decision, *supra* note 11, at para. 120.

[57] *Id.* at para. 120.

[58] Garda Confirmation Decision, *supra* note 45, at para. 179.

[59] *Id.* at para. 228.

[60] *Id.* at para. 236.

[61] Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Redacted Decision on Intermediaries, para. 7 (May 31, 2010) http://www.icc-cpi.int/iccdocs/doc/doc881407.pdf [hereinafter Lubanga Intermediary Decision].

In *Lubanga*, the Prosecution employed people to assist it in identifying and interviewing witnesses. An OTP investigator identified as P-583 gave evidence at trial that the use of intermediaries was deemed to be the only way to gain access to knowledgeable witnesses given the security situation that existed at the time and the fact that OTP does not have its own police force.[62] The Prosecution relied on seven different intermediaries to secure the evidence of approximately half of the witnesses it called at trial.[63]

The integrity of the intermediaries and the role they played in the investigation was a central issue at trial. The Defense brought a motion at trial seeking a permanent stay of the proceedings based on alleged misconduct of these intermediaries. The Chamber denied the motion finding that it would be able to reach final conclusions regarding the intermediaries and their impact on the integrity of the case during the trial.[64]

In its final judgment, the Chamber focused on the conduct of four of the seven intermediaries and set out its detailed analysis of each of them. Intermediary 143 (I-143) was a paid intermediary who introduced the Prosecution to 21 witnesses and another intermediary (P-031). Five of these witnesses were called at trial. The Defense argued that the witnesses were suborned by I-143.[65] The Chamber found that inconsistent statements by witnesses P-007, P-008, P-010 and P-011 as well as evidence that contradicted their evidence, rendered the witnesses unreliable. The Chamber further concluded that its findings reflected negatively on the integrity of I-143 and established that "it is likely that as the common point of contact he

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[62] Lubanga Judgment, *supra* note 50, at paras. 167, 181. For a detailed description of the investigation and the problems it encountered, see Lubanga Judgment, *supra* note 50, at paras. 124-77.

[63] The Prosecution informed the Chamber that it had relied on a total of 23 individuals and organizations in its investigation. *See* Lubanga Intermediary Decision, *supra* note 61, para. 3.

[64] Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Redacted Decision on the "Defense Application Seeking a Permanent Stay of the Proceedings," para. 198 (Mar. 7, 2011), http://www.worldcourts.com/icc/eng/decisions/2011.03.07_Prosecutor_v_Lubanga2.pdf.

[65] Lubanga Intermediary Decision, *supra* note 61, at para. 16.

[I-143] persuaded, encouraged or assisted some or all of them [the witnesses] to give false testimony."[66]

Intermediary 316 (I-316) was under contract with OTP, even though the Prosecution was aware of his close ties with the Congolese intelligence service.[67] The Chamber noted with particular concern that OTP employed an intermediary who was employed by the very same government that had originally referred the case to the ICC.[68] I-316 not only introduced OTP staff to witnesses but also helped arrange interviews. The Chamber considered that it was inappropriate for someone who lacked both independence and impartiality to essentially become a member of the prosecution team.[69] The Chamber was sufficiently concerned with the integrity of I-316 and his impact on the case that it instructed the Prosecution to produce him as a witness.[70] The Chamber found him incredible, citing among other things his claim that his assistant ("Individual 183") and his family had been murdered, when in fact the Prosecution conceded that his assistant was still alive.[71] The Chamber concluded that I-316 had "persuaded witnesses to lie" and dismissed the entirety of the testimony of one witness (P-015) and some of the testimony of another (P-038).[72]

P-321 was another paid intermediary who acted on behalf of OTP for more than a year and introduced investigators to eight witnesses, four of whom testified in the *Lubanga* trial. The Chamber found that all four of these witnesses gave materially false evidence and that there was a "significant possibility" that P-321's improper influence over the witnesses was the cause.[73]

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[66] Lubanga Judgment, *supra* note 50, at para. 291.

[67] In addition, the Chamber noted that at least one other member of the Congolese intelligence assisted I-316 in his work. *Id.* at para. 368.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] Lubanga Judgment, *supra* note 50, at paras. 369-74.

[72] *Id.* at para. 374.

[73] *Id.* at para. 450.

P-031 was recruited as an intermediary with the assistance of I-143 and worked for OTP between 2005 and 2008.[74] The Chamber found that while the evidence before it was insufficient to conclude that P-031 had persuaded witnesses to give false testimony, it found the evidence sufficient to require caution with respect to the evidence of witnesses who had contact with him.[75]

The Chamber concluded that "the Prosecution should not have delegated its investigative responsibilities to the intermediaries . . .notwithstanding the extensive security difficulties it faced."[76] The Chamber criticized the Prosecution's reliance on these intermediaries and that it had permitted them to work with important witnesses essentially unsupervised. The Chamber further noted the significant time it expended to scrutinize this practice and the evidence it yielded.[77] The Chamber used the judgment to inform the Prosecution that at least two of the intermediaries may have committed Crimes Against the Administration of Justice under Article 70 of the Rome Statute and reminded the Prosecution of its obligation to initiate an investigation into the matter.[78]

Notwithstanding these concerns, the Chamber ultimately concluded that children were recruited and conscripted into the UPC/FPLC[79] and deployed in hostile actions based on other credible testimonial and documentary evidence.[80]

The Chamber is correct in its criticism of OTP's use of intermediaries. Their functional role in the investigation went far beyond helping investigators contact potential witnesses. They became paid agents of OTP, to whom the Prosecution delegated important investigative functions. Using intermediaries to make initial

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[74] *Id.* at para. 453.

[75] *Id.* at para. 477.

[76] Lubanga Judgment, *supra* note 50, at para. 482.

[77] *Id.*

[78] *Id.* at para. 483. At the time this article was written, there was no public record that such an investigation had been undertaken.

[79] The FPLC is the French acronym for the Patriotic Force for the Liberation of the Congo, the military wing of the Union of Congolese Patriots (UPC).

[80] *Id.* at paras. 911-16.

contact with witnesses is an acceptable way of working in a hostile environment. In some situations making direct contact with witnesses may jeopardize their safety and give the impression that investigators are unprofessional and insensitive to their security. However, the intermediary should only be used to convey a request to speak with a potential witness and not in the selection of witnesses themselves.[81] They should not be involved in any interviews or exchange of substantive evidential information between the investigators and witnesses. If intermediaries are to be used, the investigator must carefully consider whom to use. Knowingly employing an intelligence operative to act as an intermediary, particularly in the setting of the *Lubanga* case, was fraught with danger from the outset. The Prosecution has the responsibility to control all aspects of the investigation and vigorously protect its integrity.

Even if the use of intermediaries to identify and interview potential child soldiers was necessary in *Lubanga,* the Prosecution does not appear to have taken the steps necessary to verify the information gathered in this way. Investigators with the *Lubanga* Defense obtained and tendered school and other records, which established that some of the Prosecution witnesses claiming to have been child soldiers were too old for this to be true. Given that the age of a victim/witness at the time he or she was inducted into combat was a central issue in the trial, the Prosecution had an important responsibility to independently verify the age of these witnesses before advancing their evidence in court. Had the Prosecution done so, the true age of the victims would have been apparent and many of the problems during the proceedings would have been avoided.

E. The Failure to Properly Analyze Evidence and Disclose Potentially Exculpatory Material

The handling of evidence gathered during the investigation has also been an issue to the extent that it has had implications for OTP's proper discharge of its disclosure obligations. During its investigation into the situation in Kenya*,* the Prosecution sought and

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[81] In *Lubanga,* it is reasonably possible that paid intermediaries whose job it was to locate witnesses would have considered that payment would cease unless they continued to "find witnesses."

received documents from a provider under the condition that they would not be disclosed. After the *Lubanga* confirmation hearing, the Prosecution recognized that some of this material required disclosure under Article 67(2).[82] Proceedings came to an abrupt halt when the Prosecution initially failed to receive permission to disclose the material. The Trial Chamber found that during the course of its investigations,

> [T]he Prosecution has incorrectly used Article 54(3)(e) [confidentiality agreements] when entering into agreements with information-providers, with the consequence that a significant body of exculpatory evidence which would otherwise have been disclosed to the accused is to be withheld from him, thereby improperly inhibiting the opportunities for the accused to prepare his defense . . . .[83]

The Chamber further found that the Prosecution's actions had also effectively prevented the Chamber from being able to review the material and determine whether the non-disclosure of the material would constitute a breach of the accused's right to a fair trial.[84] The Prosecution's error of accepting exculpatory material on the condition that it would not be disclosed nearly resulted in a termination of the ICC's first trial. The trial was only able to continue

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[82] Article 67(2) provides in relevant part:

> [T]he Prosecutor shall, as soon as practicable, disclose to the defense evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.

[83] Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Urgent 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, para. 92 (June 13, 2008), https://www1.umn.edu/humanrts/instree/ICC/Stay_the_Proceedings.html.

[84] *Id.*

after the conditions of the original agreement with the provider were re-negotiated.[85]

In *Kenyatta,* there is also evidence to suggest that, at least in one instance, the Prosecution was unaware of all of the evidence generated during the investigation, including clearly exculpatory material. In that case, the credibility of Witness 4, a witness originally deemed of great significance, was undermined when the Prosecution disclosed an affidavit containing a contradictory account of his evidence.[86] Due to an oversight, the affidavit was not disclosed to the defense prior to the confirmation hearing.[87] The Defense alleged that the Prosecution acted in bad faith and characterized the disclosure breach as a "clear and systematic failure involving senior Prosecution lawyers with respect to the procedures applied during its investigations."[88]

While the Chamber rejected the defense assertion of bad faith, it did express its "serious concern" with respect to the failure to disclose the affidavit and the "deficiencies in the Prosecution's internal structure."[89] In her concurring opinion, Judge Van den Wyngaert accused the Prosecution of being negligent with respect to its responsibility to verify the trustworthiness of its evidence.[90]

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[85] Prosecutor v. Thomas Lubanga Dyilo*,* Case No. ICC-01/04-01/06-1644, Reasons for Oral Decision Lifting the Stay of Proceedings, para. 10 (Jan. 23 2009), http://www.icc-cpi.int/iccdocs/doc/doc622878.pdf.

[86] Kenyatta Article 64 Decision, *supra* note 10, at paras. 24-31.

[87] *Id.* at paras. 24-26.

[88] Prosecutor v. Kenyatta*,* Case No. ICC-01/09-02/11, Public Redacted Version of the "Defense Reply to the Confidential Redacted Version of the 25 February 2013 Consolidated Prosecution Response to the Defense applications under Article 64 of the Statute to Refer the Confirmation Decision back to the Pre-Trial Chamber", para. 29 (Mar. 8, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1565107.pdf. The Defense asserts that in good investigative practice would have required that the statement in question be reviewed: i) upon receipt, ii) prior to the re-interview, iii) prior to making oral submissions at the confirmation hearing.

[89] Kenyatta Article 64 Decision, *supra* note 10, at para. 94-95.

[90] *Id.* at Anx 2 paras. 3-4 (Van den Wyngaert, J., concurring).

> [T]here can be no excuse for the Prosecution's negligent attitude towards verifying the trustworthiness of its evidence. [. . .]

International criminal investigations often involve many investigators and analysts working on different aspects of the investigation. Systems must be put in place to ensure that the evidence gathered is organized and referenced in a way that allows the investigative team to easily access all relevant information related to individual witnesses. Equally, prosecutors and investigators must be extremely careful when entering into confidentiality agreements under Rule 54(e). It is difficult to make a decision about the risks involved when entering a confidentiality agreement during the course of the investigation. The legal obligation to disclose potentially exculpatory evidence is a broad one. Entering into confidentiality agreements carry a high risk of the problems experienced in *Lubanga*. Ideally, OTP should include a clause in all agreements that should potentially exculpatory material be found, the Prosecution is authorized to submit it for an *ex parte* review by a chamber and a commitment from the provider to abide by a chamber's decision on whether such material should be disclosed to the defense.

CONCLUSION

The competency and integrity of investigations conducted by the Office of the Prosecutor of the ICC have been called into question in several of its cases. The criticisms are valid and should be carefully considered by the Prosecution. The cornerstone of every criminal prosecution is the quality and integrity of the investigation underlying it. OTP must ensure that it has competent, professionally trained staff who conduct its investigations according to generally accepted principles and in keeping with all of the requirements of the Rome Statute and its Rules of Procedure and Evidence. A failure to improve the quality of ICC investigations and to take measures to ensure investigations are concluded earlier in the process risks not

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> [T]here are grave problems in the Prosecution's system of evidence review, as well as a serious lack of proper oversight by senior Prosecution staff. Clearly, thorough and comprehensive due diligence with regard to the reliability of the available evidence is an ongoing obligation of the Prosecution under article 54(1)(a), which is as important as the collection of that evidence itself.

only continued criticism in individual cases but risks undermining the credibility of the Office of the Prosecutor and the ICC itself.

The maxim of that seasoned Manhattan prosecutor, "No witness—no case" reminds prosecutors of the fundamental importance of conducting an effective investigation and gathering credible and reliable evidence in a process that is fair. This important lesson is as true for those who prosecute crimes against humanity as it is for those who prosecute misdemeanors.