Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor

War Crimes Research Office
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American University
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About the War Crimes Research Office

The core mandate of the WCRO is to promote the development and enforcement of international criminal and humanitarian law, primarily through the provision of specialized legal assistance to international criminal courts and tribunals. The Office was established by the Washington College of Law in 1995 in response to a request for assistance from the Prosecutor of the ICTY and ICTR, established by the United Nations Security Council in 1993 and 1994 respectively. Since then, several new internationalized or "hybrid" war crimes tribunals have been established under the auspices or with the support of the United Nations, each raising novel legal issues. This, in turn, has generated growing demands for the expert assistance of the WCRO. As a result, in addition to the ICTY and ICTR, the WCRO has provided in-depth research support to the Special Panels for Serious Crimes in East Timor, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon. It has also provided similar assistance to mechanisms and institutions involved in accountability efforts for serious international crimes at the domestic level, including the War Crimes Section of the Court of Bosnia and Herzegovina, Argentina's Assistance Unit for Cases of Human Rights Violations Committed under State Terrorism, Peru's Instituto de Defensa Legal (dedicated to representing victims in serious crimes cases before Peru's National Criminal Court), and the U.S. Department of State's Office of Global Criminal Justice.

The WCRO has also conducted legal research projects on behalf of the Office of the Prosecutor (OTP) of the International Criminal Court (ICC). However, in view of how significant the impact of the Court's early decisions are likely to be on the ICC's future and in recognition of the urgent need for analytical critique at early stages of the Court's development, in 2007 the WCRO launched a new initiative, the ICC Legal Analysis and Education Project, aimed at producing public, impartial, legal analyses of critical issues raised by the Court's early decisions. With this initiative, the WCRO took on a new role in relation to the ICC. While past projects were carried out in support of the OTP, the WCRO is committed to analyzing and commenting on the ICC's early activities in an impartial and independent manner. In order to avoid any conflict of interest, the WCRO did not engage in legal research for any organ of the ICC while producing this report, nor will the WCRO conduct research for any organ of the ICC prior to the conclusion of the ICC Legal Analysis and Education Project. Additionally, in order to ensure the objectivity of its analyses, the WCRO created an Advisory Committee comprised of the experts in international criminal and humanitarian law named in the acknowledgments above.

INVESTIGATIVE MANAGEMENT, STRATEGIES, AND TECHNIQUES OF THE INTERNATIONAL CRIMINAL COURT'S OFFICE OF THE PROSECUTOR

WAR CRIMES RESEARCH OFFICE
International Criminal Court
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COVER PHOTOGRAPHS (from left)

A Darfuri rebel fighter sets aside his prosthetic legs. Abeche, Chad, 2007, courtesy Shane Bauer
The International Criminal Court building in The Hague, courtesy Aurora Hartwig De Heer
A village elder meets with people from the surrounding area. Narkaida, Darfur, Sudan, 2007, courtesy Shane Bauer
Archbishop Desmond Tutu and Minister Simone Veil at the second annual meeting of the Trust Fund for Victims, courtesy ICC Press Office

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EXECUTIVE SUMMARY

At the time of this writing, just over ten years after the Rome Statute governing the International Criminal Court (ICC) entered into force, the Court has issued warrants of arrest or summonses to appear against twenty-nine individuals. To date, fourteen of these individuals have appeared before the Court for purposes of participating in a hearing before a Pre-Trial Chamber to determine whether the Prosecution's charges should be confirmed and the case should be sent to trial. While the Pre-Trial Chambers have confirmed charges against the majority of individuals appearing before them thus far, they have declined to confirm the charges against four suspects, meaning that the Prosecution has failed to establish that there are "substantial grounds to believe" the charges against nearly one-third of its suspects. Furthermore, even in those cases that do survive the confirmation hearing and proceed to trial, charges have occasionally been dropped by the Pre-Trial Chamber due to an insufficiency of evidence. Finally, the first case to actually go to trial before the Court involved limited charges that were widely perceived as not fully reflecting the criminal conduct of the accused, and the Trial Chamber, in its judgment, determined that the evidence provided by a number of Prosecution witnesses could not be relied on due to questionable practices employed by intermediaries working with the Office of the Prosecutor (OTP).

We recognize that the challenges of conducting international criminal investigations are legion, given investigators' restricted access to evidence, either due to the passage of time and/or uncooperative governments; international institutions' lack of enforcement powers; cultural and linguistic barriers to interviewing witnesses; persistent security concerns; the overwhelming scale of the crimes under investigation; and the fact that those working in international institutions hail from different legal traditions and thus are likely to have different views on appropriate investigative policies and practices. We also appreciate that, despite these challenges, the OTP has achieved substantial successes in a short period of time, as evidenced most strikingly by the recent conviction of its first suspect and the issuance of warrants and summonses involving a wide range of

charges for war crimes, crimes against humanity, and genocide against multiple suspects across seven diverse situations in fewer than ten years. Nevertheless, we believe that – as the OTP undergoes its first change of leadership with the departure of the Court's inaugural Chief Prosecutor – it is worth examining some of the potentially problematic aspects of the Office's investigative practices that have been identified by the judges of the Court and outside observers to date. The aim of this report is to explore some of those issues and offer recommendations that we hope will contribute to improving the OTP's investigative practices, thereby helping to build a stronger Office of the Prosecutor and enhancing the Court's capacity to administer justice more effectively.

In terms of methodology, we wish to highlight from the outset that, although we did conduct interviews with former and current ICC personnel and other experts, we have chosen to limit our analysis primarily to facts and findings that are supported by the public record.[1] We would also like to point out that, while we have included references to the stated policies and practices of the OTP and the Office's response to criticisms highlighted in this report to the extent such information is publicly available, the fact is that information regarding the investigative process of any prosecution's office is understandably sensitive and, thus, public information available from the OTP on this subject is limited.

Organization and Administration of the Office of the Prosecutor

Issues Relating to the Organization and Administration of the Office of the Prosecutor

The Regulations of the OTP provide that the Office of the Prosecutor consists of three divisions: the Prosecution Division, the Investigations Division, and the Jurisdiction, Complementarity and Cooperation Division (JCCD). The Office also has an Executive Committee (Ex Com), composed of the Prosecutor and the heads of the three

[1] This is consistent with the approach adopted by the War Crimes Research Office in all of the reports written as part of the ICC Legal Analysis and Education Project.

divisions, which is responsible for the strategic, policy, and budgetary decisions of the Office. When a formal investigation is commenced, a "joint team," composed of staff from each of the three divisions within the OTP, is formed for the purpose of conducting the investigation. Each joint team has three team leaders, one from each division, who are intimately involved in the direction of the investigation, and all decisions are taken jointly. Any disputes among the three team leaders are resolved by the Ex Com. This joint team model stands in contrast to the organizational approach used at the International Criminal Tribunal for the Former Yugoslavia (ICTY), where teams are headed by a single senior attorney, who is ultimately accountable to the Chief Prosecutor, but who has broad autonomy to make decisions regarding the direction of the investigation and the case more generally.

Recommendations Relating to the Organization and Administration of the Office of the Prosecutor

As explained below, it is not altogether clear that the tripartite decision-making structure of the joint team model is an improvement on the ICTY model. Indeed, the ICC approach has been criticized on the grounds that it divides authority and is dependent on a successful interpersonal relationship among the three divisional team leaders. Furthermore, the need for three leaders to reach consensus on all or almost all decisions is likely to result in inefficiencies in the conduct of the investigation. We understand that the representative of each division in the joint team takes lead responsibility on issues within his or her respective sphere of competence. Nevertheless, because it may not always be clear which decisions fall within the purview of a particular division, we recommend that day-to-day decisions be placed in the hands of a single member of the team, most likely a single trial attorney, who would be ultimately accountable to the Prosecutor. Importantly, the Ex Com would continue to play a role in providing strategic guidance to the joint teams and the Divisional Coordinators would continue to supervise the work of the joint teams, ensuring that issues within each division's expertise are being appropriately handled by the team.

Size and Composition of Investigation Teams

Issues Relating to the Size and Composition of Investigation Teams

Pursuant to his strategy of carrying out short, focused investigations, the ICC's first Prosecutor deliberately adopted a "small team" approach to investigations. Thus, for instance, in the OTP's proposed 2013 budget, the Office requests just forty-six professional staff members for the "Investigations Teams" section of the Investigations Division, which would need to be dispersed among the seven situations in which the Court is currently active. This strategy has been defended, in part, on the ground that the resources of the OTP are finite; thus investigations must necessarily be limited. However, it appears that the policy of conducting expedited investigations with a limited number of investigators has led to certain problems. For instance, ICC investigators working in Uganda, the Democratic Republic of Congo (DRC), and Sudan have complained that atrocities not identified from the outset of the investigation are often overlooked and that, even when investigators happen upon evidence of additional crimes, they are not provided with sufficient time to follow up on that evidence. The small team approach may also have negative effects on staff retention, as there is some evidence that investigators hired by the OTP have left the Office due to burn out resulting from being overstretched. Finally, unduly restricting the size of the investigative team may force the OTP into the position of over-reliance on secondary source information, a problem discussed separately below.

In terms of the composition of investigative teams, at least one former investigative team leader has complained that the work of his team was compromised by the fact that the team was comprised of persons from a variety of backgrounds, rather than strictly consisting of investigators with a police background. On the other hand, experience at the ICTY has demonstrated that the investigation of serious international crimes requires a multi-disciplinary approach.

Recommendations Relating to the Size and Composition of Investigation Teams

While the first Prosecutor's small team approach to investigations has its benefits – namely, the conservation of resources and a potentially more expeditious investigative process –there are many potential

drawbacks to limiting the size of investigative teams. Thus, although the make-up of any given investigation team will depend on the nature and demands of a particular investigation, the OTP may want to reconsider its small team approach and recruit more investigators. Additional investigators could be used to increase the size of each investigative team, and/or to increase the number of teams per situation. Of course, expanding the number of investigators at the ICC will require greater resources from the ASP, particularly if the OTP maintains or expands the number of investigations it conducts in the future. Furthermore, the United Nations Security Council's practice of referring situations to the Court without providing resources to support the Court's work in those situations makes increased funding even more critical.

With regard to the composition of the investigation teams, the ICC has taken the right approach in recruiting team members from varied backgrounds, instead of relying strictly on those with experience in law enforcement. Of course, there are different ways of implementing a multidisciplinary approach. For instance, the investigative teams proper might be composed primarily of those with police backgrounds, who are then advised by experts in matters relating to politics, culture, linguistics, *etc*., or the investigators themselves may be drawn from a variety of backgrounds. The most important point in terms of composition is that the OTP should prioritize the recruitment and retention of *experienced* investigators, including those with specific experience investigating international crimes. Another option relating to the composition of investigation teams that may improve investigations is to hire nationals of the country being investigated and/or persons willing to be permanently located in the situation country for the duration of the investigation. Of course, this may not always be possible due to security concerns and will have to be evaluated on a case-by-case basis. In addition, the Office will need to be cautious about potential bias, be it real or perceived, when engaging local actors as part of its investigation team.

Selection of Suspects and Crimes to Be Investigated

Issues Relating to the Selection of Suspects and Crimes to be Investigated

A fundamental question that must be answered in any investigation is how quickly the investigation is narrowed to focus on a particular suspect and/or specific crime or set of crimes. Notably, information provided by the lead investigators of the first DRC and Uganda investigations in testimony and interviews with the media suggests that, in the opinion of the investigators, priorities were established too quickly and without sufficient input from investigators, resulting in relevant evidence being disregarded and potentially important charges being never brought. Furthermore, evidence suggests that many experienced investigators left the ICC between 2005 and 2008 due, at least in part, to the perception that their input was not being adequately valued within the OTP.

Recommendations Relating to the Selection of Suspects and Crimes to Be Investigated

In light of evidence suggesting that, at least in some cases, investigative priorities were established too quickly, the OTP may want to provide its investigators, where possible, with more time and flexibility in gathering evidence before settling on a particular suspect and/or set of charges. The selection of suspects and crimes that will be the focus of an investigation may also benefit from changes to the OTP's process of conducting its *preliminary* examination into a situation. Specifically, we recommend that, in most cases, the OTP send analysts to the country under examination for an extended period of time prior to the formal opening of an investigation, which may improve the OTP's understanding of the context in which the crimes took place and its ability to gain the trust of those who may be in a position to provide useful information. Of course, this option will only be available where the OTP is willing to publicize the fact that a situation is under preliminary examination, and where some level of state cooperation is forthcoming. However, even absent sending an analyst to the field for an extended stay during the preliminary examination stage, the OTP could develop other means of deepening its understanding of the country's culture, politics, history, and other

dynamics prior to launching a formal investigation by working with local actors and/or hiring country experts as consultants for the period of the preliminary examination.

Investigation of Sexual Violence and Gender-Based Crimes

Issues Relating to the Investigation of Sexual Violence and Gender-Based Crimes

To date, the Office of the Prosecutor has experienced particular difficulties in bringing and/or sustaining one particular subset of charges, namely, those involving sexual and gender-based violence (SGBV). As discussed below, the Prosecution has been criticized for either failing to charge SGBV crimes altogether or insufficiently charging this category of offenses in a number of cases. Furthermore, according to a March 2012 report from the Women's Initiatives for Gender Justice, more than fifty percent of gender-violence based allegations that have been brought by the OTP have been dismissed before the case reached the trial stage due to a lack of evidence.

Recommendations Relating to the Investigation of Sexual Violence and Gender-Based Crimes

One potential explanation for the OTP's failure to sufficiently investigate SGBV in a way that will ensure relevant acts are not only charged, but also survive to trial, may be the Prosecutor's strategy of short, focused investigations, mentioned above. Another explanation may be a lack of adequate resources devoted to such investigations. Based on these possibilities, the OTP's investigation of sexual and gender based violence will likely improve if the OTP implements two of the general recommendations already made above, namely: provide investigators greater flexibility on the ground and expand the size of investigation teams. It is also important that the Office continue to ensure that the right staff, including one or more gender crimes experts, is in place on each investigation team, and that this staff reflects an appropriate number of both male and female investigators. Finally, the OTP must continue to prioritize training to increase all of its staff's competency in gender issues.

Of course, in some circumstances, it is simply too difficult to gather evidence from SGBV victims to the extent necessary to substantiate a

charge of sexual violence as genocide, crimes against humanity, or war crimes against the type of high-level suspects that are the focus of ICC investigations, particularly when the suspects were not the physical perpetrators or even present at the scene of the crime. However, even in instances where direct victim testimony regarding SGBV is unavailable, it may still be possible to successfully investigate and prosecute sexual and gender-based crimes. For instance, the Prosecution may attempt to establish its case through hospital records, forensic evidence, and the testimony of doctors, insider witnesses, international observers, and eyewitnesses to the sexual violence. Finally, absent alternatives, where investigating and/or prosecuting SGBV is not practical due to security concerns and/or the unavailability of necessary evidence, the OTP must strive to communicate these factors to the public.

Balancing Security Concerns with the Need to Preserve the Integrity of Investigations

Issues Relating to Balancing Security Concerns with the Need to Preserve the Integrity of Investigations

During the course of the *Lubanga* case, the first case to go to trial at the ICC, evidence emerged regarding the Prosecution's use of intermediaries in the DRC that cast serious doubt on the reliability of much of the Prosecution's evidence. Specifically, the Chamber determined that the evidence presented by a series of Prosecution witnesses could not be relied upon due to the largely unsupervised activities of three of the Prosecution's intermediaries. Although the Trial Chamber ultimately denied a Defense motion seeking a permanent stay of the proceedings for abuse of process based on evidence that several OTP intermediaries had suborned witness testimony, it determined that the testimony of each of the nine witnesses claimed by the Prosecution to have served as child soldiers in Mr. Lubanga's militia was unreliable and excluded the testimony from its deliberations on the guilt of the accused. Before reaching this conclusion, the Trial Chamber identified a number of questionable practices on the part of the OTP with respect to intermediaries, including findings that there was no formal process within the Office for checking the background of individuals who presented themselves as willing to serve as intermediaries; that the OTP continued to engage

the services of at least one intermediary after serious concerns arose regarding his impartiality; and that the OTP relied on intermediaries not only to contact witnesses on behalf of the Office, but to propose potential witnesses.

Recommendations Relating to Balancing Security Concerns with the Need to Preserve the Integrity of Investigations

Importantly, many of the lessons that may be gleaned from the experience of the first DRC investigation in relation to the use of intermediaries have been memorialized in the current version of the *Draft Guidelines Governing the Relations Between the Court and Intermediaries*, a Court-wide document aimed at providing a common framework regarding the ICC's relationship with intermediaries. We therefore urge adoption by the Court of the Draft Guidelines. Furthermore, while we understand that the OTP has revised its operational modalities with regard to intermediaries in its Operational Manual based on lessons learned during its first years of operation and subsequent jurisprudence from the Court, the Operational Manual is not public. Thus, we recommend that the OTP publicize this portion of its Operational Manual and/or develop its own policy paper regarding the implementation of the Court-wide guidelines, in line with the recognition in the *Draft Guidelines* that certain organs or units of the Court may adopt specialized policies to expand on particular practices not necessarily addressed or settled by the Court-wide document.

Evaluating the Sufficiency of Evidence

Issues Relating to Evaluating the Sufficiency of Evidence

As explained above, the Pre-Trial Chambers of the ICC have declined to confirm charges brought against nearly one-third, or approximately 28.6 percent, of the individuals who have undergone the confirmation process at the Court, leading to the dismissal of the cases against those individuals. Notably, this is a substantially higher rate of dismissal than the acquittal rate seen at other international criminal bodies following a full trial, even though the burden of proof at trial – beyond a reasonable doubt – is higher than the burden at the confirmation stage. One possible explanation for this is that the Pre-Trial Chambers have been too strict in evaluating whether the OTP has presented

sufficient evidence to establish substantial grounds to believe the charges. Another possibility is that the Office has simply moved too quickly in bringing some cases before the judges, relying on the fact that it need only establish "reasonable grounds to believe" the charges to secure an arrest warrant or summons to appear and "substantial grounds to believe" the charges to move the case to trial following a confirmation hearing. On the one hand, proceeding in this fashion has some obvious benefits, as the OTP has limited resources and faces significant pressure to produce results quickly. However, as evidenced by the decisions of the Court refusing to confirm either all or some of the charges against a number of suspects, the judges of various Pre-Trial Chambers are not satisfied with the sufficiency of the evidence being put forward by the Prosecution at the confirmation stage. In fact, in a number of cases, judges have not only declined to confirm the charges set forth by the Prosecution, but have openly expressed dissatisfaction with the Prosecution's approach to the gathering of evidence in the case.

Recommendations Relating to Evaluating the Sufficiency of Evidence

The Pre-Trial Chamber decisions discussed in detail below suggest that, at least in some cases, the Prosecution may need to postpone moving forward with a case until more thorough investigations have been conducted. Under some circumstances, this may necessitate seeking a postponement of the confirmation hearings, which the Prosecution is authorized to do under the ICC's Rules of Procedure and Evidence. Absent extraordinary circumstances, however, a better solution would be for the ICC Prosecutor to wait until a case is trial-ready or almost trial-ready before any charges are ever presented to a judge. Notably, this is the stated policy of the Prosecutor of the ICTY, which has achieved a conviction rate of approximately 89.7 percent to date. While the Prosecution is obviously not required to present all of its evidence at the early stages of proceedings against a suspect, aiming to complete investigations before obtaining an arrest warrant or summons would avoid unnecessary delays in holding the confirmation proceedings and ensure that the OTP is able to satisfy the Pre-Trial Chamber judges that it has met the standard required for the case to move to trial. Furthermore, while conducting the investigation in stages may save resources in the short run, in the long run it likely will be far more efficient if the Office initiates only those cases that it

believes, from the start of the process, will lead to successful convictions. Completing an investigation against a suspect prior to seeking a warrant or arrest or summons to appear will also encourage compliance with Article 54(1)(a) of the Rome Statute, which requires that the Prosecution investigate incriminating and exonerating circumstances equally. Lastly, despite the pressure on the OTP to move expeditiously in addressing the most serious crimes of concern to the international community, the credibility of the Office – and the Court – will be greatly improved if the Prosecution is seen to be limiting its cases to those supported by the necessary evidence. Of course, the ICC Appeals Chamber has held that the Prosecution need not fully complete its investigation prior to the start of the confirmation proceedings in a case, and we are not suggesting that the Prosecution should be precluded from using evidence obtained after the charges have been confirmed. In fact, we recognize that certain witnesses – particularly insider witnesses – often need to be cultivated and may be more likely to come forward with information that is useful to the Prosecution after perceiving that the case is likely to progress in court. However, as a policy matter, the Prosecution should aim to complete as much of its investigations as possible before bringing a case to the judges.

Another measure that may help to expose potential weaknesses in the Prosecution's case and ensure that all necessary investigative steps have been undertaken before the OTP seeks an arrest warrant or summons to appear would be to implement a rigorous and formal "peer review" process within the OTP similar to that used at the ICTY. Pursuant to this process, lawyers and investigators from throughout the ICTY Prosecutor's office are invited to participate in an internal review of the charges and evidence assembled by a particular team for the purpose of eliminating factually or legally questionable charges before the case is presented to the Chief Prosecutor and before an indictment is sought. While we understand that the ICC OTP does engage in a consultative process aimed at internally reviewing the sufficiency of evidence in a case, it is not clear that this process occurs routinely or on a mandatory basis, and, in any event, the process does not appear to take place until the confirmation of charges proceedings. Thus, we recommend that the OTP adopt a policy of routinely conducting rigorous reviews with colleagues from other teams much earlier in the process, ideally before an arrest warrant request is made.

Finally, the OTP's evaluation of the sufficiency of its evidence in a given case may be strengthened if, where possible, investigators have interviewed the suspect(s) in the case during the investigation. Of course, this will not always be an option due to an inability to access the suspect or other strategic considerations.

Reliance on Indirect Evidence to Support Charges

Issues Relating to the OTP's Reliance on Indirect Evidence to Support Charges

As discussed above, in its first years of operation, the OTP followed a deliberate strategy of carrying out short, focused investigations. The first Prosecutor also had a stated policy of relying on as few witnesses as possible to support his case, in part because this limited the number of persons put at risk as a result of their interaction with the Office. However, one apparent by-product of these strategies has been a heavy reliance on indirect evidence gathered through secondary sources, meaning information gathered by persons not employed as investigators by the ICC that was collected for reasons independent of the ICC investigation, such as reports produced by non-governmental organizations (NGOs), the United Nations (UN), or media outlets. Although the Pre-Trial Chambers have repeatedly held that such reports are admissible, they have generally attached a lower probative value to indirect proof, and have stated that they will not confirm charges on the basis of a single piece of indirect or anonymous hearsay evidence. Nevertheless, in the *Mbarushimana* case, the Prosecution relied heavily on indirect evidence, with the result being that a large number of allegations were dismissed by the Pre-Trial Chamber on the ground that the only proof submitted by the Prosecution in support of the charge was a single, uncorroborated report from either the UN or an NGO.

As a general matter, reliance on indirect evidence to support the Prosecution's factual allegations – as opposed to using reports from secondary sources merely as lead evidence – is problematic for several reasons. First, such reports are often based on anonymous hearsay, meaning it is impossible for the Defense to challenge the reliability of the evidence. Second, even where sources are provided for the information contained in the report, there is no guarantee that the

entity responsible for reporting the facts itself corroborated or verified the relevant facts. There is also a potential problem with partiality, as the ICC OTP is obligated to investigate incriminating and exonerating circumstances equally, but third parties not connected to the Court are obviously under no such obligation. Finally, even if the entity responsible for producing the report is not partial to any particular party or perspective, the fact is that report was produced for purposes *other than* to support an impartial criminal investigation, and thus is likely not suitable as legal evidence.

Recommendations Relating to the Reliance on Indirect Evidence

Given the issues discussed above, we recommend that, as a matter of practice, the OTP rely on secondary sources only for purposes of establishing contextual or pattern evidence, and only where the sources are amply corroborated by other evidence. As a practical matter, this will likely mean that the Office needs to devote greater time and resources to its investigations from the outset so that it may gather the necessary witness statements, forensic material, and documentary evidence whose authenticity has been verified by ICC investigators. This likely will require not only an expansion in the number of investigators on a given team, but also investments in specialized units with expertise in forensics or technological innovations that may contribute to evidentiary collection, or at least the cultivation of experts that may be engaged on an *ad hoc* basis with respect to particularly technical issues to the extent such expertise is not already available in-house. It may also necessitate a departure from the Office's policy of prioritizing expeditious investigations. Although this policy may be appealing from an efficiency perspective, in the long run, the OTP's work is far less efficient if it is unable to successfully secure warrants of arrest or sustain charges in a case. Of course, reports produced by non-governmental and inter-governmental organizations can be critical to the work of the OTP as lead evidence. Importantly, the OTP may be able to increase the value of such reports by providing relevant guidance to organizations active in countries where the Office is investigating, regarding both investigative techniques and the process by which information is shared with the OTP.

I. INTRODUCTION

At the time of this writing, just over ten years after the Rome Statute governing the International Criminal Court (ICC) entered into force,[2] the Court has issued warrants of arrest or summonses to appear against twenty-nine individuals charged with committing genocide, crimes against humanity and/or war crimes.[3] To date, fourteen of these individuals have appeared before the Court – either voluntarily or following apprehension and transfer to ICC custody – for purposes of participating in a hearing before a Pre-Trial Chamber to determine whether the Prosecution's charges should be confirmed and the case should be sent to trial.[4] Specifically, pursuant to Article 61 of the Rome Statute, the confirmation of charges process requires that the Pre-Trial Chamber determine whether the Prosecution has presented "sufficient evidence to establish substantial grounds to believe" that the individual is responsible for the charges contained in the warrant of arrest or summons to appear.[5] While the Pre-Trial Chambers have

[2] The Rome Statute entered into force on 1 July 2002. *See* Rome Statute of the International Criminal Court, *adopted on* 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force* 1 July 2002, U.N. Doc. A/CONF.183/9 (1998).
[3] *See* International Criminal Court Website, *Situations and Cases: Cases*, http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases/.
[4] Twelve individuals remain at large or are being held by the authorities of a state pending a decision as to whether their cases are admissible before the ICC. Two warrants of arrest have been terminated after a determination by the Pre-Trial Chamber that the accused was deceased. *See The Prosecutor v. Joseph Kony, et al.*, Decision to Terminate the Proceedings against Raska Lukwiya, ICC-02/04-01/05-248 (Pre-Trial Chamber II, 11 July 2007); *The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, et al.*, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, ICC-01/11-01/11-28 (Pre-Trial Chamber I, 22 November 2011). Finally, the confirmation hearing in the case against Laurent Gbagbo has been indefinitely postponed pending a determination on the fitness of the accused to participate in the proceedings. *See The Prosecutor v. Laurent Gbagbo*, Decision on Issues Related to the Proceedings under Rule 135 of the Rules of Procedure and Evidence and Postponing the Date of the Confirmation of Charges Hearing, ICC-02/11-01/11-201 (Pre-Trial Chamber I, 2 August 2012).
[5] Rome Statute, *supra* n. 2, Art. 61(7).

confirmed charges against the majority of individuals appearing before the Court thus far, they have declined to confirm the charges against four suspects, meaning that the Prosecution has failed to convince the Court that there are "substantial grounds to believe" the charges against nearly one-third of the individuals who have appeared before it.[6] Furthermore, even in those cases that do survive the confirmation hearing and proceed to trial, charges have occasionally been dropped by the Pre-Trial Chamber due to a lack of evidence.[7] Finally, the first case to actually go to trial before the Court involved limited charges that were widely perceived as not fully reflecting the criminal conduct of the accused[8] and the Trial Chamber, in its judgment, determined that the evidence provided by "[a] series" of Prosecution witnesses could not "safely be relied on" as a result of the fact that the Office of the Prosecutor (OTP) inappropriately delegated its "investigative responsibilities" to intermediaries.[9]

We recognize that the challenges of conducting international criminal investigations are legion, given investigators' restricted access to evidence, either due to the passage of time and/or uncooperative governments; international institutions' lack of enforcement powers;

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[6] *See The Prosecutor v. Bahr Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red (Pre-Trial Chamber I, 8 February 2010) (declining to confirm the charges against Mr. Abu Garda); *The Prosecutor v. Callixte Mbarushimana*, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red (Pre-Trial Chamber I, 16 December 2011) (declining to confirm the charges against Mr. Mbarushimana); *The Prosecutor v. William Samoei Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, ¶ 74 (Pre-Trial Chamber II, 23 January 2012) (confirming the charges against Mssrs. Ruto and Sang, but declining to confirm the charges against Mr. Kosgey); *The Prosecutor v. Francis Kirimi Muthaura, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red (Pre-Trial Chamber II, 23 January 2012) (confirming the charges against Mssrs. Muthaura and Kenyatta, but declining to confirm the charges against Mr. Ali).

[7] *See infra* n. 139 *et seq.* and accompanying text (discussing the confirmation decisions in the *Katanga & Ngudjolo* and *Muthaura, et al.* cases).

[8] *See infra* n. 54 and accompanying text and n. 132 and accompanying text.

[9] *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, ¶¶ 482-83 (Trial Chamber I, 14 March 2012). *See also infra* n. 168 *et seq.* and accompanying text.

cultural and linguistic barriers to interviewing witnesses; persistent security concerns; the overwhelming scale of the crimes under investigation; and the fact that those working in international institutions hail from different legal traditions and thus are likely to have different views on appropriate investigative policies and practices.[10] We also appreciate that, despite these challenges, the OTP has achieved substantial successes in a short period of time, as evidenced most strikingly by the recent conviction of its first accused and the issuance of warrants and summonses involving a wide range of charges for war crimes, crimes against humanity, and genocide against multiple suspects across seven situations[11] in fewer than ten years. Nevertheless, we believe that – as the OTP undergoes its first change of leadership with the departure of the Court's inaugural Chief Prosecutor[12] – it is worth examining some of the potentially

[10] *See*, *e.g.*, Hiroto Fujiwara & Stephan Parmentier, *Investigations*, *in* INTERNATIONAL PROSECUTORS 573-75 (Reydams, *et al.* eds. 2012); Morten Bergsmo & Michael J. Keegan, *Case Preparation for the International Criminal Tribunal for the Former Yugoslavia*, *in* MANUAL ON HUMAN RIGHTS MONITORING: AN INTRODUCTION FOR HUMAN RIGHTS FIELD OFFICERS 6-9 (2008); Michael J. Keegan, *The Preparation of Cases for the ICTY*, 7 Transnational Law & Contemporary Problems 119, 120-25 (1997); Serge Brammertz, *International Criminal Tribunals & Conducting International Investigations*, Presentation Delivered at the Max Planck Institute, July 2009, at 7.

[11] In the context of the ICC, the Court's operations are divided into two broad categories: "situations" and "cases." According to Pre-Trial Chamber I, "situations" are "generally defined in terms of temporal, territorial and in some cases personal parameters" and "entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such." *Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC-01/04-tEN-Corr, ¶ 65 (Pre-Trial Chamber I, 17 January 2006). In other words, the "situation" refers to the operations of the ICC designed to determine whether crimes have been committed within a given country that should be investigated by the Prosecutor. By contrast, "cases" are defined as "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects" and entail "proceedings that take place after the issuance of a warrant of arrest or a summons to appear." *Id.*

[12] The Court's first Prosecutor, Luis Moreno Ocampo, was replaced on 15 June 2012, following the conclusion of his nine-year term, by the new Prosecutor, Fatou Bensouda. *See* International Criminal Court Press Release, *Ceremony for the solemn*

problematic aspects of the Office's investigative practices that have been identified by the judges of the Court and outside observers to date. The aim of this report is to explore some of those issues and offer recommendations that we hope will contribute to improving the OTP's investigative practices, thereby helping to build a stronger Office of the Prosecutor and enhancing the Court's capacity to administer justice more effectively.

In terms of methodology, we wish to highlight from the outset that, although we did conduct interviews with former and current ICC personnel and other experts, we have chosen to limit our analysis primarily to facts and findings that are supported by the public record.[13] We would also like to point out that, while we have included references to the stated policies and practices of the OTP and the Office's response to criticisms highlighted in this report to the extent such information is publicly available, the fact is that information regarding the investigative process of any prosecution's office is understandably sensitive and, thus, public information available from the OTP on this subject is limited.

undertaking of the ICC Prosecutor, Fatou Bensouda, ICC-CPI-20120615-PR811 (15 June 2012), http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/pr811.

[13] This is consistent with the approach adopted by the War Crimes Research Office in all of the reports written as part of the ICC Legal Analysis and Education Project.

II. ORGANIZATION AND ADMINISTRATION OF THE OFFICE OF THE PROSECUTOR

A. Issues Relating to the Organization and Administration of the Office of the Prosecutor

As set forth in the Regulations of the Office of the Prosecutor, the OTP is comprised of three divisions: the Prosecution Division;[14] the Investigation Division;[15] and the Jurisdiction, Complementarity and Cooperation Division (JCCD).[16] The Prosecution Division is led by

[14] International Criminal Court, Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, Reg. 5 (23 April 2009). The Prosecution Division is responsible for: "(a) the provision of legal advice on issues likely to arise during investigations and which may impact on future litigation; (b) the preparation of litigation strategies within the context of the trial team for the consideration and approval of [the Executive Committee] and their subsequent implementation before the Chambers of the Court; (c) the conduct of prosecutions including litigation before the Chambers of the Court; and (d) coordination and cooperation with the Registry, when required, on trial related issues." *Id.* Reg. 9.

[15] The Investigations Division is responsible for the following: "(a) the preparation of the necessary security plans and protection policies for each case to ensure the safety and well-being of victims, witnesses, Office staff, and persons at risk on account of their interaction with the Court, in adherence with good practices and in cooperation and coordination with the Registry, when required, on matters relating to protection and support; (b) the provision of investigative expertise and support; (c) the preparation and coordination of field deployment of Office staff; and (d) the provision of factual crime analysis and the analysis of information and evidence, in support of preliminary examinations and evaluations, investigations and prosecutions." *Id.* Reg. 8.

[16] JCCD is responsible for the following: "(a) the preliminary examination and evaluation of information pursuant to articles 15 and 53, paragraph 1 [of the Rome Statute] and rules 48 and 104 and the preparation of reports and recommendations to assist the Prosecutor in determining whether there is a reasonable basis to proceed with an investigation; (b) the provision of analysis and legal advice to [the Executive Committee] on issues of jurisdiction and admissibility at all stages of investigations and proceedings; (c) the provision of legal advice to [the Executive Committee] on cooperation, the coordination and transmission of requests for cooperation made by the Office under Part 9 of the Statute, the negotiation of agreements and arrangements pursuant to article 54, paragraph 3 [of the Rome Statute]; and (d) the coordination of cooperation and information-sharing networks." *Id.* Reg. 7.

the Deputy Prosecutor,[17] while both the Investigations Division and the JCCD are led by a Head of Division.[18] In addition, the Office has an Executive Committee (Ex Com), "composed of the Prosecutor and the Heads of the three Divisions of the Office,"[19] which "shall provide advice to the Prosecutor, be responsible for the development and adoption of the strategies, policies and budget of the Office, provide strategic guidance on all the activities of the Office and coordinate them."[20] Finally, each division has a "coordinator." The Investigations Coordinator is responsible for ensuring that "OTP investigations are conducted in compliance with the OTP Operational [M]anual and Ex Com instructions and provid[ing] advice on how to improve the quality of the investigations,"[21] whereas the Prosecution Coordinator "oversees the substantive legal work and joint teams, and reviews and approves all pleadings before filing."[22] The JCCD Coordinator "assists with the management of the Division and coordinates with the Investigations and Prosecution Coordinators."[23] Since the creation of the position of Divisional Coordinators, the Coordinators have also been included in Ex Com consultations.[24]

Regulation 32 of the Regulations of the Office of the Prosecutor provides that a "joint team," composed of staff from each of the three

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[17] *See* International Criminal Court Website, *Structure of the Court: Office of the Prosecutor*, http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/.
[18] *Id.*
[19] ICC Regulations of the Office of the Prosecutor, *supra* n. 14, Reg. 4(1).
[20] *Id.* Reg. 4(2).
[21] International Criminal Court, Vacancy Announcement No. 1150EE-PO, 31 January 2012, https://jobs.icc-cpi.int/sap/bc/webdynpro/sap/hrrcf_a_posting_apply?PARAM=cG9zdF9pbnN0X2d1aWQ9RTEzMTYyMTcxOEYyNDRGMUI2MDcwMDFCNzgzQjQ4QUEmY2FuZF90eXBlPUVYVA%3D%3D&sap-client=100&sap-language=EN.
[22] Gregory Townsend, *Structure and Management*, *in* INTERNATIONAL PROSECUTORS 290 (Reydams, *et al.* eds. 2012). In the organizational chart of the OTP, the post of Prosecution Coordinator is situated within the Prosecution Division of the Office. *See*, *e.g.*, International Criminal Court, *Proposed Programme Budget for 2012 of the International Criminal Court*, ICC-ASP/10/10, at 25 (21 July 2011).
[23] Email between the authors of the report and Olivia Swaak-Goldman, Head of the International Relations Task Force of the OTP's JCCD, 11 October 2012.
[24] *Id.*

divisions within the OTP, "shall be formed upon a decision to proceed with an investigation in a situation, for the purpose of conducting the investigation."[25] Regulation 32 further specifies that "[e]ach joint team shall regularly report its progress and activities to Ex Com in order to receive strategic guidance."[26]

The respective roles of the joint teams and the Executive Committee were further explained in testimony provided by the lead investigator in the *Katanga & Ngudjolo* case, who testified at the request of the Trial Chamber regarding the "conditions under which the investigation" in that case took place,[27] as well as her experiences as an OTP investigator generally.[28] Specifically, the investigator, who testified under a pseudonym, stated:

> The joint team is a concept in which the OTP conducts its investigations. It means that investigators, prosecutors and cooperation staff, we all work together from the very beginning of an investigation. The leadership of the joint team is comprised of the investigation team leader, a senior trial lawyer and an international cooperation adviser… Decisions in the joint team are taken jointly.[29]

The *Katanga & Ngudjolo* investigator went on to suggest that the leadership of the joint team is deeply involved in shaping the course of the investigations:

> The decisions on whom to interview [during the course of an investigation], they need to be discussed with the leadership of the joint team. So, of course, the whole

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[25] ICC Regulations of the Office of the Prosecutor, *supra* n. 14, Reg. 32(1)-(2).
[26] *Id.* Reg. 32(4).
[27] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Transcript, ICC-01/04-01/07-T-81-Red-ENG, at 5:9 – 5:10 (25 November 2009).
[28] *See generally id.*
[29] *Id.* at 7:4 – 7:9. *See also id.* at 29:17 – 29:19 ("We need to coordinate with each other when activities happen. It is – what is important to understand, that all decisions are made jointly with the three parts of the joint team.").

> joint team and its members meet regularly to discuss the way forward and potential sources and in the course of that discussion there can be disagreements and differences in view but, ultimately, it is the joint team that decides whom to interview and which sources to exploit.[30]

Finally, she explained that, where there is disagreement among the members of the joint team, "the decision will go to… senior management,"[31] namely the Ex Com.[32]

This "joint team" model stands in contrast to the organizational approach used at the International Criminal Tribunal for the Former Yugoslavia (ICTY), where teams have been headed by a single senior attorney, who is ultimately accountable to the Chief Prosecutor, but who has broad autonomy to make decisions regarding the direction of the investigation and the case more generally.[33]

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[30] *Id.* at 30:21 – 30:25.
[31] *Id.* at 30:10 – 30:11.
[32] *Id.* at 31:1 – 31:8. Note, however, that the investigator also testified that she could not remember any "substantive disagreement[] within [her] joint team that would have been taken up to the [E]xecutive [C]ommittee" over the course of the investigation. *Id.* at 44:1 – 44:7.
[33] *See, e.g.*, Townsend, *Structure and Management*, *supra* n. 22, at 237 (explaining the role of Senior Trial Attorneys at the ICTY and noting that, as of 2001, "[a] Senior Trial Attorney was assigned to a case once an investigation had been approved," giving "direction and focus to the investigation"); Bergsmo & Keegan, *Case Preparation for the International Criminal Tribunal for the Former Yugoslavia*, *supra* n. 10, at 6 ("[At the ICTY,] [t]he senior lawyer on the team is the lawyer who works most closely with the case from the beginning of the investigation through the trial. That lawyer is responsible for the daily legal supervision during the entire case preparation process and normally drafts the indictment, drawing on the other lawyer(s) in the team. The leader of the team will normally be responsible, in consultation with the team legal adviser, for the preparation of a statement of facts or similar summary of the evidence which accompanies the draft indictment through the internal OTP review process and the submission to the confirming judge."). Note that, in several instances in this report, we compare the practices of the ICC OTP to those of the ICTY OTP, without mentioning the practice of other international criminal bodies. This is not to imply that the ICTY is the only other institution worth

B. Recommendations Relating to the Organization and Administration of the Office of the Prosecutor

With regard to the structure of "joint teams," it is not altogether clear that the tripartite decision-making structure is an improvement on the ICTY model, under which a single Senior Trial Attorney had the authority, *inter alia*, to provide "direction and focus to the investigation."[34] As Gregory Townsend has observed, the ICC's "joint team concept perpetuates 'a division between the Divisions,'" as opposed to "unifying the authority in a lead prosecutor assigned to a case (as do other tribunals)."[35] This division may turn out to be "natural and unproblematic," but only "to the extent there is adequate coordination in practice and the guidance from the senior lawyers is followed."[36] Otherwise, in the words of one OTP staff member interviewed by Townsend, the perpetuation of the division "can produce bad results."[37] Indeed, other OTP staff members interviewed by Townsend outright criticized the joint team concept on the grounds that it "divides authority, requires consensus throughout, and can subject all decisions to a difficult interpersonal dynamic, likening it to a three-headed dragon."[38] Furthermore, the need for three leaders to reach consensus on all or almost all decisions is likely to result in inefficiencies in the conduct of the investigation. More generally, it has been observed that "[m]anagement is… one of the most underdeveloped areas of the OTP, with poor results obtained in internal surveys,"[39] suggesting that the current leadership structure is not being well received by the staff. We understand that, pursuant to the current OTP Operational Manual, which is not public, the representative of each division in the joint team takes lead

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examining, but rather a product of the fact that public information regarding the investigative processes of all international criminal bodies is scarce, and the ICTY is the one institution about which we were able to find relevant information in the public record.

[34] Townsend, *Structure and Management*, *supra* n. 22, at 237.

[35] *Id.* at 292.

[36] *Id.*

[37] *Id.*

[38] *Id.* (citing "Statements of anonymous ICC OTP ID and PD Staff Members").

[39] *Id.* at 293.

responsibility on issues within his or her respective sphere of competence. According to Olivia Swaak-Goldman, Head of the International Relations Task Force of the OTP's JCCD, this development means "that the leadership of the joint team should be thought of primarily as a coordination process to ensure all relevant expertise from each division is brought to bear on an issue, rather than a forum for creating gridlock or inefficiencies."[40] Swaak-Goldman also explained that the "creation of Divisional Coordinators who provide standardised guidance on operational issues to all joint teams further facilitates the process of harmonisation across the OTP."[41] Nevertheless, because it may not always be clear which decisions fall within a division's sphere of competence, we recommend that day-to-day decisions be placed in the hands of a single member of the team, most likely a single trial attorney, who would be ultimately accountable to the Prosecutor. Importantly, the Ex Com would continue to play a role in providing "strategic guidance" to the joint teams,[42] and would also maintain its role in approving the joint teams' initial case hypotheses and the plans developed pursuant to those hypotheses, as well as any adjustments to the hypotheses and related plans over time.[43] In addition, the Divisional Coordinators would continue to supervise the work of the joint teams, ensuring that issues within each division's area of expertise are being appropriately handled by the team. However, having a single leader at the team level would obviate the need for agreement on issues that may be seen to fall within more than one division's competence, thereby likely reducing inefficiency and avoiding the "difficult interpersonal dynamic" at the decision making level described above.

[40] Email between the authors of the report and Olivia Swaak-Goldman, Head of the International Relations Task Force of the OTP's JCCD, 11 October 2012.
[41] *Id.*
[42] ICC Regulations of the Office of the Prosecutor, *supra* n. 14, Reg. 32.
[43] For more on the case hypothesis, *see infra* n. 100 *et seq.* and accompanying text.

III. SIZE AND COMPOSITION OF INVESTIGATION TEAMS

A. Issues Relating to the Size and Composition of Investigation Teams

In the *Lubanga* case, the lead investigator, Bernard Lavigne, provided testimony relating to both the size and the composition of the first team to undertake an investigation in the Democratic Republic of Congo (DRC). Mr. Lavigne testified that he had at most twelve people working under him and that he had always deemed this number to be "insufficient."[44] Notably, however, the first DRC investigation team was not unusually small. Indeed, in the OTP's proposed 2012 budget, the Office requests just forty-four professional staff members for the "Investigations Teams" section of the Investigations Division, which would need to be dispersed among the seven situations in which the Court is currently active.[45]

Observers have stated that the ICC's first Prosecutor purposefully adopted a "small team" approach to investigations[46] as part of his

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[44] *The Prosecution v. Thomas Lubanga Dyilo*, Transcript, ICC-01/04-01/06-Rule68Deposition-Red2-ENG WT, at 16 (16 November 2010).

[45] *See* ICC, *Proposed Programme Budget for 2012 of the International Criminal Court*, *supra* n. 22, at 47. As a general matter, the proposed budget does not break down how many investigators would be assigned to each situation, but it does indicate that in 2011, the Libya investigative team consisted of ten professional-level staff members and one general services assistant, and that the team would maintain the same composition in 2012. *Id.* at 45. Specifically, in 2011, the Libya team consisted of: one team leader (P-4), two investigators (P-3), five associate investigators (P-2), two assistant investigators (P-1), and one information management assistant (GS-OL). *Id.*

[46] Alex de Waal & Julie Flint, *Case Closed: A Prosecutor Without Borders*, World Affairs (Spring 2009), http://www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders. *See also* FIDH, *The Office of the Prosecutor of the ICC – 9 Years On*, at 21 (December 2011) ("Pursuant to the policy of focused investigations, the Prosecutor decided at the outset that he would only need small investigation teams."); Marieke Wierda & Anthony Triolo, *Resources, in* INTERNATIONAL PROSECUTORS 143 (Reydams, *et al.* eds. 2012) ("The ICC OTP [has] pursued a policy of targed investigations through small teams, which meant

stated strategy of carrying out "short investigations"[47] with the aim of "present[ing] expeditious and focused cases."[48] This strategy has been defended on the ground that, as a practical matter, the resources of the OTP are finite and, in the words of the former Director of the JCCD, the Office "need[s] a good selection and cannot investigate hundreds of similar incidents."[49] The policy also reflects a conscious departure from the practice of the *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda (ICTR), which have been criticized for moving too slowly and, in some instances, bringing unnecessarily complex cases.[50] However, it appears that the policy of conducting

that fewer resources went into investigations than at other tribunals."); Pascal Kambale, *The ICC and Lubanga: Missed Opportunities*, Possible Futures (16 March 2012), http://www.possible-futures.org/2012/03/16/african-futures-icc-missed-opportunities/#fn-2780-20 (discussing Moreno Ocampo's "vision of light-touch investigations" in the Ituri region of the DRC, which involved a small team of investigators carrying out "a short and focused investigation").

[47] International Criminal Court Office of the Prosecutor, *Prosecutorial Strategy: 2009-2012*, ¶ 20 (February 2010). *See also* International Criminal Court Office of the Prosecutor, *Report on the Activities Performed During the First Three Years (June 2003-June 2006)*, at 15-16 (12 September 2006) (reporting that, in Uganda, a "small team of investigators in short time was able to focus its efforts on collecting the information necessary to link the crimes under investigation to those most responsible").

[48] *See* ICC OTP, *Report on the Activities Performed During the First Three Years (June 2003-June 2006)*, *supra* n. 47, at 8. *See also* International Criminal Court Office of the Prosecutor, *Report on Prosecutorial Strategy*, at 5 (14 September 2006) ("The second principle guiding the Prosecutorial Strategy is that of focused investigations and prosecutions.").

[49] Katy Glassborow, *ICC Investigative Strategy Under Fire*, Institute for War & Peace Reporting (27 October 2008).

[50] *See, e.g.*, FIDH, *The Office of the Prosecutor of the ICC – 9 Years On*, *supra* n. 46, at 10 (explaining that Moreno Ocampo "wanted to avoid long proceedings like those of the [ICTY and ICTR], which had sought to conduct exhaustive investigations in order to demonstrate the guilt of the accused"); Glassborow, *ICC Investigative Strategy Under Fire*, *supra* n. 49 (quoting the former Director of the Jurisdiction, Complementarity, and Compliance Division of the OTP as saying that the "the ICC ha[d] learned lessons from cases at the international war crimes tribunals that came before it, like the trial of former Serbian president Slobodan Milosevic at the [ICTY]," noting that it took the ICTY "six years to prepare three separate indictments against Milosevic, covering crimes committed in Bosnia, Croatia and Kosovo over the course of almost a decade" and that the "accused died four years into the trial, before a judgement could be passed").

expedited investigations with a limited number of investigators has led to certain problems.[51] For instance, according to a 2008 article published by the Institute for War and Peace Reporting, former ICC investigators working in Uganda, the DRC, and Sudan complained that, "[b]ecause they arrive in the country already focused on gathering evidence of a particular set of crimes, committed in specific locations and on specific dates… other atrocities are often overlooked."[52] Furthermore, "[e]ven when investigators stumble across evidence of other crimes not on their initial list," they "lack the time to investigate these properly, meaning that the alleged perpetrators are less likely to be charged."[53] Thus, for example, investigators working on the first DRC investigation stated that, "given more time and control in their investigation, they could have produced evidence to ground war crimes charges against [Thomas] Lubanga for killings and rapes, in addition to the child soldiers charge."[54] It should be noted here that, according to a filing submitted by the Prosecution in the *Lubanga* case, the OTP did initially plan to continue investigating Mr. Lubanga in an effort to potentially add charges to the case after the arrest of the accused, but, as of June 2006, "the ability of the [OTP] to investigate in the DRC, and in particular in the area of Ituri, [was] significantly

[51] *See* Wierda & Triolo, *Resources*, *supra* n. 46, at 144 (noting that the strategy of pursuing targeted investigations through small teams has been defended, in part, on grounds of "cost-effectiveness," but that the strategy "has also had its critics, who believe that this approach has been detrimental to both the scope and quality of investigations in ICC cases").

[52] Glassborow, *ICC Investigative Strategy Under Fire*, *supra* n. 49. *See also* Elena A. Baylis, *Outsourcing Investigations*, Legal Studies Research Paper Series, Working Paper No. 2010-20, at 133 (September 2009) ("The [ICC OTP] investigators focus from the beginning on a predetermined set of incidents and suspects in a particular time frame, rather than exploring the situation comprehensively.").

[53] Glassborow, *ICC Investigative Strategy Under Fire*, *supra* n. 49. *See also* Pascal Kambale, *The ICC and Lubanga: Missed Opportunities*, Possible Futures (16 March 2012), http://www.possible-futures.org/2012/03/16/african-futures-icc-missed-opportunities/#fn-2780-20 ("The investigative teams assigned to the Ituri situation were too undersized and too short-term to generate [a] good analysis of the intricately entangled criminal activities in this bloody part of Congo.").

[54] Baylis, *Outsourcing Investigations*, *supra* n. 52, at 136. Note that, in other cases brought by the OTP to date, the charges have been much broader.

limited by the security conditions in the region and the impact of the upcoming election period on these conditions."[55] Nevertheless, the statements by the investigators suggest that investigations were being curtailed for reasons other than security concerns alone. Hence, while security issues and the overwhelming scale of atrocities may curtail the OTP's ability to investigate in certain circumstances, the question remains whether the OTP could be conducting more extensive investigations where possible. For instance, in the *Ruto, et al.* case, participating victims claimed that the OTP failed to conduct sufficient investigations into the eyewitness accounts of the victims of the post-election violence in Kenya and did not perform adequate on-site investigations, leading to a disconnect between the Prosecution's case and the victims' experiences.[56] In particular, 126 of the victims who were authorized to participate in the confirmation proceedings in that case informed the Pre-Trial Chamber that they had never been interviewed by the OTP, nor were they aware of anyone else living in their locality who had been interviewed, and none were aware that the OTP had conducted on-site investigations in their localities.[57]

The "small team" approach may also have negative effects on staff retention, as investigators hired by the OTP may begin to feel overstretched. Indeed, in a September 2008 letter from Human Rights Watch to the OTP's Executive Committee concerning the Office's "management practices,"[58] the non-governmental organization observed that "[m]any experienced investigators [had] left the OTP since 2005," due in part to "burn out" resulting from the fact that there were "simply not enough of them to handle the rigorous demands for

[55] *The Prosecutor v. Thomas Lubanga Dyilo*, Prosecutor's Information on Further Investigation, ICC-01/04-01/06-170, ¶¶ 2, 7, n. 20 (Office of the Prosecutor, 28 June 2006).
[56] *Ruto & Sang*, Request by the Victims' Representative for Authorization to Make a Further Written Submission on the Views and Concerns of the Victims, ¶¶ 9-10 (Nov. 9, 2011)
[57] *Id.* ¶ 10.
[58] Human Rights Watch, Letter to the Executive Committee of the Office of the Prosecutor, at 1 (15 September 2008), http://www.article42-3.org/Secret%20Human%20Rights%20Watch%20Letter.pdf.

conducting investigations."[59] Obviously, it is important for the OTP to retain qualified investigators over time, not only to ensure the continuity of particular investigations, but also to add to the level of experience of the investigative staff and build up the institutional knowledge of the Office.[60] Finally, unduly restricting the size of the investigative team may force the OTP into the position of over-reliance on secondary source information, a problem discussed in detail below.[61]

In terms of the composition of the first investigative team in the DRC, lead investigator Lavigne observed that that, in his opinion, his team should have been comprised strictly of people who had "a police background," but that "[i]t was decided… that people with more varied backgrounds should also be recruited," including "former members of [non-governmental organizations (NGOs)] who could provide better open-mindedness to enable the other team members not to limit themselves to their police backgrounds."[62] According to Mr. Lavigne, this approach "may have had a negative impact on the quality of the work."[63] On the other hand, experience at the ICTY has demonstrated that "[i]nvestigating serious violations of international

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[59] *Id. See also* Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years*, at 48 (July 2008) (reiterating the same message regarding "burn out" on the part of ICC investigators).

[60] *See, e.g.*, Townsend, *Structure & Management*, *supra* n. 22, at 317 ("All international prosecutors' offices have faced human resources challenges. In terms of management, having quality staff working in unison is critical for these offices to function effectively. Recruiting *and retaining* highly skilled staff should be a priority.") (emphasis added).

[61] *See infra* n. 238 *et seq.* and accompanying text.

[62] *Lubanga*, 16 November 2010 Transcript, *supra* n. 44, at 16-17. Subsequently, Mr. Lavigne explained that his team was comprised of investigators from various NGOs, including Amnesty International in Africa and the Belgium chapter of Lawyers Without Borders, the ICTY, and the United Nations Mission in the Democratic Republic of Congo (MONUC), among others. *See Prosecutor v. Thomas Lubanga Dyilo*, Transcript, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, at 42 (17 November 2010). The team also included a Congolese national that acted as a country expert and advisor to the other OTP investigation team members. *Lubanga*, 16 November 2010 Transcript, *supra* n. 44, at 18.

[63] *Lubanga*, 16 November 2010 Transcript, *supra* n. 44, at 16-17.

humanitarian law requires a multi-disciplinary approach, and requires operational teams of specialists who bring together a range of skills and capabilities."[64]

B. Recommendations Relating to the Size and Composition of Investigation Teams

As discussed above, while the first Prosecutor's "small team" approach to investigations has its benefits, there are many potential drawbacks to minimizing the size of investigative teams. Thus, although the make-up of any given investigation team will depend on the nature and demands of a particular investigation, the OTP may want to reconsider its small team approach and recruit more investigators.[65] Additional investigators could be used to increase the size of each investigative team, and/or to increase the number of teams per situation. Notably, by contrast to the small teams at the ICC to date, investigative teams at the ICTY consisted of up to twenty members,[66] and there were up to ten separate teams operational at a given time,[67] even though the geographic jurisdiction of the Tribunal

[64] International Criminal Tribunal for the Former Yugoslavia & United Nations Interregional Crime and Justice Research Institute, *ICTY Manual on Developed Practices*, at 12 (2009).

[65] Several outside observers of the Court have made a similar recommendation. *See, e.g.*, Human Rights Watch, *Courting History*, *supra* n. 59, at 48 (noting that "it may be necessary to deploy more investigators at the outset to ensure that investigations are sufficiently comprehensive"); FIDH, *The ICC, 2002 - 2012: 10 years, 10 Recommendations for an Efficient and Independent International Criminal Court*, at 3 (15 June 2012), http://www.fidh.org/IMG/article_PDF/article_a11837.pdf ("[T]he policy of limiting the size of the investigation teams should be revised to recruit professional investigators.").

[66] Bergsmo & Keegan, *Case Preparation for the International Criminal Tribunal for the Former Yugoslavia*, *supra* n. 10, at 6.

[67] *See, e.g.*, International Criminal Tribunal for the Former Yugoslavia, Sixth Annual Report of the International
Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, A/54/187, S/1999/846, ¶ 126 (31 July 1999) ("Ten investigation teams, including a team established in 1998 dedicated to looking into the events in Kosovo, are responsible for conducting criminal investigations and gathering evidence in the former Yugoslavia in order to bring indictments against

was limited to the territories of the former Yugoslavia.[68]

Of course, expanding the number of investigators at the ICC will require greater resources. Importantly, as demonstrated by the chart on the following page, which is based on budget estimates submitted by the OTP for the years 2007 through 2013, the number of professional staff[69] members employed in the "Investigation Teams" sub-division of the OTP has *decreased* since 2007, despite the increase in the number of situations in which the Court is active.

those responsible for violations of international humanitarian law.").

[68] *See* Statute of the International Criminal Tribunal for the Former Yugoslavia, *adopted* 25 May 1993, *as amended* 7 July 2009, Art. 1 ("The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.")

[69] Professional staff refers to employees classified as "P-1" and above. *See*, *e.g.*, International Criminal Court, *Proposed Programme Budget for 2007 of the International Criminal Court*, at 55, ICC-ASP/5/9 (22 August 2006).

Proposed Budget Fiscal Year	Number of Situations at the Time of the Budget Proposal	Number of Professional Staff Requested for Investigation Teams
2007	4[70]	52[71]
2008	4[72]	41[73]
2009	4[74]	44[75]
2010	4[76]	45[77]
2011	5[78]	46[79]
2012	6[80]	44[81]
2013	7[82]	46[83]

[70] Uganda (29 January 2004), The Democratic Republic of the Congo (19 April 2004), Darfur (31 March 2005), The Central African Republic (07 January 2005).
[71] International Criminal Court, *Proposed Programme Budget for 2007 of the International Criminal Court*, ICC-ASP/5/9, at 55 (22 August 2006).
[72] *See supra* n. 70.
[73] International Criminal Court, *Proposed Programme Budget for 2008 of the International Criminal Court*, ICC-ASP/6/8, at 43 (25 July 2007).
[74] *See supra* n. 70.
[75] International Criminal Court, *Proposed Programme Budget for 2009 of the International Criminal Court*, ICC-ASP/7/9, at 46 (29 July 2008).
[76] *See supra* n. 70.
[77] International Criminal Court, *Proposed Programme Budget for 2010 of the International Criminal Court*, ICC-ASP/8/10, at 48 (30 July 2009).
[78] Uganda (29 January 2004), The Democratic Republic of the Congo (19 April 2004), Darfur (31 March 2005), The Central African Republic (07 January 2005), Kenya (31 March 2010).
[79] International Criminal Court, *Proposed Programme Budget for 2011 of the International Criminal Court*, ICC-ASP/9/10, at 49 (2 August 2010).
[80] Uganda (29 January 2004), The Democratic Republic of the Congo (19 April 2004), Darfur (31 March 2005), The Central African Republic (07 January 2005), Kenya (31 March 2010), Libya (26 February 2011).
[81] ICC, *Proposed Programme Budget for 2012 of the International Criminal Court*, *supra* n. 22, at 47.
[82] Uganda (29 January 2004), The Democratic Republic of the Congo (19 April 2004), Darfur (31 March 2005), The Central African Republic (07 January 2005),

The chart also demonstrates that the OTP has largely resisted requesting resources from the Assembly of States Parties[84] for additional staff members for the Investigation Teams. Indeed, this seems to have been a point of pride for the Office, which has insisted that its "lean and flexible joint investigation and trial teams" enable the Office "to perform more investigations and prosecutions simultaneously, with the same number of staff."[85] Given a number of States Parties' desire for a "zero-growth" budget,[86] this approach has no doubt been welcomed by the ASP. However, critics have charged that it may lead to a situation in which the OTP is able to do less and less in each situation "to square demand with limited resources" where "just the opposite is required."[87] Hence, assuming that the OTP

Kenya (31 March 2010), Libya (26 February 2011), Côte d'Ivoire (3 October 2011).

[83] International Criminal Court, *Proposed Programme Budget for 2013 of the International Criminal Court*, ICC-ASP/11/10, at 55 (16 August 2012)

[84] The Assembly of States Parties to the Rome Statute "consider[s] and decide[s] the budget for the Court." Rome Statute, *supra* n. 2, Art. 112(2)(d).

[85] International Criminal Court, *Second Status Report on the Court's Investigations into Efficiency Measures*, ICC-ASP/8/30, at 2 (4 November 2009), http://212.159.242.181/iccdocs/asp_docs/ASP8/ICC-ASP-8-30-ENG.pdf.

[86] *See*, *e.g.*, Robbie Corey-Boulet, "Concern Over ICC Funding," *Inter Press Service*, 28 September 2011, http://ipsnews.net/news.asp?idnews=105279 (noting that, "[e]ven before the [Court's 2012 budget] proposal was submitted," "key donors were issuing calls for zero growth in the court's budget"); Blake Evans-Pritchard, "Mali Case Throws Spotlight on ICC Budget Constraints," *Institute for War & Peace Reporting*, 6 August 2012, http://iwpr.net/report-news/mali-case-throws-spotlight-icc-budget-constraints ("For the past two years, the signatory states that decide the budget have adopted a policy of zero growth for the court, insisting that it free up funds by making cuts in 'non-core' areas.")

[87] Townsend, *Structure and Management*, *supra* n. 22, at 293. *See also* Rebecca Hamilton, *Closing ICC Investigations: A Second Bite at the Cherry for Complementarity?*, HRP Research Working Paper Series, at 2 (May 2012), http://www.law.harvard.edu/programs/hrp/documents/Hamilton.pdf ("[A] core challenge facing the [C]ourt's second prosecutor… will be to align the OTP's workload with its resources"); Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Cases*, at 1(15 September 2011), http://www.hrw.org/node/101560 ("As Moreno-Ocampo prepares to leave office and hand over to a new prosecutor, states parties must confront the challenge of equipping the ICC to meet heightened expectations. As the court is asked to take on more situations, there is a risk that the ICC and its prosecutor will increasingly "hollow out" the court's approach to its situations under investigation. That is, the ICC may take on more

maintains or even expands the number of investigations it is performing in the future, it will likely need to seek greater resources for its investigative teams. The United Nations Security Council's practice of referring situations to the Court without providing resources to support the Court's work in those situations makes increased funding even more critical.[88]

In terms of the composition of the investigation teams, it seems that, Mr. Lavigne's complaints notwithstanding, the ICC has taken the right approach in recruiting members of the investigation team from varied backgrounds, instead of relying strictly on those with experience in law enforcement. Indeed, as stated above, experience at the ICTY has demonstrated that it is best to employ a multi-disciplinary approach when investigating serious international crimes.[89] Thus, the *ICTY Manual on Developed Practices* states that, "in addition to investigators with a traditional police background, teams require the services of military, criminal and political analysts, historians, demographers, forensic specialists and linguists," noting that "[a]ll groups of investigators can learn from each other."[90] Of course, there are different ways of implementing a multidisciplinary approach. For instance, the investigative teams proper might be composed primarily of those with police backgrounds, who are then advised by experts in

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situations, but do less and less in each situation to square demand with limited resources—especially in difficult economic times.").

[88] *See* United Nations Security Council Resolution 1593, S/RES/1593, ¶ 7 (2005) ("[The Security Council] [r]ecognizes that none of the expenses incurred in connection with the referral [of the situation in Darfur] including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily."); United Nations Security Council Resolution 1970, S/RES/1970, ¶ 8 (2011) ("[The Security Council] [r]ecognizes that none of the expenses incurred in connection with the referral [of the situation in Libya], including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily.").

[89] *See supra* n. 64 *et seq.* and accompanying text.

[90] ICTY & UNICRI, *ICTY Manual on Developed Practices*, *supra* n. 64, at 12.

matters relating to politics, culture, linguistics, *etc.*, or the investigators themselves may be drawn from a variety of backgrounds. The most important point in terms of composition seems to be that the OTP must prioritize the recruitment and retention of *experienced* investigators, including those with specific experience investigating international crimes and those experienced in questioning difficult witnesses. As Human Rights Watch has observed:

> By "experienced" investigator, we mean an individual who not only has knowledge of the country situation under investigation but who also has a background in conducting investigations in different contexts (such as working in a national police force). Experienced investigators generally have better developed instincts, which can improve both the quality and efficiency of investigations overall. For instance, experienced investigators can more quickly identify and pursue leads linking crimes committed on the ground to senior officials who ordered them. Further, experienced investigators can help to mentor junior investigations staff, which can help strengthen the office's investigations over the longer term.[91]

Indeed, the importance of qualified, experienced investigators cannot be overstated. As the ICTY observed in its first annual report to the United Nations, "the success of the Tribunal as a whole depends very much on the calibre of the investigative staff of the Office of the Prosecutor."[92] While "[h]aving experienced and well-qualified prosecutors is important," the report continues, "they can present cases to the Tribunal only based on the evidence gathered by the investigative staff," meaning that, "[i]f the prosecution evidence is not thorough and complete, or is insufficiently prepared, then the risk of

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[91] Human Rights Watch, *Courting History*, *supra* n. 59, at 48.

[92] International Criminal Tribunal for the Former Yugoslavia, *First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, A/49/342, S/1994/1007, ¶ 144 (28 July 1994).

prosecution failure is high."[93]

Another option relating to the composition of investigation teams that may improve investigations is to hire nationals of the country being investigated and/or persons willing to be permanently located in the situation country or a neighboring country for the duration of the investigation. Presently, members of the investigation team are all based in The Hague,[94] and thus are required to undertake repeated, short-term missions to the situation country to perform investigations. For instance, in the ten months following the opening of the investigation in Uganda in July 2004, OTP investigators conducted over fifty missions in the field.[95] Similarly, between July 2004 and September 2006, members of the OTP investigating the situation in Sudan conducted "more than" fifty missions to fifteen different countries, including three to Sudan.[96] According to Mr. Lavigne, the lead investigator on the first DRC investigation, investigators working on his team only spent on average ten days in the field, on a rotating basis, which made it difficult to interview witnesses.[97] Research conducted by Human Rights Watch into the investigative practices of the OTP supports this claim. According to the organization:

> The opportunities for Hague-based investigators to interact and develop strong contacts with witnesses are limited in number and timeframe. The sometimes precarious security situation in each of the countries under investigation and the resulting restrictions on travel and movement mean that these opportunities may be limited further. Moreover, even when key witnesses agree to a specified time to meet with investigators, circumstances may change, rendering them unavailable by the time that the Hague-based members of the

[93] *Id.*
[94] Human Rights Watch, *Courting History*, *supra* n. 59, at 54.
[95] ICC OTP, *Report on the Activities Performed During the First Three Years (June 2003-June 2006)*, *supra* n. 47, at 15.
[96] *Id.* at 3, 19.
[97] *Lubanga*, Trial Chamber Judgment, *supra* n. 9, ¶ 165; *Lubanga*, 16 November 2010 Transcript, *supra* n. 44, at 75.

> investigative teams travel to the field. Additional field missions may be required, adding to the already-rigorous travel schedule of investigative team members. This can lead to delays in investigations overall.[98]

Again, this state of affairs may be improved if at least a portion of the OTP's investigative team was located in the situation country on a permanent or semi-permanent basis.[99] Of course, this may not always be possible due to security concerns and will have to be evaluated on a case-by-case basis. In addition, the Office will need to be cautious about potential bias, be it real or perceived, when engaging local actors as part of its investigation team.

[98] Human Rights Watch, *Courting History*, *supra* n. 59, at 55-56.
[99] It may also be useful to take this approach during the preliminary examination stage, which is led by the JCCD. *See infra* n. 119 *et seq.* and accompanying text.

IV. SELECTION OF SUSPECTS AND CRIMES TO BE INVESTIGATED

A. Issues Relating to the Selection of Suspects and Crimes to be Investigated

A fundamental question that must be answered in any investigation is how quickly the investigation is narrowed to focus on a particular suspect and/or specific crime or set of crimes. The Regulations of the OTP contain some information regarding the process by which the Office selects the suspect(s) and charge(s) in a given case. Specifically, Regulation 34 states that the "joint team shall review the information and evidence collected and shall determine a provisional case hypothesis (or hypotheses) identifying the incidents to be investigated and the person or persons who appear to be the most responsible."[100] The provisional hypothesis/es "shall include a tentative indication of possible charges, forms of individual criminal responsibility and potentially exonerating circumstances."[101] Regulation 34 also requires that the joint team "submit the provisional case hypothesis (or hypotheses) to Ex Com for approval."[102] The Regulations also provide that the case hypotheses and all plans developed pursuant to those hypotheses[103] "shall be reviewed and adjusted on a continuous basis taking into consideration the evidence collected."[104] Understandably, however, the Regulations do not specify how much time should be given to investigators to gather evidence before this process is set in motion, as the appropriate timing

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[100] ICC Regulations of the Office of the Prosecutor, *supra* n. 14, Reg. 34(1).
[101] *Id.* Reg. 34(1).
[102] *Id.* Reg. 34(3). As discussed above, "Ex Com," which is short for the Executive Committee, is composed of the Prosecutor and the heads of each of the three divisions within the OTP. *See supra* n. 19 and accompanying text.
[103] According to Regulation 35(1), "[f]ollowing strategic guidance from Ex Com [following approval of the case hypothesis/es], the joint team shall develop an evidence collection plan and a cooperation plan." ICC Regulations of the Office of the Prosecutor, *supra* n. 14, Reg. 35(1). "All plans shall be submitted to Ex Com for approval." *Id.*
[104] *Id.* Reg. 35(4).

of each investigation may vary widely.

In the context of the *Lubanga* case, Mr. Lavigne provided testimony suggesting that the decision as to how quickly to narrow the focus of the investigation was influenced by the fact that the investigators "were subject to a lot of pressure," including from the Office of the Prosecutor, which "wanted [the investigators] to start something," and from judges of the Court who, in the opinion of Mr. Lavigne "were subject to a certain intellectual inactivity" in the Court's first years.[105] As a result of this pressure, Mr. Lavigne testified, "it was necessary for [the investigators] to make progress or to give the impression that [they] were advancing."[106] In addition, as the *Lubanga* Trial Chamber itself noted, the investigators received "a degree of international and local pressure, once it was known that officials from the Court had arrived in the country."[107] The notion that pressure on the Court to move quickly may have negatively influenced the pace of investigations in the first DRC investigation is also reflected in a 2008 article that quotes former ICC investigators as saying that, as a result of the "enormous pressure" placed on the ICC "to prove itself," prosecutors "pushed" investigators "into situations before they ha[d] thoroughly collected and analysed existing information."[108] Indeed, according to that article, one former member of the first DRC investigation team speculated that the reason investigators were told, after a year and a half of investigating "killings, attacks on villages, [and] the flow of illegal weapons," to "focus just on child soldiers" was that "the investigation had already taken a long time, and prosecutors wanted something to present at court as soon as possible."[109]

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[105] *Lubanga*, 17 November 2010 Transcript, *supra* n. 62, at 54:23 – 55:3.
[106] *Id.* at 55.
[107] *Lubanga*, Trial Chamber Judgment, *supra* n. 9, at 70.
[108] Glassborow, *ICC Investigative Strategy Under Fire*, *supra* n. 49.
[109] *Id.* Note that former ICC senior trial attorney Christine Chung disputed the notion that the pressure to start cases negatively impacted investigations in Uganda and the DRC. *Id.* Chung is quoted as saying: "The [OTP] does a great deal of pre-investigation planning – many think for too long – [and] at some point you need to go to the field." *Id.*

The lead investigator in the Uganda situation, Martin Witteveen, has also expressed the view that investigative priorities were narrowed too early, not allowing for an expansion of the case as investigations move forward. Specifically, according to Witteveen, prosecutors made the decision to limit the investigation in Uganda to six incidents after investigators had been in the country for just four weeks, and that decision "was never changed."[110] In response to this remark, former Director of JCCD, Beatrice Le Frapper du Hellen, observed the following:

> During the analysis phase we collect [information from] open sources, communications, reports by NGOs and out of that try to see what the period was of most violence, and which region [suffered most]. Then we select a few incidents and this is where the frustration comes from for investigators, and I understand it entirely… But we have to set the standards and the focus of the investigation, and we can only select a few incidents; we need a good selection and cannot investigate hundreds of similar incidents… [The procedure] is probably not perfect and can be criticised, but at one time, we need to settle on our incidents which [reflect] our own evidence.[111]

Nevertheless, in Witteveen's opinion, the Office could have "done better on the thematic charges [for systematic crimes committed by the Lord's Resistance Army (LRA) throughout the conflict], like sexual crimes and use of child soldiers."[112]

Yet another potential drawback to focusing a case too early is that investigators may believe that their input is not adequately being taken into account by the leadership of the joint team. Notably, in its September 2008 letter to the OTP's Executive Committee discussed

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[110] Glassborow, *ICC Investigative Strategy Under Fire*, *supra* n. 49.
[111] *Id.*
[112] *Id.*

above,[113] Human Rights Watch noted that many of the experienced investigators who left the ICC between 2005 and 2008 did so not only due to "burn out," but also due to the "perception that the input of investigators [was] not sufficiently valued within the OTP, leading to dissatisfaction."[114] This view is supported by testimony provided by Mr. Lavigne, who testified that, in the early days of the DRC investigation, the objectives "were varied, not due to the investigators, but due to the choices of the [OTP], as such, and the way in which it was carrying out its cases."[115] The result, according to Mr. Lavigne, was that, even after certain evidence was found indicating a particular militia had committed particular crimes, a "choice" was made to "prioritise another … charge than that of the one related to the first evidence that [the investigators] found."[116] This sentiment was apparently shared by former investigators in a "variety of different cases," who told the Institute for War and Peace Reporting in 2008 that "they were instructed to change direction in the middle of investigations to focus on a different set of incidents and crimes," which "reflected an overall lack of strategic direction, and meant that the limited time they had was not used efficiently."[117]

B. Recommendations Relating to the Selection of Suspects and Crimes to be Investigated

In light of the foregoing, it appears that the OTP may want to provide its investigators with more time and flexibility in gathering evidence before settling on a particular suspect and/or set of charges. Furthermore, it may be appropriate for the Office to assign more weight to the findings of investigators before finalizing the contours of a case. As Human Rights Watch has observed:

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[113] *See supra* n. 58 and accompanying text.
[114] De Waal & Flint, *Case Closed: A Prosecutor Without Borders*, *supra* n. 46. *See also* Human Rights Watch, *Courting History*, *supra* n. 59, at 48 (reiterating that many experienced investigators left the ICC after 2005 due, in part, to a perception that their views were not being sufficient valued within the OTP).
[115] *Lubanga*, 16 November 2010 Transcript, *supra* n. 44, at 24.
[116] *Id*.
[117] Glassborow, *ICC Investigative Strategy Under Fire*, *supra* n. 49.

> Having a preliminary "roadmap" for investigators in the field can be beneficial, at least initially. However, the assessment of what should be considered the gravest incidents and the main type of victimization may change based on information collected on the ground. This underscores why it is essential to prioritize the input of investigators in deciding which incidents are selected for further investigation and, ultimately, prosecution. Investigators' ability to contextualize the crimes based on their experience in the field means that they can offer important insights in devising the Office of the Prosecutor's investigative and trial strategy. In this way, the input of investigators can contribute to ensuring that the Office of the Prosecutor's "focused" strategy for incident selection is appropriately implemented.[118]

The selection as to which suspects and crimes will be the focus of an investigation may also benefit from changes to the OTP's process of conducting *preliminary* examinations into a situation. According to a 2011 report published by the OTP, "the Office conducts a preliminary examination of all situations brought to its attention based on statutory criteria and the information available,"[119] and these examinations necessarily include an assessment of whether a crime or crimes falling within the jurisdiction of the Court have been committed.[120] Specifically, the preliminary examinations are carried out by JCCD, "in conjunction with relevant officers of the Investigations Division where appropriate."[121] Following the examination, JCCD prepares

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[118] Human Rights Watch, *Courting History*, *supra* n. 59, at 47-48.

[119] International Criminal Court Office of the Prosecutor, *Report on Preliminary Examination Activities*, ¶ 1 (13 December 2011).

[120] *Id*. ¶¶ 3-4. Pursuant to Article 53(1) of the Rome Statute, the other factors considered by the OTP during a preliminary investigation include the admissibility of the situation and the interests of justice. *See* Rome Statute, *supra* n. 2, Art. 53(1). *See also* ICC OTP, Report on Preliminary Examination Activities, *supra* n. 119, ¶¶ 3-8.

[121] International Criminal Court Office of the Prosecutor, *Annex to the "Paper on Some Policy Issues Before the Office of the Prosecutor:" Referrals and*

"reports and recommendations to assist the Prosecutor in determining whether there is a reasonable basis to proceed with an investigation."[122] Because JCCD is a small division,[123] and because its staff members' duties are not limited to conducting preliminary examinations,[124] "in practice, most of the preliminary analysis has been carried out at the OTP's headquarters in The Hague by very small teams," with analysts "rarely" visiting the country under investigation "for more than one week."[125] Indeed, Paul Seils, the former Head of the Situation Analysis Section within the JCCD, has lamented the fact that more extensive preliminary examinations are not conducted on the ground and recommended that analysts be sent to the country under examination "for more extensive periods."[126] While Seils'

Communications, at 6 (21 April 2004).

[122] ICC Regulations of the Office of the Prosecutor, *supra* n. 14, Reg. 7(a).

[123] In 2011, the JCCD consisted of seventeen staff members. *See* ICC, *Proposed Programme Budget for 2012 of the International Criminal Court*, *supra* n. 22, at 39. The Prosecutor did not request any additional staff for the division in its proposed 2012 budget. *Id.*

[124] JCCD is itself divided into two subsections: the International Cooperation Section and the Situation Analysis Section. *See*, *e.g.*, ICC, *Proposed Programme Budget for 2012 of the International Criminal Court*, *supra* n. 22, at 25. The former "develops networks for support and information-sharing, provides legal advice on complementarity and cooperation, coordinates and channels all [Requests for Assistance], carries out external relations activities, oversees public information activities, negotiates cooperation agreements, and liaises with external actors to implement the complementarity policy." Townsend, *Structure and Management*, *supra* n. 22, at 289. The Situation Analysis Section is the section that "conducts the initial review of information on crimes and incoming communications, prepares reports and recommendations, collects additional information on new situations of concern, and carries out in-depth analysis of jurisdiction and admissibility issues as well as the interests of justice." *Id.* Furthermore, as discussed above, some members of JCCD participate in the "joint teams" established once an investigation is formally opened. *See supra* n. 25 *et seq.* and accompanying text.

[125] Paul F. Seils, *Making Complementarity Work: Maximizing the Limited Role of the Prosecutor*, *in* THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE, VOL. II, at 999 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011). Seils acknowledges that Colombia represents an exception, but notes that even in that case, "the total amount of time in such a complex situation remains very limited indeed (probably under a full month in-country over six years)." *Id.* at 999-1000.

[126] Seils, *Making Complementarity Work: Maximizing the Limited Role of the*

recommendation is aimed at promoting the "catalytic effect" that preliminary investigations may have on national proceedings in a country under preliminary examination, he explains that "[a] longer presence on the ground should allow [ICC] analysts to improve their understanding of the institutions that are of interest, *both in terms of those providing information* and those conducting national proceedings."[127] Furthermore, he notes that "[s]hould nothing happen at a national level, the OTP will at least be in good shape with someone who knows the lie of the land well enough to identify reliable and credible counterparts to begin the investigation."[128] In fact, it is well established that the "development of relationships and trust is a prerequisite to a successful investigation" in cases involving mass atrocities.[129] Thus, in most cases, having an OTP analyst on the ground for a prolonged period prior to the formal opening of an investigation will likely assist the investigators in their formation of case hypotheses from the outset of the investigation.

Of course, the option of stationing one or more OTP analysts in a situation country for a lengthy period of time during the preliminary examination phase will only be available where the OTP is willing to publicize the fact that a situation is under preliminary examination,[130] and where some level of state cooperation is forthcoming. However, even absent sending an analyst to the situation country for an extended stay during the preliminary analysis phase, the JCCD could develop other means of deepening its understanding of the country's culture,

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Prosecutor, *supra* n. 125, at 999.

[127] *Id.* at 999-1000 (emphasis added).

[128] *Id.* at 1000.

[129] Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, 30 Mich. J. Int'l L. 927, 976 (2009). The need to establish trust among the affected community may be particularly important in situations involving crimes of sexual violence. *See, e.g.*, Laurel Fletcher, *et al.*, *Human Rights Violations Against Women*, 15 Whittier L. Rev. 319, 371 (1993) ("Many survivors [of rape and other sexual assault] are more likely to recount their experiences to someone with whom they have already developed an ongoing relationship based upon trust than to a complete stranger.").

[130] As Seils explains, "[d]uring the first two years of operations, the OTP indicated that it would not make public which situations were under preliminary examination," but that "[t]his practice was reversed in 2007." *Id.* at 998.

politics, history, and other dynamics prior to the launch of a formal investigation by working with local actors and/or hiring country experts as consultants for the period of the preliminary examination.

V. INVESTIGATION OF SEXUAL VIOLENCE AND GENDER-BASED CRIMES

A. Issues Relating to the Investigation of Sexual Violence and Gender-Based Crimes

To date, the Office of the Prosecutor has experienced particular difficulties in bringing and/or sustaining one particular subset of charges, namely, those involving sexual and gender-based violence (SGBV). Indeed, according to the Women's Initiatives for Gender Justice:

> [R]esearch has shown that more than 50% of the charges for gender-based crimes in cases for which confirmation hearings have been held, have been dismissed before trial, making gender-based crimes the most vulnerable category of crimes at the ICC… With more than half of all charges for gender-based crimes which reach the confirmation stage… not being successfully confirmed, no other category of charges before the ICC faces this level of dismissal and contention.[131]

The most notable example of the Prosecution failing to *charge* SGBV is the *Lubanga* case, which was limited to allegations relating to the conscription, enlistment, and use of child soldiers in armed conflict, despite early calls from human rights groups that the Prosecutor add charges reflecting evidence that members of Mr. Lubanga's militia were responsible for acts of sexual violence.[132] The Prosecution also

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[131] Women's Initiatives for Gender Justice, *Legal Eye on the ICC* (March 2012), http://www.iccwomen.org/news/docs/WI-LegalEye3-12-FULL/LegalEye3-12.html#footnote-66 (noting that, "[o]f the cases including charges gender-based crimes for which confirmation of charges hearings have been held (Katanga & Ngudjolo, Bemba, Mbarushimana, and Muthaura et al) 14 out of 29 charges of gender-based crimes have been successfully confirmed").

[132] *See, e.g.*, Joint Letter from Avocats Sans Frontières *et al.* to the Chief Prosecutor

failed to include any reference to SGBV in its initial application for a warrant of arrest against Bosco Ntaganda,[133] although the Pre-Trial Chamber recently granted a request from the Prosecutor to add charges of, *inter alia*, rape and sexual slavery as crimes against humanity and as war crimes in the case.[134] In other cases, some SGBV charges are included, but observers have complained that the charges are too limited. For instance, in the *Kony, et al.* case, which is the only case brought to date in the Uganda situation, Joseph Kony has been charged with sexual enslavement and rape as crimes against humanity and rape as a war crime[135] and Vincent Otti has been charged with sexual enslavement as a crime against humanity and rape as a war crime.[136] However, Brigid Inder, director of the Women's Initiatives for Gender Justice and recently-appointed Special Gender Advisor to the ICC Prosecutor,[137] has stated that "each of the indicted LRA commanders could have been charged with rape as a crime against humanity because they were all active in overseeing and enforcing this act."[138]

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of the International Criminal Court, *D.R. Congo: ICC Charges Raise Concern* (31 July 2006), http://hrw.org/english/docs/2006/08/01/congo13891_txt.htm; Letter from Women's Initiatives for Gender Justice to Mr. Luis Moreno Ocampo, Chief Prosecutor, International Criminal Court (August 2006), http://www.iccwomen.org/documents/Prosecutor_Letter_August_2006_Redacted.pdf. As noted above, the OTP stated in a June 2006 filing to the Court that it had initially planned to continue investigating Mr. Lubanga after his arrest in order to assess whether additional charges could be added to the case, but that security conditions on the ground in Ituri at the time prevented such investigations. *See supra* n. 55 and accompanying text.

[133] *See The Prosecutor v. Bosco Ntaganda*, Warrant of Arrest, ICC-01/04-02/06-2 (Pre-Trial Chamber I, 22 August 2006).

[134] *See The Prosecutor v. Bosco Ntaganda*, Decision on the Prosecutor's Application under Article 58, ICC-01/04-02/06-36-Red (Pre-Trial Chamber I,13 July 2012).

[135] *The Prosecutor v. Joseph Kony, et al.*, Warrant of Arrest for Joseph Kony issued on 8th July 2005 as amended on 27th September 2005, ICC-02/04-01/05-53, at 12-13 (Pre-Trial Chamber II, 27 September 2005).

[136] *The Prosecutor v. Joseph Kony, et al.*, Warrant of Arrest for Vincent Otti, ICC-02/04-01/05-54, at 12-13 (Pre-Trial Chamber II, 8 July 2005).

[137] *See* International Criminal Court, Office of the Prosecutor, *ICC Prosecutor Fatou Bensouda Appoints Brigid Inder, Executive Director of the Women's Initiatives for Gender Justice, as Special Gender Advisor*, ICC-OTP-20120821-PR833 (21 August 2012).

[138] Glassborow, *ICC Investigative Strategy Under Fire*, *supra* n. 49.

Lastly, there are the cases in which SGBV charges have been alleged by the Prosecution, but some or all of the relevant allegations have not survived the confirmation process due to the Pre-Trial Chamber's finding regarding the sufficiency of the evidence put forward in support of the charges. For instance, in the *Katanga & Ngudjolo* case, while the Pre-Trial Chamber confirmed charges of rape and sexual slavery as war crimes and crimes against humanity, it declined to confirm the charge of outrages upon personal dignity as a war crime, which was based in part on the allegation that a woman "was stripped and forced to parade half naked in front" of combatants belonging to the militia led by the accused.[139] Specifically, while the Chamber determined that this incident had occurred and that it rose to the level of outrages upon personal dignity as a war crime,[140] the Chamber also found that "the Prosecution brought *no evidence* showing that the commission of [the crime] was intended by the [accused] as part of the common plan to 'wipe out' Bogoro village"[141] or that the relevant acts would have occurred "in the ordinary course of events" as a result of the implementation of the accuseds' common plan.[142] In the *Muthaura, et al.* case, while the Pre-Trial Chamber confirmed the charge of rape as a crime against humanity in relation to events occurring in two locales, in its decision issuing a Summons to Appear, the Chamber significantly narrowed the "geographic scope" of the alleged rape charges because, as summarized by the Women's Initiatives for Gender Justice, the Prosecution failed to "provide evidence of… the individual criminal responsibility of [the three accused] for gender-based crimes committed in other locations."[143] Finally, the majority of the Pre-Trial Chamber declined to confirm any of the thirteen charges in the *Mbarushimana* case, including eight charges for gender-based crimes, after concluding that the Prosecution had not presented sufficient evidence to establish substantial grounds

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[139] *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, ¶ 366 (Pre-Trial Chamber I, 30 September 2008).
[140] *Id.* ¶¶ 374-77.
[141] *Id.* ¶ 570 (emphasis added).
[142] *Id.* ¶¶ 571-72.
[143] Women's Initiatives for Gender Justice, *Gender Report Card on the International Criminal Court*, at 126 (2011).

to believe either that the alleged crimes were committed or that the accused bore responsibility for the crimes.[144]

B. Recommendations Relating to the Investigation of Sexual Violence and Gender-Based Crimes

One potential explanation for the OTP's failure to sufficiently investigate SGBV in a way that will ensure relevant acts are not only charged, but also survive to trial, is that the Prosecutor's strategy of short, focused investigations, discussed above.[145] Indeed, Martin Witteveen, the former Uganda investigator who complained in 2008 that the scope of the investigation in that country was finalized by prosecutors too early,[146] has stated that "in Uganda, more evidence of sexual crimes could have been gathered had the investigation been broadened."[147] He explained:

> We interviewed a number of "wives" (girls forced to live with senior LRA men) but questions were focused on their relationship to commanders, not on rape and sexual enslavement… We should not have limited ourselves to this kind of witness – we should have widened it out to speak to other victims of sexual violence [*i.e.*, those who were not LRA "wives"].[148]

Another explanation may be a lack of adequate resources devoted to

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[144] *See, e.g.*, *Mbarushimana*, Decision on the Confirmation of Charges, *supra* n. 6, ¶ 221 (determining that the Prosecution's evidence did "not provide sufficient information for the Chamber to establish to the required threshold that the war crime of rape under article 8(2)(e)(vi) of the Statute was committed by the FDLR during the attack in Mianga on or about 12 April 2009"); *id.* ¶¶ 164, 340 (concluding that, although there was sufficient evidence to establish that acts of rape were committed by the FDLR during the attack on Busurungi on 9-10 May 2009, there were "not substantial grounds to believe that the Suspect is individually responsible under article 25(3)(d) of the Statute for the crimes committed by the FDLR," including the acts of rape in Busurungi).

[145] *See supra* n. 48 *et seq.* and accompanying text.

[146] *See supra* n. 110 and accompanying text.

[147] Glassborow, *ICC Investigative Strategy Under Fire*, *supra* n. 49.

[148] *Id.*

such investigations. For instance, the Women's Initiatives for Gender Justice has charged that the "high rate" with which gender-based charges have been dismissed at the confirmation stage of proceedings "can be attributed in part to the Prosecution's use of open-source information and failure to investigate thoroughly."[149] Based on these observations, it seems that the OTP's investigation of sexual and gender based violence may improve if the OTP implements two of the general recommendations already made above, namely: provide investigators greater flexibility on the ground and expand the size of investigation teams.

As a structural matter, we understand that the OTP has committed itself to "pay[ing] particular attention to methods of investigations of… sexual and gender-based crimes,"[150] including by taking steps such as the appointment of a Special Gender Advisor to the Prosecutor;[151] the creation of the Gender and Children's Unit within the OTP, which was "established to provide advice and assistance, including on sexual and gender-based crimes, to the different divisions of the OTP;"[152] striving for gender balance among the Office's staff members;[153] and providing training "to all members of the [joint] teams on the ICC's legal framework with regard to sexual and gender-based crimes."[154] We commend these developments and encourage the Office to maintain the necessary structure for ensuring the adequate investigation of SGBV. In particular, it is important that the

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[149] Women's Initiatives for Gender Justice, *Legal Eye on the ICC*, *supra* n. 131.
[150] ICC OTP, *Report on Prosecutorial Strategy*, *supra* n. 48, at 7.
[151] *See* ICC OTP, *ICC Prosecutor Fatou Bensouda Appoints Brigid Inder, Executive Director of the Women's Initiatives for Gender Justice, as Special Gender Advisor*, *supra* . 137. This post was initially created in November 2008. *See* International Criminal Court Office of the Prosecutor, *ICC Prosecutor appoints Prof. Catharine A. MacKinnon as Special Adviser on Gender Crimes*, ICC-OTP-20081126-PR377 (26 November 2008).
[152] Dianne Luping, *Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court*, 17 Am. U.J. Gender Soc. Pol'y & L. 431, 489 (2009).
[153] *Id.* n. 109 (stating that, among the "among the budgeted posts" at the OTP, "fifty-four percent are held by females and thirty-four percent of the professional staff are also female").
[154] *Id.* at 489.

OTP continue to ensure that the right staff, including one or more gender crimes experts, is in place on each investigation team, and that this staff reflects an appropriate number of both male and female investigators. Importantly, an absence of female investigators may make gender-based crime victims refrain from coming forward from the beginning, which further narrows the potential witness pool.[155] Furthermore, ensuring an appropriate gender balance in its investigative teams not only increases the likelihood that the OTP will be able to secure witnesses to testify about SGBV, but also demonstrates the OTP's commitment to gender equality internally, and could increase legitimacy in the eyes of the public. Such increased legitimacy may, in turn, encourage victims to come forward and assist the investigators in their work. It is also critical that all investigative teams include a gender expert, or, at the very least, consult with a gender expert, as this will help investigators understand what evidence is necessary for such prosecutions and how to obtain the evidence. Finally, the OTP must continue to prioritize training to increase all of its staff's competency in gender issues. As the Women's Initiatives for Gender Justice has recommended, such trainings should be ongoing and mandatory.[156]

Of course, in some circumstances, it is simply too difficult to gather evidence from SGBV victims to the extent necessary to substantiate a charge of sexual violence as genocide, crimes against humanity, or war crimes against the type of high-level suspects that are the focus of ICC investigations, particularly when the suspects were not the physical perpetrators or even present at the scene of the crime. As an initial matter, locating victims of any form of mass atrocity is difficult in the immediate aftermath of an attack, as populations have been displaced.

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[155] *See* Hilmi Mohammad Ahmad Zawati, *Symbolic Judgments or Judging Symbols: Fair Labeling and the Dilemma of Prosecuting Gender-Based Crimes under the Statutes of the International Criminal Tribunals*, at 183 (June 2010) (unpublished Ph.D dissertation, McGill University). *See also* Luping, *Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court*, *supra* n. 152, at 493 (noting that "a number of witnesses" interviewed by the ICC in Uganda "expressed a preference for female-only investigative teams").

[156] Women's Initiatives for Gender Justice, *2011 Gender Report Card on the International Criminal Court*, *supra* n. 143, at 73.

Furthermore, former ICC investigators have said that SGBV victims are "often reluctant to testify," given that they may be stigmatized by their communities as a result of their testimony and/or "at risk of retributive violence from the militias or government troops against which they give evidence."[157] Indeed, according to the lead investigator in the *Katanga & Ngudjolo* case, it was "enormously challenging to find victims [of sexual violence]… willing to speak to a prosecutorial office," as these victims "often not only fear being branded in their own societies, but they also fear retaliation from their perpetrators or groups close to them."[158] Even where victims are willing to testify, they may not be able to provide the evidence necessary to sustain the relevant charges. For instance, victims may be unable to identify their perpetrator, which would not be surprising in a conflict involving multiple armed forces, or to "link the highest commanders to the rapes and enslavement that happened at the times and places that are the focus of the investigation."[159] Another challenge is that victims may not be able to provide evidence that would link the violence committed against them to a broader conflict or attack on a civilian population, making it difficult to establish that the violence falls within the jurisdiction of the Court. Lastly, even if a particular victim is willing to testify, victims whose mental well-being could be compromised during a trial may not be pursued by the OTP based on the results of a psychological evaluation.[160] Importantly, however, even in instances where direct victim testimony regarding SGBV is simply unavailable, it may still be possible to investigate and prosecute SGBV without using crime-based witnesses. For instance, the Prosecution may attempt to establish its case through hospital records, forensic evidence, and the testimony of doctors, insider

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[157] Glassborow, *ICC Investigative Strategy Under Fire*, *supra* n. 49.
[158] *Katanga & Ngudjolo*, 25 November 2009 Transcript, *supra* n. 27, at 11:6 – 11:10.
[159] Glassborow, *ICC Investigative Strategy Under Fire*, *supra* n. 49.
[160] Kim Thuy Seelinger, *et al*., *The Investigation and Prosecution of Sexual Violence*, Human Rights Ctr. at Berkeley, Working Paper, at 25 (2011) (explaining that, "[b]efore a potential witness is formally engaged in the investigative process, she is assessed as to whether a) she is likely to provide evidence of sexual crimes or information linking crimes to identified suspects, b) she bears personal security risks, and c) she possesses the requisite physical and psychological health to undergo the investigative and prosecutorial process.").

witnesses, international observers, and eyewitnesses to the sexual violence. As Kelly Askin has observed:

> In cases where the prosecution must rely exclusively on non-victim testimony for the rape crimes, gender crimes experts, medical personnel, and innovations like rape databases containing witness statements, can provide useful testimony or documentation to the court, including to establish the widespread or systematic nature of the crimes or the accused's knowledge of the sexual violence. Reports by NGOs, [United Nations (UN)] bodies, experts, and humanitarian organizations, media, researchers, and others, including members of armed groups and insiders, can also provide compelling evidence of the crimes and who incurs responsibility for them.[[161]] When appropriate, mid – and lower – level suspects could be offered immunity from prosecution by the ICC in order to secure their testimony against higher level accused.[162]

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[161] As discussed in detail below, indirect evidence such as reports compiled by NGOs or UN agencies should only be used as contextual or pattern evidence, and only when corroborated by other sources. *See infra* n. 264 *et seq.* and accompanying text.

[162] *See* Kelly Dawn Askin, *Can the ICC Sustain a Conviction for the Underlying Crime of Mass Rape without Testimony from Victims?*, Human Rights & International Criminal Law Online Forum (June 2012), http://uclalawforum.com/massrape. *See also* Anne-Marie de Brouwer, *Cases of Mass Sexual Violence Can Be Proven Without Direct Victim Testimony*, Human Rights & International Criminal Law Online Forum (June 2012), http://uclalawforum.com/massrape ("There has not been a case before an international criminal tribunal in which it was stated that without the direct testimony of the victim the crime was unable to be proven or that the rights of the accused were violated. Evidence in cases of sexual violence other than direct victim testimony has commonly included eyewitnesses, hearsay witnesses, and expert witnesses (for instance, from an NGO, medical or psychology background) who testified about an actual incidence of sexual violence and/or sexual violence in general."). Indeed, the first person to be convicted at the ICC, Thomas Lubanga Dyilo, was convicted despite the fact that the Trial Chamber excluded all testimony provided by direct victim-witnesses from its deliberations on the guilt of the accused. *See infra* n. 171 *et seq.* and accompanying text. While Mr. Lubanga was not charged with SGBV crimes, his conviction generally demonstrates

Askin also notes that there is some precedent for such prosecutions in the ICTY and ICTR,[163] discussing in particular the *Bagosora, et al.* case, in which the ICTR Prosecutor successfully secured a conviction for the crime against humanity of rape against Colonel Théoneste Bagosora, despite the fact that only one of 242 witnesses in the case testified about her own sexual victimization.[164] Of course, establishing an accused's responsibility for a crime without direct victim testimony may be difficult. One problem is that, absent a plan from the start of the conflict to gather documentary and forensic evidence of SGBV, such evidence is not preserved or not prepared in a way that will make it useful in a criminal prosecution.[165] While it may be possible to put such a plan in place in those instances in which the ICC has been authorized to conduct investigations from the outset of a conflict, this will not always be the case. Another problem is that the Trial Chamber may simply be unconvinced that the non-direct victim testimony is sufficiently reliable or probative. Indeed, in the *Bagosora, et al.* case referred to directly above,[166] Bagosora's three co-accused were each acquitted of the charge of rape as a crime against humanity "when the judges found the linkage evidence lacking."[167]

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the possibility of establishing guilt without direct victim-witness testimony.

[163] Askin, *Can the ICC Sustain a Conviction for the Underlying Crime of Mass Rape without Testimony from Victims?*, *supra* n. 162.

[164] *The Prosecutor v. Théoneste Bagosora, et al.*, Judgement and Sentence, ICTR-98-41-T, at 568 (ICTR Trial Chamber, 18 December 2008). Askin explains the approach of the Prosecutor in this case: "[I]n court the prosecution asked most witnesses, including UN officials and human rights and women's rights experts, whether they had seen or heard of sexual violence. Many witnesses testified about knowledge of or [were] eye-witness[es] to sexual violence, which has been found to have been part of the genocide in Rwanda, committed on both a widespread and systematic basis. Some witnesses were also asked about any linkage testimony of the accused to any of the rapes." Askin, *Can the ICC Sustain a Conviction for the Underlying Crime of Mass Rape without Testimony from Victims?*, *supra* n. 162.

[165] For instance, hospital records documenting that a victim suffered sexual violence may not identify the perpetrator of such violence, as such information is not necessary for treatment.

[166] *See supra* n. 164 and accompanying text.

[167] *See* Askin, *Can the ICC Sustain a Conviction for the Underlying Crime of Mass Rape without Testimony from Victims?*, *supra* n. 162.

Finally, absent alternatives, where investigating and/or prosecuting SGBV is not practical due to security concerns and/or the unavailability of necessary evidence, the OTP must strive to communicate these factors to the public.

VI. BALANCING SECURITY CONCERNS WITH THE NEED TO PRESERVE THE INTEGRITY OF INVESTIGATIONS

A. Issues Relating to Balancing Security Concerns with the Need to Preserve the Integrity of Investigations

During the course of the *Lubanga* trial, evidence emerged regarding the Prosecution's use of intermediaries[168] that cast serious doubt on the reliability of much of the Prosecution's evidence. Specifically, the Chamber determined that "[a] series of witnesses [were] called during this trial whose evidence, as a result of the essentially unsupervised actions of three of the principal [Prosecution] intermediaries, cannot safely be relied on."[169] Thus, although the Trial Chamber ultimately denied a Defense motion seeking a permanent stay of the proceedings for abuse of process based on the evidence that several OTP intermediaries had suborned witness testimony,[170] it determined that the testimony of each of the nine witnesses claimed by the Prosecution to have served as child soldiers in Mr. Lubanga's militia was unreliable and excluded the testimony from its deliberations on the guilt of the accused.[171]

Importantly, the OTP's heavy reliance on intermediaries in the *Lubanga* case was explained with reference to security concerns in the DRC. In particular, the OTP explained that members of the small villages where investigations were taking place would immediately be

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[168] In its *Draft Guidelines Governing the Relations Between the Court and Intermediaries*, the ICC defines 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 and/or affected communities more broadly on the other." International Criminal Court, *Draft Guidelines Governing the Relations Between the Court and Intermediaries*, at 5 (April 2012).

[169] *Lubanga*, Trial Chamber Judgment, *supra* n. 9, ¶ 482.

[170] *See The Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings," ICC-01/04-01/06-2690-RED2 (Trial Chamber I, 2 March 2011).

[171] *Lubanga*, Trial Chamber Judgment, *supra* n. 9, ¶ 480.

aware of outsiders asking questions and potential witnesses would be put at risk or otherwise compromised.[172] As Trial Chamber I summarized in the *Lubanga* judgment:

> Because of their long-term presence, it was considered that [human rights] activists [who had already been in the country] were better placed than the investigators, and particularly it did not cause any surprise when the activists spoke with representatives of [the United Nations Mission in the DRC] or had discussions with villagers. The investigators could not move about freely without being threatened and witnesses were endangered if the investigators spoke directly with them. As a result, the investigating team or some of the activists suggested the latter should act as intermediaries.[173]

In particular, the investigative team began relying on individuals who "present[ed] themselves" to investigators as persons who wanted to provide information to the Court.[174] Unfortunately, it does not appear that the OTP exercised much discretion with respect to which individuals it relied upon in the first DRC investigation, some of whom were described by the lead investigator in the case as "militant activists,"[175] and one of whom was later revealed to have worked for the DRC government in intelligence.[176] Indeed, according to the

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[172] *See, e.g.*, *The Prosecutor v. Thomas Lubanga Dyilo*, Prosecution's Response to the Defence's «Requête de la Défense aux fins d'arrêt définitif des procédures», ICC-01/04-01/06-2678-Red, ¶ 14 (Office of the Prosecutor, 31 January 2011) ("[T]he OTP has no police force of its own and operated in hostile environments within the DRC. The OTP thus relied on intermediaries to conduct activities related to its investigations in the field to improve the security for the witnesses and OTP staff."). *See also Lubanga*, 16 November 2010 Transcript, *supra* n. 44, at 37-39 (describing the climate of insecurity in the DRC and the fact that the top priority of the investigators was the safety of OTP staff and potential witnesses).
[173] *Lubanga*, Trial Chamber Judgment, *supra* n. 9, ¶ 167.
[174] *Id.* at 71; *id.* at 96; *Lubanga*, 16 November 2010 Transcript, *supra* n. 44, at 22, 48, 53.
[175] *Lubanga*, 16 November 2010 Transcript, *supra* n. 44, at 22.
[176] *Lubanga*, Trial Chamber Judgment, *supra* n. 9, at 142, 170-71.

Lubanga Trial Chamber: "There was no formal recruitment procedure for selecting intermediaries. An intermediary was simply someone who could perform this role; there was no process of candidacy or application and instead it was a matter of circumstance."[177] More importantly, testimony in the *Lubanga* case suggested that, at least at the time of the first DRC investigation, there was no formal process within the OTP for checking the background of individuals who presented themselves as willing to serve as intermediaries, although the Chamber noted that the team "carried out some verification of the intermediaries, based on the information available to them."[178] Furthermore, the OTP continued to engage the services of the one intermediary who had a relationship with the DRC intelligence services even after concerns arose about his credibility and reliability.[179] Finally, evidence revealed that the OTP relied on the intermediaries not only to *contact* witnesses on behalf of the Office, but to *propose* potential witnesses.[180] Together, these problematic practices led the *Lubanga* Trial Chamber to conclude that the OTP had "delegated its investigative responsibilities" to intermediaries in an inappropriate manner.[181]

B. Recommendations Relating to Balancing Security Concerns with the Need to Preserve the Integrity of Investigations

Due to circumstances that may exist in countries where the ICC is investigating, it is likely that the OTP will need to rely on intermediaries in the future, particularly when conducting investigations in remote locations where potential witnesses have limited access to communications technology such as cell phones. However, many lessons may be gleaned from the experience of the first DRC investigation to ensure that problems such as those that

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[177] *Id.* ¶ 195.
[178] *Id.* ¶ 197. *See also Lubanga*, 17 November 2010 Transcript, *supra* n. 62, at 19.
[179] *Lubanga*, Trial Chamber Judgment, *supra* n. 9, at 136-138, 172, 208-09.
[180] *Lubanga*, 16 November 2010 Transcript, *supra* n. 44, at 48 (emphasis added). See also *Lubanga*, Trial Chamber Judgment, *supra* n. 9, at 94-95 (explaining that an intermediary engaged for consulting on security issues ended up providing witnesses).
[181] *Lubanga*, Trial Chamber Judgment, *supra* n. 9, ¶ 482.

emerged during the *Lubanga* trial are not repeated. First, in terms of selecting intermediaries, the OTP should reach out to individuals who already have established relationships with non-governmental or intergovernmental organizations with a presence in the situation country and who have proven to be reliable, as opposed to taking on intermediaries who "present themselves" to the investigators, as was done in the *Lubanga* investigation.[182] Furthermore, prior to engaging with any potential intermediary, the OTP should conduct a background check, exercising particular caution with regard to the possibility of bias on the part of the individual. The OTP should also require that all intermediaries are placed under formal contract with the ICC at the start of the relationship, a practice that was not followed in the *Lubanga* investigation, in which only a limited number of intermediaries were placed under contract, and only after they had been working with the investigators for some time.[183] Obviously, an intermediary engaged by the Office should be sanctioned, and possibly dismissed, upon evidence that he or she acted inappropriately, such as by reviewing the subject matter of the potential witness's discussions with OTP investigators. Finally, in terms of the purposes for which intermediaries are engaged, their use should be limited to logistical purposes, such as contacting and transporting a potential witness who was identified through other means, as opposed to serving as a *source* for potential witnesses.[184]

Fortunately, many of these lessons have been memorialized in the current version of the *Draft Guidelines Governing the Relations Between the Court and Intermediaries*, a Court-wide document aimed at providing a "framework with common standards and procedures" regarding "the Court's relationship with intermediaries."[185] For instance, with respect to the identification and selection of intermediaries, the *Draft Guidelines* state that "the organs and units of

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[182] *See supra* n. 174 and accompanying text.
[183] *Lubanga*, Trial Chamber Judgment, *supra* n. 9, ¶ 203.
[184] We note that, in contrast to the practice in the *Lubanga* case, this appears to have been the practice in the *Katanga & Ngudjolo* investigation. *See Katanga & Ngudjolo*, 25 November 2009 Transcript, *supra* n. 27, at 62:1- 62:3.
[185] *See* ICC, *Draft Guidelines Governing the Relations Between the Court and Intermediaries*, *supra* n. 168, at 3.

the Court and Counsel shall carry out, as early as possible, an assessment of the capacity of a potential intermediary… to carry out specified functions," and note that, "[t]o that end, the organ or unit of the Court or Counsel shall gather detailed information and develop a profile about the potential intermediary."[186] The *Draft Guidelines* also provide a list of "standardized selection criteria" to be "applied for assessing if a potential intermediary is suitable," including specific criteria falling under the categories of "[a]herence to confidentiality and respect for dignity;" "[c]redibility and reliability;" and "[c]apacity, knowledge, and experience."[187] Furthermore, the *Draft Guidelines* contain a Code of Conduct for Intermediaries and provide that this document "shall be delivered to all intermediaries at the earliest opportunity" and that intermediaries "shall be asked to sign a document acknowledging receipt of the Code."[188] The *Draft Guidelines* also address accountability, specifying that each organ of the Court that engages with intermediaries "shall appoint one (or more) of their (staff) members to supervise the work of the intermediary and to keep a record of their supervisory methods and actions" and that the "appointed persons(s) shall ensure that the tasks delegated to the intermediary, in both their delegation and their performance, in no way adversely impact on the fairness and impartiality of the proceedings."[189]

We urge adoption by the Court of the *Draft Guidelines*. Furthermore, while we understand that the OTP has "revised its operational modalities with regard to intermediaries in its Operational Manual as a result of best practices and lessons learned arising from its first years of its operation," and that "these provisions are consistent with the [*Draft Guidelines*], and have continued to be updated based on the

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[186] *Id.* at 7.
[187] *Id.* at 7-10.
[188] *Id.* at 7. The *Draft Guidelines* also stipulate that, "[w]here it is not possible to provide a copy of the Code of Conduct to the intermediary (for example, due to security reasons), the intermediary shall be briefed in relation to their obligations under the Code, and they shall be requested to sign a procès-verbal acknowledging that they have been briefed and that they understand their obligations under the Code of Conduct." *Id.*
[189] *Id.* at 11.

case-law of the court,"[190] the Operational Manual is not public. Thus, we recommend that the OTP publicize this portion of its Operational Manual and/or develop its own policy paper regarding the implementation of the Court-wide guidelines, in line with the recognition in the *Draft Guidelines* that certain organs or units of the Court may "adopt specialized policies" to expand on particular areas not necessarily addressed or settled by the Court-wide document.[191]

[190] Email between the authors of the report and Olivia Swaak-Goldman, Head of the International Relations Task Force of the OTP's JCCD, 11 October 2012.
[191] *Id.* at 3.

VII. EVALUATING THE SUFFICIENCY OF EVIDENCE

A. Issues Relating to Evaluating the Sufficiency of Evidence

As set forth in the Introduction to this Report, the Pre-Trial Chambers of the ICC have declined to confirm charges brought against nearly one-third, or approximately 28.6 percent, of the individuals who have undergone the confirmation process at the Court, leading to the dismissal of the cases against those individuals.[192] Notably, this is a substantially higher rate of dismissal than the acquittal rate seen at other international criminal bodies following a full trial,[193] even though the burden of proof at trial – beyond a reasonable doubt – is higher than the burden at the confirmation stage. One possible explanation for this is that the Pre-Trial Chambers have been too strict in evaluating whether the OTP has presented sufficient evidence to establish substantial grounds to believe the charges. Indeed, in the *Mbarushimana* case, one of the three judges on the Pre-Trial Chamber dissented from the decision declining to confirm any of the charges against the accused, saying that the majority's findings were "based on an incorrect application of the standard of 'substantial grounds to

[192] *See supra* n. 6 and accompanying text. Note that, "[w]here the Pre-Trial Chamber declines to confirm a charge, the Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence." Rome Statute, *supra* n. 1, Art. 61(8). However, to date, the OTP has not attempted to obtain confirmation of any of the charges dismissed by the PTC pursuant to this provision.

[193] As of the time of this writing, the acquittal rate of ICTY is approximately 10.3 percent, with thirteen of the 126 accused for whom proceedings have been completed having been fully acquitted. *See* International Criminal Tribunal for the Former Yugoslavia Website, *Key Figures*, http://www.icty.org/sections/TheCases/KeyFigures. The acquittal rate for the International Criminal Tribunal for Rwanda at the time of writing is approximately17.9 percent, with ten of the fifty-six accused for whom proceedings have been completed having been fully acquitted. *See* International Criminal Tribunal for Rwanda Website, *Status of Cases*, http://www.unictr.org/Cases/tabid/204/Default.aspx. To date, neither the Special Court for Sierra Leone nor the Extraordinary Chambers in the Courts of Cambodia have acquitted a single accused.

believe.'"[194] Note, however, that the Appeals Chamber upheld the *Mbarushimana* majority's approach to evaluating the evidence at the confirmation stage of proceedings.[195] Another possible explanation is that the Office has simply moved too quickly in bringing its case before the judges, relying on the fact that it need only establish "reasonable grounds to believe" to secure an arrest warrant or summons to appear[196] and "substantial grounds to believe" to move the case to trial following a confirmation hearing.[197] On the one hand, proceeding in this fashion has some obvious benefits. As the Open Society Justice Initiative's Alison Cole explains:

> [I]t may be argued that the prosecutor must move swiftly and submit evidence to the judges as soon as each threshold is met at each successive stage in the legal proceedings. Under such an approach, the investigations continue through to the commencement of trial, with the prosecution only required to obtain the *de minimis* evidence required to prove each standard of proof, namely "reasonable grounds to believe" for an arrest warrant, "substantial grounds to believe" for confirmation of the charges, and "beyond reasonable

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[194] *Mbarushimana*, Decision on the Confirmation of Charges, *supra* n. 6, Dissenting Opinion of Judge Sanji Mmasenono Monageng, ¶ 2.

[195] *See The Prosecutor v. Callixte Mbarushimana*, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the Confirmation of Charges" (Appeals Chamber, 30 May 2012). The Prosecution had challenged the majority's approach by appealing two issues relating to its evaluation of the evidence, namely: "a. 'Whether the correct standard of proof in the context of Article 61 allows the Chamber to deny confirmation of charges supported by the Prosecution evidence, by resolving inferences, credibility doubts and perceived inconsistencies against the Prosecution and thereby preventing it from presenting its case at trial'; and b. 'whether a proper interpretation of the scope and nature of a confirmation hearing, as defined by Article 61, allows the Pre-Trial Chamber to evaluate the credibility and consistency of witness interviews, summaries and statements without the opportunity to examine the witnesses that would be possible at trial'." *Id.* ¶ 16. The Appeals Chamber dismissed both grounds of appeal. *See id.* ¶¶ 37-49.

[196] Rome Statute, *supra* n. 2, Art. 58(1).

[197] *Id.* Art. 61(5).

> doubt" for trial. This approach to evidence collection has had the benefit of saving resources in the face of increased budgetary cuts. Additionally, there is the benefit of not delaying proceedings as a result of matters which can encumber an international court based outside the country where the alleged crimes took place, where violent conflict often continues during investigations.[198]

Furthermore, once a suspect is in custody, moving forward with the confirmation proceedings before the investigation is complete may be necessary to comply with the Rome Statute's mandate that the confirmation hearing be held "within a reasonable time after the person's surrender or voluntary appearance before the Court"[199] and with the accused right to "be tried without undue delay."[200] In addition, as discussed above, there is considerable pressure on the OTP – from within the Court, from situation countries, and from the broader international community – to produce results quickly.[201] Finally, the Office may impose a level of pressure on itself to move forward rapidly in line with its stated principle of "maximiz[ing] the impact of the activities of the Office" in a way that promotes the Court's goals of ending impunity and preventing future crimes,[202] particularly in situations of ongoing conflict.

However, as evidenced by the decisions of the Court refusing to confirm either all or some of the charges against a number of suspects, the judges of various Pre-Trial Chambers are not satisfied with the sufficiency of the evidence being put forward by the Prosecution at the confirmation stage. In fact, in a number of cases, judges have not only declined to confirm the charges set forth by the Prosecution, but have openly expressed dissatisfaction with the Prosecution's approach to the

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[198] Alison Cole, "Moreno-Ocampo's End of Term Report from ICC Judges: Could Do Better," *Guardian*, 6 June 2012, http://www.guardian.co.uk/law/2012/jun/06/moreno-ocampo-icc-judges-critical.
[199] Rome Statute, *supra* n. 2, Art. 61(1).
[200] *Id.* Art. 67(1)(c).
[201] *See supra* n. 105 *et seq.* and accompanying text.
[202] ICC OTP, *Prosecutorial Strategy: 2009-2012*, *supra* n. 47, ¶ 23.

gathering of evidence in the case. For instance, in the *Abu Garda* case, in which the Pre-Trial Chamber unanimously declined to confirm any of the charges based on the lack of evidence,[203] Judge Cuno Tarfusser found it necessary to include a Separate Opinion in which he wrote that the "lacunae and shortcomings exposed by the mere factual assessment of the evidence" presented by the Prosecution were "so basic and fundamental" that the Chamber should have completely refrained from analyzing the "legal issues pertaining to the merits of the case."[204] On a more general level, in the two cases brought to date arising from the Kenya situation, Judge Hans-Peter Kaul, who dissented from the decision of the majority in each case confirming the charges against two of the three suspects, dedicated a portion of his dissent to "clarify[ing] and summaris[ing] [his] views and expectations with regard to" the OTP's approach to investigations.[205] Specifically, Judge Kaul highlighted the fact that Article 54(1) of the Rome Statute requires that the Prosecutor, "[i]n order to establish the truth… investigate incriminating and exonerating circumstances equally,"[206] and suggested that any investigation that "*de facto* is aiming, in a first phase, (only) at gathering enough evidence to reach the 'sufficiency standard'" required at the confirmation stage"[207] would fail to meet the Article 54(1) requirement. Moreover, such a limited investigation

[203] *See generally Abu Garda*, Decision on the Confirmation of Charges, *supra* n. 6.
[204] *Id.* Separate Opinion of Judge Tuno Carfusser, ¶ 3.
[205] *Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 6, Dissenting Opinion by Judge Hans-Peter Kaul, ¶ 43; *Muthaura, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 6, Dissenting Opinion by Judge Hans-Peter Kaul, ¶ 48.
[206] *Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 6, Dissenting Opinion by Judge Hans-Peter Kaul, ¶ 44 (quoting Article 54(1)(a) of the Rome Statute); *Muthaura, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 6, Dissenting Opinion by Judge Hans-Peter Kaul, ¶ 49 (quoting Article 54(1)(a) of the Rome Statute).
[207] *Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 6, Dissenting Opinion by Judge Hans-Peter Kaul, ¶ 47; *Muthaura, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 6, Dissenting Opinion by Judge Hans-Peter Kaul, ¶ 52.

would, in Kaul's opinion, "probably" lead "to problems and difficulties not only for an effective and successful prosecution but also for the work of the Chamber concerned and for the Court in general."[208] Indeed, Judge Kaul expressed his view "that such 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 [to be] 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, then with many serious consequences, including for the entire Court and the victims who have placed great hopes in this institution."[209] Thus, Judge Kaul concluded that it is the "duty of the Prosecutor to conduct any investigation *ab initio* as effectively as possible with the unequivocal aim to assemble as expeditiously as possible relevant and convincing evidence which will enable ultimately the Trial Chamber to consider whether criminal responsibility is proven 'beyond reasonable doubt.'"[210]

Most recently, in *Mbarushimana*, the majority of the Pre-Trial Chamber criticized the OTP for including vague charges against the accused without evidence to back up those charges, suggesting that the OTP was hoping to continue investigating after the charges were confirmed.[211] Specifically, the Chamber expressed "concern" at what

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[208] *Ruto, et al.,* Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 6, Dissenting Opinion by Judge Hans-Peter Kaul, ¶ 47; *Muthaura, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 6, Dissenting Opinion by Judge Hans-Peter Kaul, ¶ 52.

[209] *Ruto, et al.,* Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 6, Dissenting Opinion by Judge Hans-Peter Kaul, ¶ 47; *Muthaura, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 6, Dissenting Opinion by Judge Hans-Peter Kaul, ¶ 52.

[210] *Ruto, et al.,* Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 6, Dissenting Opinion by Judge Hans-Peter Kaul, ¶ 48; *Muthaura, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 6, Dissenting Opinion by Judge Hans-Peter Kaul, ¶ 53.

[211] *Mbarushimana*, Decision on the Confirmation of Charges, *supra* n. 6, ¶¶ 81-82,

it characterized as an "attempt on the part of the Prosecution to keep the parameters of its case as broad and general as possible, without providing any reasons as to why [certain charges were not pled with greater specificity] and without providing any evidence to support the existence of broader charges, seemingly in order to allow it to incorporate new evidence relating to other factual allegations at a later date without following the procedure [governing amendments to the charges]."[212] It went on to stress that the "Prosecution must know the scope of its case, as well as the material facts underlying the charges that it seeks to prove, and must be in possession of evidence necessary to prove those charges to the requisite level *in advance of the confirmation hearing*."[213] This finding was supported by the Appeals Chamber in its decision upholding the Pre-Trial Chamber's decision declining to confirm the charges, in which the Appeals Chamber held that "the investigation should largely be completed at the stage of the confirmation of charges hearing."[214] The majority of the *Mbarushimana* Pre-Trial Chamber also determined that, with regard to those allegations that were pled with sufficient specificity, the

110. As noted above, one of the three judges on the Pre-Trial Chamber dissented from the decision declining to confirm any of the charges against the accused, saying that the majority's findings were "based on an incorrect application of the standard of 'substantial grounds to believe.'" *Mbarushimana*, Decision on the Confirmation of Charges, *supra* n. 6, Dissenting Opinion of Judge Sanji Mmasenono Monageng, ¶ 2.

[212] *Id.* ¶ 82. *See also id.* ¶ 110 ("[T]he Chamber wishes to highlight that the charges and the statements of facts in the DCC have been articulated in such vague terms that the Chamber had serious difficulties in determining, or could not determine at all, the factual ambit of a number of the charges."). Article 61(9) of the Rome Statute provides as follows: "After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held. After commencement of the trial, the Prosecutor may, with the permission of the Trial Chamber, withdraw the charges." Rome Statute, *supra* n. 2, Art. 61(9).

[213] *Mbarushimana*, Decision on the Confirmation of Charges, *supra* n. 6, ¶ 82 (emphasis added).

[214] *Mbarushimana*, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the Confirmation of Charges," *supra* n. 195, ¶ 44.

Prosecution failed to supply adequate evidence in support of the charges, noting that in a number of instances, the Prosecution either provided *no evidence* to support particular elements of the charged crime,[215] or relied on a single witness who was unable to provide relevant details[216] or anonymous hearsay statements not substantiated by other evidence.[217]

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[215] *See, e.g.*, *Mbarushimana*, Decision on the Confirmation of Charges, *supra* n. 6, ¶ 134 ("The Prosecution does not specifically allege that the acts relied on to support the charge of mutilation were carried out [REDACTED] was still alive and no evidence is provided to support the view that he was mutilated before, as opposed to after, he was
killed. Accordingly, the Chamber is not satisfied that there is sufficient evidence establishing substantial grounds to believe that the crime of mutilation under either article 8(2)(c)(l)-2 or 8(2)(e)(xi)-l of the Statute was committed by FDLR soldiers in Busurungi and surrounding villages in March 2009."); *id.* ¶ 135 ("No evidence was provided to the Chamber in relation to an attack against the civilian population in Busurungi on or about 28 April 2009."); *id.* ¶¶ 204-05 (noting that, although the Prosecution alleged that the war crime of torture was committed in the village of Malembe in August 2009, "no evidence of torture being committed during the attack on Malembe was provided to the Chamber").

[216] For instance, although the Prosecution charged Mbarushimana with the war crime of attacking civilians in the village of Busurungi in late January 2009, the only evidence provided to support that the attack took place was the statement of one witness, who "mentioned an attack on Busurungi around January or February 2009, but… did not provide any further details in relation to this attack." *Id.* ¶¶ 130-31. *See also id.* ¶¶ 204-06 (noting that the only evidence put forward by the Prosecution in support of the charge that the war crime of rape was committed in the village of Malembe in August 2009 was a statement from a single witness who "mention[ed] that sexual violence *might* have been perpetrated in Malembe, without giving any further concrete information") (emphasis in original).

[217] *See id.* ¶ 117 (rejecting the Prosecution's allegations that the accused bore responsibility for war crimes committed in the villages of Malembe and Busheke in late January 2009 because, "[i]n both cases the Prosecution relied only on a single UN or Human Rights Watch Report" to support the allegations, without providing "any other evidence in order for the Chamber to ascertain the truthfulness and/or authenticity of those allegations," and in both cases the reports were themselves based on information from anonymous sources). For more on the *Mbarushimana* Pre-Trial Chamber's treatment of anonymous hearsay evidence, *see infra* n. 248 *et seq.* and accompanying text.

B. Recommendations Relating to Evaluating the Sufficiency of Evidence

The decisions discussed above suggest that, at least in some cases, the Prosecution may need to postpone moving forward with a case until more thorough investigations have been conducted. Under some circumstances, this may necessitate seeking a postponement of the confirmation hearings, which the Prosecution is authorized to do under the ICC's Rules of Procedure and Evidence,[218] subject to the requirement mentioned above that the confirmation hearing be held within a "reasonable time" after the arrest or appearance of a suspect.[219] Absent extraordinary circumstances,[220] however, a better solution would be for the ICC Prosecutor to adopt a policy similar to that applied by the Prosecutor of the ICTY, which has held that "[i]deally a case should be ready for trial before an indictment is issued," meaning "it should be the object of the Prosecutor's investigation to gather all necessary evidence *before any charges are brought*."[221] While the Prosecution is obviously not required to present all of its evidence at the early stages of proceedings against a suspect, this approach would avoid unnecessary delays in holding the confirmation proceedings and ensure that the OTP is able to satisfy the Pre-Trial Chamber judges that it has met the standards required for the case to move to trial. At the same time, while conducting the investigation in stages may have the "benefit of saving resources" in the short run,[222] in the long term it will be far more efficient if the Office initiates only those cases that it believes, from the start of the process, will lead to successful convictions. Completing an investigation against a suspect prior to seeking a warrant of arrest or summons to appear will also encourage compliance with Article 54(1)(a) of the Rome Statute, which, as discussed above, requires that

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[218] International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1, R. 121(7) (2000).
[219] Rome Statute, *supra* n. 2, Art. 61(1).
[220] Such circumstances may include the possibility of losing a unique opportunity to apprehend the suspect, which may cause the Prosecution to seek an arrest warrant before completing its investigation.
[221] ICTY & UNICRI, *ICTY Manual on Developed Practices*, *supra* n. 64, at 35.
[222] *See supra* n. 198 and accompanying text.

the Prosecution "investigate incriminating and exonerating circumstances equally."[223] Indeed, even absent the requirement in Article 54(1)(a) that the Prosecutor investigate both sides of a matter, it is simply a matter of best practice that the Prosecutor be aware of any weaknesses in the case before moving forward. Lastly, despite the pressure on the OTP to move expeditiously in addressing the most serious crimes of concern to the international community, the credibility of the Office – and of the Court – will be greatly improved if the Prosecution is seen to be limiting its cases to those supported by the necessary evidence. Thus, while Moreno Ocampo had promised early in his term that the ICC would deliver swift justice,[224] a focus on securing convictions, rather than on moving rapidly, would likely have had longer-term benefits for the Court.[225]

Of course, the ICC Appeals Chamber has held that the Prosecution need not fully complete its investigation prior to the start of the confirmation proceedings in a case,[226] and we are not suggesting that the Prosecution should be precluded from using evidence obtained after the charges have been confirmed. In fact, we recognize that certain witnesses – particularly insider witnesses – often need to be cultivated and may be more likely to come forward with information that is useful to the Prosecution after perceiving that the case is

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[223] Rome Statute, *supra* n. 2, Art. 54(1)(a).

[224] Jess Bravin, "Justice Delayed For Global Court, Ugandan Rebels Prove Tough Test; African Politics, Tactical Fights, Hamper Chief Prosecutor; No Trial Date in Sight Who Will Arrest Mr. Kony?," *Wall Street Journal* (8 June 2006). *See also supra* n. 47 *et seq.* and accompanying text (discussing the first Prosecutor's stated strategy of carrying out "short investigations" with the aim of "present[ing] expeditious and focused cases").

[225] *Cf.* De Waal & Flint, *Case Closed: A Prosecutor Without Borders*, *supra* n. 46 (observing that Moreno Ocampo "had set trial dates before his case was ready" because he was "preoccupied with the wrong court – that of public opinion").

[226] *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I Entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence," ICC-01/04-01/06-568, ¶ 54 (Appeals Chamber, 13 October 2006). Specifically, the Appeals Chamber held that, "ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing," but that "this is not a requirement of the Statute." *Id.*

progressing in court. However, as a policy matter, the Prosecution should aim to complete as much of its investigations as possible before bringing a case before the Court. Interestingly, this is the stated policy of the OTP, as expressed in its 2006 and 2009 reports on prosecutorial strategy.[227] Nevertheless, the Prosecution's inability to confirm any of the charges against four of the fourteen suspects appearing before the Court to date suggests that this policy is not being implemented as a practical matter.

Another measure that may help to expose potential weaknesses in the Prosecution's case and ensure that all necessary investigative steps have been undertaken before the OTP seeks an arrest warrant or summons to appear would be to implement a rigorous and formal "peer review" process within the OTP similar to that used at the ICTY. Specifically, at least in the early years of its operation, the ICTY's OTP had a practice of internally reviewing draft indictments, before the case was ever presented to a judge, and even before the indictment was shared with the Chief and Deputy Chief Prosecutor,[228] for the purpose of "eliminating factually or legally deficient charges."[229] All staff members working in the OTP – including lawyers, investigators, and analysts[230] – would be invited to participate in the review, which

[227] *See* ICC OTP, *Prosecutorial Strategy: 2009-2012*, *supra* n. 47, ¶ 21 (explaining that the policy of the Office is to "submit to the Chambers a request for an arrest warrant or summons to appear, based on the evidence collected, when the Office is nearly trial-ready, thus contributing to efficient Court proceedings").
[228] Email between the authors of the report and Richard Goldstone, former Chief Prosecutor of the ICTY, 5 September 2012.
[229] Bergsmo & Keegan, *Case Preparation for the International Criminal Tribunal for the Former Yugoslavia*, *supra* n. 10, at 11. *See also The ICTY Investigations: Interview with Jean-René Ruez*, *in* INVESTIGATING SREBRENICA: INSTITUTIONS, FACTS, RESPONSIBILITIES 35 (Delpla, *et al.* eds. 2012) (in which the lead ICTY investigator of the Srebrenica massacre explains that the Prosecutor's office would hold an "indictment review meeting" in order to "determine which indictments should be brought before the court," noting that "the least charges against individuals [were] relentlessly debated" at these meetings, as the Prosecutor had "no intention of embarking on trials that [were] lost before they beg[a]n").
[230] Email between the authors of the report and Richard Goldstone, former Chief Prosecutor of the ICTY, 5 September 2012.

looked at the draft indictment and any supporting material.[231] According to one description of the process written by two former legal advisors to the ICTY OTP, "[a]s many as 20-25 lawyers, who ha[d] been provided with and reviewed the relevant material, [could] participate in such reviews, which tend[ed] to be very thorough and [could] sometimes last several days."[232] Following the assessment, those participating in the review would draft a full report of their conclusions, which sometimes included both a majority and a minority opinion.[233] Significantly, "[i]n most cases," a "number of changes [were] made in the draft indictment following the review,"[234] suggesting that the review process was critical to uncovering important weaknesses in the majority of instances before the case was filed. Furthermore, according to Richard Goldstone, the first Chief Prosecutor of the ICTY, the fact that this review was carried out before the indictment was presented to the Chief and Deputy Chief Prosecutor meant that the heads of the office could "themselves review the indictment with fresh minds and without having become involved during the earlier processes."[235] We understand that the ICC OTP has, since its first case, "instituted a practise of internal peer review that involves colleagues from other teams as well as the Legal Advisory Section in critically evaluating the evidence and/or the presentation of arguments at critical phases of the proceedings, such as before the confirmation of charges proceeding or the opening of trial."[236] However, it is not clear that this process occurs routinely or on a mandatory basis, and, in any event, the process does not appear to take place until the confirmation of charges proceedings. Thus, we recommend that the OTP adopt a policy of routinely conducting

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[231] Bergsmo & Keegan, *Case Preparation for the International Criminal Tribunal for the Former Yugoslavia*, *supra* n. 10, at 11.
[232] *Id*.
[233] Email between the authors of the report and Richard Goldstone, former Chief Prosecutor of the ICTY, 5 September 2012.
[234] Bergsmo & Keegan, *Case Preparation for the International Criminal Tribunal for the Former Yugoslavia*, *supra* n. 10, at 11.
[235] Email between the authors of the report and Richard Goldstone, former Chief Prosecutor of the ICTY, 5 September 2012.
[236] Email between the authors of the report and Olivia Swaak-Goldman, Head of the International Relations Task Force of the OTP's JCCD, 11 October 2012.

rigorous reviews with colleagues from other teams much earlier in the process, ideally before an arrest warrant request is made.

Finally, the OTP's evaluation of the sufficiency of its evidence in a given case may be strengthened if, where possible, investigators were to interview the suspect(s) in the case during the investigation. While nothing in the Rome Statute or Rules of Procedure and Evidence requires the Prosecution to interview suspects, the Rome Statute does contemplate the possibility of such questioning and provides a number of rights to the suspect in the event he or she is interviewed by the OTP.[237] Of course, neither the Prosecution nor the Chambers has the power to compel any individual, including the target of a case, to speak with the Prosecutor, so this will only be an option where the suspect voluntarily agrees to submit to questioning by the OTP. Furthermore, there may be instances where the OTP simply cannot access the suspect or where other strategic considerations render such an investigation undesirable.

[237] *See* Rome Statute, *supra* n. 2, Art. 55(2) ("Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned: (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court; (b) To remain silent, without such silence being a consideration in the determination of guilt or innocence; (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel."). Note that the ICTY Prosecutor chose to interview the suspects "[d]uring some investigations." International Criminal Tribunal for the Former Yugoslavia Website, *About the ICTY: Office of the Prosecutor: Investigations*, http://www.icty.org/sid/97. Unfortunately, the factors that the ICTY OTP considered in determining whether to conduct such interviews do not appear to be publicly available.

VIII. RELIANCE ON INDIRECT EVIDENCE TO SUPPORT CHARGES

A. Issues Relating to the OTP's Reliance on Indirect Evidence to Support Charges

As discussed above, in its first years of operation, the OTP followed a deliberate strategy of "carry[ing] out short investigations"[238] with the aim of "present[ing] expeditious and focused cases."[239] The first Prosecutor also had a stated policy of relying on "as few witnesses as possible" to support his case,[240] in part because this limited the number of persons put at risk as a result of their interaction with the Office.[241] However, one apparent by-product of these strategies has been a heavy reliance on indirect evidence gathered through secondary sources, meaning information gathered by persons not employed as investigators by the ICC that was collected for reasons independent of the ICC investigation, such as reports produced by NGOs, the UN, or media outlets.[242] Although the Pre-Trial Chambers have repeatedly

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[238] ICC OTP, *Prosecutorial Strategy: 2009-2012*, *supra* n. 47, ¶ 20.
[239] *See* ICC OTP, *Report on the Activities Performed During the First Three Years (June 2003-June 2006)*, *supra* n. 47, at 8. *See also* ICC OTP, *Report on Prosecutorial Strategy*, *supra* n. 48, at 5 ("The second principle guiding the Prosecutorial Strategy is that of focused investigations and prosecutions.").
[240] ICC OTP, *Report on Prosecutorial Strategy*, *supra* n. 48, at 5.
[241] *See* ICC OTP, *Prosecutorial Strategy: 2009-2012*, *supra* n. 47, ¶ 20 (noting that the OTP's policy of focused investigations "allows the Office to… limit the number of persons put at risk by reason of their interaction with the Office").
[242] *See, e.g.*, Baylis, *Outsourcing Investigations*, *supra* n. 52, at 133 ("The OTP has done a limited amount of investigation of its own, and therefore necessarily must rely on third-party investigations both to direct its initial design of an investigation and also to fill in the gaps in its own work."); Heikelina Verrijn Stuart, *The ICC in Trouble*, 6 J. Int'l Crim. Just. 409, 414 (2008) ("Independent investigations by the OTP on the ground are still a minor factor or even non[-]existent, as is the case in Darfur."); Women's Initiatives for Gender Justice, *2011 Gender Report Card on the International Criminal Court*, *supra* n. 143, at 126 ("Women's Initiatives' research shows in some instances the Office of the Prosecutor may rely too heavily on information from UN reports, NGO reports or information provided by governments, press clippings or newspaper articles, to construct charges at the application for arrest warrant or summons to appear and confirmation of charges stages of

held that such reports are admissible,[243] "[a]s a general rule, a lower probative value will be attached to indirect evidence than to direct evidence."[244] Furthermore, the Chambers have stated that "the decision of the Chamber on the confirmation of charges cannot be solely based" on a single piece of indirect evidence,[245] and that "information based on anonymous hearsay," as is often the case in reports from secondary sources,[246] "will be used only for the purpose

proceedings, rather than a solid reliance on witness testimonies and other primary evidence."); Niamh Hayes, *Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court*, *in* ASHGATE RESEARCH COMPANION TO INTERNATIONAL CRIMINAL LAW: CRITICAL PERSPECTIVES 17-18 (N. Hayes, Y. McDermott and W.A. Schabas, eds., 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021249 (noting that one feature of the OTP's investigations to date that has "depreciated the standard of evidence produced" has been "an over-reliance on the use of open-source information, such as reports from human rights organisations, media outlets and Government or UN agencies.").

[243] *See, e.g., The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06-803, ¶¶ 99-103 (Pre-Trial Chamber I, 29 January 2007); *Katanga & Ngudjolo*, Decision on the Confirmation of Charges, *supra* n. 139, ¶¶ 134-40; *Mbarushimana*, Decision on the Confirmation of Charges, *supra* n. 6, ¶ 78.

[244] *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, ¶ 51 (Pre-Trial Chamber II, 15 June 2009). *See also Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, *supra* n. 6, ¶ 74 ("With respect to indirect evidence, the Chamber is of the view that, as a general rule, such evidence must be accorded a lower probative value than direct evidence.").

[245] *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, *supra* n. 244, ¶ 51. *See also Ruto, et al.* Decision on the Confirmation of Charges, *supra* n. 6, ¶ 74 ("[A]lthough indirect evidence is commonly accepted in the jurisprudence of the Court, the decision on the confirmation of charges cannot be based solely on one such piece of evidence.").

[246] *See, e.g.*, Human Rights First, *The Role of Human Rights NGOs in Relation to ICC Investigations*, Discussion Paper, at 5 (September 2004) ("[A] particular concern for human rights NGOs is protecting confidential relationships, including the identities of sources. This has both ethical and practical dimensions. NGOs are understandably concerned about the security of the individuals with whom they interact. Often NGOs also have a long-standing presence in the area where violations take place and have a strong interest in preserving their long-term ability to protect and support victims of human rights violations. They do not want to do anything to

of corroborating other evidence."[247] Nevertheless, in the *Mbarushimana* case, the Prosecution relied heavily on indirect evidence to support a number of its factual allegations, with the result being that a large number of allegations were dismissed by the Pre-Trial Chamber on the ground that the *only* evidence submitted by the Prosecution in support of the charge was a single, uncorroborated report from either the United Nations or an NGO.[248] For instance, although the Prosecution alleged that the accused bore responsibility for war crimes committed in, *inter alia*, the villages of Malembe and Busheke in late January 2009,[249] the Chamber noted that "[i]n both cases the Prosecution relied only on a single UN or Human Rights Watch Report" to support the allegations, without providing "any other evidence in order for the Chamber to ascertain the truthfulness and/or authenticity of those allegations."[250] Similarly, in support of the charge that Mbarushimana bore responsibility for war crimes committed in the village of Mutakato on 2-3 December 2009,[251] the Prosecution relied solely on a single UN report that only "incidentally" referred to Mutakato and did not "contain any reference to the circumstances in which the alleged attack would have occurred or sufficient information as to the crimes committed."[252] The Prosecution also relied upon a single Human Rights Watch report to support its

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jeopardize that function or to put their operations or any individuals at risk. International organizations may also be concerned about the implications for their reputation beyond the area in question if they do not withhold sources, and they may be worried about the effect on the human rights movement as a whole if human rights workers are unable to maintain confidentiality.").

[247] *Mbarushimana*, Decision on the Confirmation of Charges, *supra* n. 6, ¶ 78. *See also Katanga & Ngudjolo*, Decision on the Confirmation of Charges, *supra* n. 139, ¶ 140 ("[T]he Chamber will not rely solely on anonymous hearsay evidence. However, the Chamber does hold that information based on anonymous hearsay evidence may still be probative to the extent that it (i) corroborates other evidence in the record, or (ii) is corroborated by other evidence in the record.").

[248] *See generally Mbarushimana*, Decision on the Confirmation of Charges, *supra* n. 6, ¶¶ 113-239.

[249] *Id.* ¶ 113.

[250] *Id.* ¶ 117. Notably, the "sources of the information contained in both the UN and Human Rights Watch Report [were] anonymous." *Id.*

[251] *Id.* ¶ 113.

[252] *Id.* ¶ 120.

allegations that rape and torture were committed as war crimes in the village of Manje, which the Chamber dismissed after noting that the relevant report was itself "based on hearsay" and was in no way corroborated.[253] Again, a number of additional allegations were dismissed by the Pre-Trial Chamber on similar grounds.[254]

As a general matter, reliance on indirect evidence to support the Prosecution's factual allegations – as opposed to using reports from secondary sources merely as lead evidence – is problematic for several reasons. First, as stated above, such reports are often based on anonymous hearsay evidence, meaning it is impossible for the Defense to challenge the reliability of the evidence. Second, even where sources are provided for the information contained in the report, there is no guarantee that the entity responsible for reporting the facts itself corroborated or verified the relevant facts. Indeed, as William Pace, the Convenor of the Coalition for the International Criminal Court, has observed, "human rights and humanitarian organizations are lousy criminal investigators" as "[t]hey are not producing forensic evidence that can be used by a prosecutor."[255] The lead investigator in the *Lubanga* case largely agreed, explaining that while he would not go so far as to describe such organizations as "lousy" in their investigations, he did find that the "the procedure of investigation of humanitarian groups… is more a sort of a general journalism rather than legal-type activities of investigators"[256] and noted that investigators "sometimes find it difficult to corroborate information provided by human rights groups who are eager to call international attention to crises."[257]

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[253] *Id.* ¶ 194.
[254] *See generally id.* ¶¶ 113-239.
[255] *Lubanga*, Trial Chamber Judgment, *supra* n. 9, ¶ 130. *See also* Human Rights First, *The Role of Human Rights NGOs in Relation to ICC Investigations*, *supra* n. 246, at 5 (noting that "most human rights monitors and activists are not trained criminal investigators").
[256] *Lubanga*, 17 November 2010 Transcript, *supra* n. 62, at 47. *See also* Baylis, *Outsourcing Investigations*, *supra* n. 52, at 144-45 (noting that "third-party investigators will typically not have been trained in the procedures of criminal inquiries").
[257] *Lubanga*, 17 November 2010 Transcript, *supra* n. 62, at 46. *See also* *Mbarushimana*, Transcript, ICC-01/04-01/10-T-7-Red-ENG, at 80 (19 September

Another potential problem with reliance on secondary sources relates to partiality. As noted above, the ICC OTP is obligated to investigate incriminating and exonerating circumstances equally,[258] but third parties not connected to the Court are obviously under no such obligation and, as a practical matter, "NGOs and other third parties are rarely directing their efforts at producing compelling exculpatory evidence for international criminal defendants."[259] Indeed, as Human Rights First has acknowledged, NGOs are not always "independent and impartial; for instance in any given conflict an NGO may be closely allied with one party to the conflict or have a particular political or other agenda."[260] In any event, as Professor Elena Baylis has observed, "many of the involved third parties are committed to promoting particular ideals and are not constrained by ethical obligations of fairness to potential defendants."[261] Finally, even if the entity responsible for producing the report is not partial to any particular party or perspective, the fact is the report was produced for purposes other than to support an impartial criminal investigation, such as drawing attention to massive human rights abuses or influencing the policies of international or domestic decision makers. Thus, as a former Trial Attorney with the ICTY observed in relation to reports prepared by the UN, governments, and NGOs relating to the conflict in the former Yugoslavia, the reports are not prepared according to the "exacting process of establishing a legally sufficient case for prosecution."[262] These reasons may explain why it was the "policy" of

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2011) (in which the Defense complained that NGOs sensationalize reporting and do not necessarily report verifiable figures, citing to a HRW on Remeka, DRC that first stated in a report that dozens and dozens of people were killed but subsequent report stated 7 were killed in the same incident).

[258] Rome Statute, *supra* n. 2, Art. 54(1).

[259] Baylis, *Outsourcing Investigations*, *supra* n. 52, at 145.

[260] Human Rights First, *The Role of Human Rights NGOs in Relation to ICC Investigations*, *supra* n. 246, at 6.

[261] Baylis, *Outsourcing Investigations*, *supra* n. 52, at 144.

[262] Keegan, *The Preparation of Cases for the ICTY*, *supra* n. 10, at 124. *See also* Morten Bergsmo & William H. Wiley, *Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes*, *in* MANUAL ON HUMAN RIGHTS MONITORING: AN INTRODUCTION FOR HUMAN RIGHTS FIELD OFFICERS 2 (2010) ("In seeking evidence the investigative and analytical staff must remain mindful at all times of the applicable standard of proof which determines the

the ICTY's OTP to have "Tribunal investigators go to the original sources of information, and not merely to rely on information provided by others."[263]

B. Recommendations Relating to the Reliance on Indirect Evidence

Given the issues discussed above, we recommend that, as a

outcome of criminal proceedings (such as 'beyond reasonable doubt'). For their part, human rights organisations are more concerned with issues of monitoring and protection through advocacy; they seek to change conduct through the provision of information geared towards greater respect for human rights, the rule of law, good governance and democracy. The reporting efforts of human rights professionals are judged largely in the court of public opinion – which requires a lower 'standard of proof'."); Fujiwara & Parmentier, *Investigations*, *supra* n. 10, at 581 ("[E]xternal entities… may pre-select information or prioritize certain events, in line with their own perspective. These entities may be states, international organizations, NGOs, or other intelligence agencies, and their mandates and objectives are usually quite different from those of international staff appointed with a specific mandate to carry out independent investigations and prosecutions… NGOs tend to be focused on regimes or elements within a regime, such as its army or secret police, with a view to effect changes in policy, either by direct pressure on the offending government, or by indirect influence on other nations to change their policies towards the offending government. But investigations by international prosecutor are focused on individuals and assemble evidence to prove their guilt beyond reasonable doubt in a court of law. The two types of investigation imply different standards of proof.").

[263] ICTY & UNICRI, *ICTY Manual on Developed Practices*, *supra* n. 64, at 11. *See also* ICTY Website, *About the ICTY: Office of the Prosecutor: Investigations*, *supra* n. 237 ("Witnesses were crucial in building the first cases… By working with victims, refugees and displaced persons, several humanitarian organisations and other institutions [investigators] were… able to gather *first-hand accounts of events and other information*, which was passed on to the OTP to examine.") (emphasis added); International Criminal Tribunal for the Former Yugoslavia, *Fifth Annual Report of the International Tribunal for The Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, A/53/21.9, S/1998/737, ¶ 116 (27 July 1998) ("[Investigations] are undertaken by multi-disciplinary teams of the Prosecutor's staff *whose objective is to get to the source of the evidence either by interviewing witnesses directly or by conducting on-site investigations which enable investigators to establish facts for themselves*. The Prosecutor regards the ability to obtain evidence in this important manner as being fundamental to the work of her Office.") (emphasis added).

matter of practice, the OTP rely on secondary sources only for purposes of establishing contextual or pattern evidence,[264] and only where the sources are amply corroborated by other evidence. As a practical matter, this will likely mean that the Office needs to devote greater time and resources to its investigations from the outset so that it may gather the necessary witness statements, forensic material, and documentary evidence whose authenticity has been verified by ICC investigators. This likely will require an expansion in the number of investigators on a given team, but also investments in specialized units with expertise in forensics or technological innovations that may contribute to evidentiary collection, or at least the cultivation of experts that may be engaged on an *ad hoc* basis with respect to particularly technical issues to the extent such expertise is not already available in-house. It may also require a departure from the Office's policy of prioritizing expeditious investigations.[265] Although the current strategy may be appealing from an efficiency perspective, in the long run, the OTP's work is far less efficient if it is unable to successfully secure warrants of arrest or sustain charges in a case.

Of course, reports produced by non-governmental and inter-governmental organizations can be critical to the work of the OTP as lead evidence. As Human Rights First has observed, "the most useful role most NGOs may be able to play is to alert the OTP that certain violations are likely to have occurred," at which point the OTP may "then decide whether to deploy its own investigative resources."[266] Importantly, the OTP may be able to increase the value of such reports by providing relevant guidance to organizations active in countries where the Office is investigating. In 2004, Human Rights First published a list of questions that "might confront NGOs doing fact-

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[264] *See, e.g.*, Human Rights First, *The Role of Human Rights NGOs in Relation to ICC Investigations*, *supra* n. 246, at 4 ("Human rights NGOs may also be in a good position to provide a broad picture of the context in which violations take place and present a pattern of the events."). To the extent that the OTP relies on indirect evidence for such purposes, we recommend that the Office be clear that the evidence is being used solely to establish contextual or pattern evidence.

[265] *See supra* n. 48 *et seq.* and accompanying text.

[266] Human Rights First, *The Role of Human Rights NGOs in Relation to ICC Investigations*, *supra* n. 246, at 5.

finding in a context that could come before the ICC," including:

- What changes might NGOs need to make in their fact-gathering methodology?
- What are the implications for the ways in which NGOs interact with witnesses, particularly as regards taking statements?
- What considerations might arise in relation to physical evidence?; and
- To what extent will NGOs be able to preserve confidentiality?[267]

Again, answers to these questions, and additional guidance as to the types of information that would be most helpful to the OTP, such as clarity about attribution, specifics about where/when crimes occurred, firsthand accounts from victims interviewed by the organization, and information about the organization's methodology, may greatly improve the value of NGO investigations as a source of lead evidence for the OTP. It may also be helpful for the OTP to advise NGOs as to how they might best present the evidence they have in their possession to the Prosecution. For instance, rather than reporting separately about individual incidents, it may be helpful if NGOs were able to provide summaries of the total number of incidents they discover in a particular location, the types of crimes, and the suspected perpetrators of those crimes and/or groups to which they are linked.

[267] *Id.* at 6-10.

IX. CONCLUSION

As set forth in the Introduction, the purpose of this report has been to examine some of the potentially problematic aspects of the manner in which the OTP has managed and carried out its investigations to date and offer recommendations that may improve the investigative process going forward. While we recognize that investigating international crimes is enormously challenging, and that the ICC's Office of the Prosecutor has achieved a great deal in its first decade of operation, we hope that the recommendations contained in this Report will contribute to an even stronger Office going forward.

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Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor

At the time of this writing, just over ten years after the Rome Statute governing the International Criminal Court (ICC) entered into force, the Court had issued warrants of arrest or summonses to appear against twenty-nine individuals. To date, fourteen of these individuals have appeared before the Court for purposes of participating in a hearing before a Pre-Trial Chamber to determine whether the Prosecution's charges should be confirmed and the case should be sent to trial. While the Pre-Trial Chambers have confirmed charges against the majority of individuals appearing before them thus far, they have declined to confirm the charges against four suspects, meaning that the Prosecution has failed to establish that there are "substantial grounds to believe" the charges against nearly one-third of its suspects. Furthermore, even in those cases that do survive the confirmation hearing and proceed to trial, charges have occasionally been dropped by the Pre-Trial Chamber due to an insufficiency of evidence. Finally, the first case to actually go to trial before the Court involved limited charges that were widely perceived as not fully reflecting the criminal conduct of the accused, and the Trial Chamber, in its judgment, determined that the evidence provided by a number of Prosecution witnesses could not be relied on due to questionable practices employed by intermediaries working with the Office of the Prosecutor (OTP).

We recognize that the challenges of conducting international criminal investigations are legion, given investigators' restricted access to evidence, either due to the passage of time and/or uncooperative governments; international institutions' lack of enforcement powers; cultural and linguistic barriers to interviewing witnesses; persistent security concerns; the overwhelming scale of the crimes under investigation; and the fact that those working in international institutions hail from different legal traditions and thus are likely to have different views on appropriate investigative policies and practices. We also appreciate that, despite these challenges, the OTP has achieved substantial successes in a short period of time, as evidenced most strikingly by the recent conviction of its first suspect and the issuance of warrants and summonses involving a wide range of charges for war crimes, crimes against humanity, and genocide against multiple suspects across seven diverse situations in fewer than ten years. Nevertheless, we believe that – as the OTP undergoes its first change of leadership with the departure of the Court's inaugural Chief Prosecutor – it is worth examining some of the potentially problematic aspects of the Office's investigative practices that have been identified by the judges of the Court and outside observers to date. The aim of this report is to explore some of those issues and offer recommendations that we hope will contribute to improving the OTP's investigative practices, thereby helping to build a stronger Office of the Prosecutor and enhancing the Court's capacity to administer justice more effectively.

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