Vanderbilt Journal of Transnational Law

Volume 49
Issue 3 *May 2016*

Article 4

2016

From Nuremberg to Kenya: Compiling the Evidence for International Criminal Prosecutions

Jennifer Stanley

From Nuremberg to Kenya: Compiling the Evidence for International Criminal Prosecutions

ABSTRACT

The Prosecutor of the International Criminal Court has encountered significant difficulty in conducting investigations. Faced with violence on the ground, witnesses who fear repercussions, and limitations on resources, the Prosecutor has turned to relying on secondary forms of evidence, such as the reports of NGOs and other third-party information providers.

This Note argues that the Prosecutor's use of such evidence is problematic because it fails to adequately follow the evidentiary rules of the Court and, subsequently, to protect the rights of witnesses and defendants. Moreover, the Office of the Prosecutor's dependence on third-party evidence has stunted the Prosecutor's ability to carry out her mandate and achieve justice for victims. The solution is to add an article to the Rome Statute that includes several procedural requirements governing the use of third-party evidence. This structural addition will properly strike the balance between the Prosecutor's need to rely on third-party evidence and defendants' rights.

TABLE OF CONTENTS

I. INTRODUCTION

On December 5, 2014, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) filed a notice of withdrawal of charges against accused Uhuru Muigai Kenyatta of Kenya,[1] who had been charged with the crimes against humanity of murder, deportation or forcible transfer of population, rape, persecution, and other inhumane acts.[2] The Prosecutor gave insufficient evidence as the reason for withdrawing the charges, citing the Trial Chamber's December 3, 2014 ruling.[3] In that ruling, the Trial Chamber declined, after three years of proceedings and one six-month adjournment, to postpone trial proceedings further.[4] The Chamber reasoned that despite five years of investigations into the Kenya situation, the prosecution had not demonstrated a "concrete prospect" that it would collect sufficient evidence to prove the charges beyond a reasonable doubt.[5]

The decision by the Prosecutor to withdraw the charges against Mr. Kenyatta was the culmination of several years of evidentiary wrangling with the Kenyan government. In March 2011, the Kenyan government filed an application challenging the admissibility of the Kenyan cases in the ICC.[6] The court rejected this application,[7] and

---

1. Prosecutor v. Kenyatta, Case No. ICC–01/09–02/11, Notice of Withdrawal of the Charges Against Uhuru Muigai Kenyatta (Dec. 5, 2014) [hereinafter Notice of Withdrawal], http://www.icc-cpi.int/iccdocs/doc/doc1879204.pdf [https://perma.cc/564K-NHN9] (archived Feb. 17, 2016).

2. Prosecutor v. Kenyatta, Case No. ICC-01/09–02/11, Public Redacted Version of the Second Updated Document Containing the Charges, pt. VII, ¶ 25 (May 7, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1590453.pdf [https://perma.cc/XQV4-4YV5] (archived Feb. 17, 2016).

3. Notice of Withdrawal, *supra* note 1, ¶¶ 1–2.

4. Prosecutor v. Kenyatta, Case No. ICC–01/09–02/11, Decision on Prosecution's Application for a Further Adjournment, ¶¶ 47, 50, 57 (Dec. 3, 2014) [hereinafter Decision on Prosecution's Application], http://www.icc-cpi.int/iccdocs/doc/doc1878156.pdf [https://perma.cc/GCJ2-UWCT] (archived Feb. 17, 2016).

5. *Id.* ¶¶ 47, 49–50.

6. Prosecutor v. Ruto & Prosecutor v. Muthaura, Case Nos. ICC–01/09–01/11 & ICC–01/09–02/11, Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute (Mar. 31, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1050028.pdf [https://perma.cc/77DL-2EX3] (archived Feb. 17, 2016).

the ensuing exchanges between the Kenyan government and the OTP grew increasingly hostile.[8] In May 2013, a responsive filing by the OTP alleged that "the Office of the Prosecutor . . . has encountered serious difficulties in securing full and timely cooperation from the Government of Kenya . . . ."[9] The response went on to note that certain evidence key to the Prosecutor's investigation of the Kenya situation was available only through the Kenyan government.[10] Additionally, the OTP response stated that though the government had cooperated with certain OTP requests, it had refused to grant others, severely undermining the investigation.[11] The document proclaimed that "the [Government of Kenya] has constructed an outward appearance of cooperation, while failing to execute fully the OTP's most important requests."[12] In its response to these allegations, the Government of Kenya rejected the Prosecutor's accusations as factual misstatements and declared that it had cooperated fully with and, indeed, helped to facilitate the OTP's investigation.[13]

In her statement addressing the withdrawal of the charges, Prosecutor Fatou Bensouda blamed the failure of the Kenyatta proceedings on the Kenyan government.[14] She also alleged additional

---

7. Prosecutor v. Muthaura, Case No. ICC–01/09–02/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1078823.pdf [https://perma.cc/P5L7-KNH5] (archived Feb. 17, 2016).

8. *See, e.g.*, Prosecutor v. Kenyatta, Case No. ICC–01/09–02/11, Public Redacted Version of the 8 May 2013 Prosecution Response to the "Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the Alternative, Application for Leave to File Observations Pursuant to Rule 103(1) of the Rules of Procedure and Evidence (ICC-01/09-02/11-713)" (May 10, 2013) [hereinafter 8 May 2013 Prosecution Response], http://www.icc-cpi.int/iccdocs/doc/doc1591193.pdf [https://perma.cc/S4BP-VXJG] (archived Feb.17, 2016) (responding to April 8 submissions by the Government of Kenya and alleging failure to cooperate on the part of the Government); Prosecutor v. Kenyatta, Case No. ICC–01/09–02/11, Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the Alternative, Application for Leave to File Observations Pursuant to Rule 103(1) of the Rules of Procedure and Evidence (Apr. 8, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1577522.pdf [https://perma.cc/23XE-J5AA] (archived Feb. 17, 2016) (responding to claims by the Prosecution that the Kenyan government was not cooperating with the OTP investigation).

9. 8 May 2013 Prosecution Response, *supra* note 8, ¶ 1.

10. *Id.* ¶ 3.

11. *Id.* ¶ 4.

12. *Id.*

13. *See* Prosecutor v. Kenyatta, Case No. ICC–01/09–02/11, Reply by the Government of Kenya to the "Prosecution Response to the 'Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the Alternative, Application for Leave to File Observations Pursuant to Rule 103(1) of the Rules of Procedure and Evidence' (ICC–01/09–02/11–713)", ¶¶ 3–8 (June 10, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1602452.pdf [https://perma.cc/785A-JAQV] (archived Feb. 24, 2016) (rebutting six alleged misrepresentations of fact).

14. Press Release, International Criminal Court [ICC] Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on

factors that had hindered her investigations: "A steady and relentless stream of false media reports," social media efforts to identify protected witnesses, and widespread attempts to harass and intimidate would-be witnesses.[15]

Compare the ICC investigations in Kenya to those of Nazi war criminals carried out by the Allies in the wake of World War II. The International Military Tribunal at Nuremberg, where between 1945 and 1946 the highest-ranking Nazi officials and leaders were prosecuted for war crimes, crimes against peace, crimes against humanity, and conspiracy,[16] marked the inception of international criminal law.[17] The Nuremberg trials, which have received their fair share of criticism,[18] have nonetheless been widely perceived as setting the standards for international criminal proceedings.[19] Indeed, the establishment of the ICC fifty years after the trials has been heralded as the fulfillment of the Nuremberg legacy.[20]

Though one objective of the Nuremberg proceedings was to bring individuals charged with heinous crimes to justice for their actions,[21] the trials also served the function of preserving a meticulously

---

the Status of the Government of Kenya's Cooperation with the Prosecution's Investigations in the Kenyatta Case (Dec. 5, 2014) [hereinafter Statement of the Prosecutor], http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-stat-04-12-2014.aspx [https://perma.cc/8ST2-AWX4] (archived Feb. 17, 2016).

15. *Id.*

16. *See generally* TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1947) [hereinafter TRIAL OF THE MAJOR WAR CRIMINALS], http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html (last updated Aug. 13, 2014) [https://perma.cc/KKG4-AC5X] (archived Feb. 17, 2016).

17. *See, e.g.*, Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT'L L. REV. 203, 215 (1998), http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1260&context=pilr [https://perma.cc/8MEW-QCQ9] (archived Feb. 17, 2016) ("The International Military Tribunal in particular, and the twelve subsequent trials at Nuremberg, laid the basic foundations for the later development of international criminal law.").

18. *See, e.g.*, Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. INT'L CRIM. JUST. 830, 832–37 (2006), http://faculty.maxwell.syr.edu/hpschmitz/PSC354/PSC354Readings/TomuschatLegacyNuremberg.pdf [https://perma.cc/MT5R-VU4K] (archived Feb. 17, 2016) (discussing the major criticisms of the Nuremberg trials, including the "victor's justice" objection, the lack of international law precedent, and the *ex post facto* claim).

19. *See, e.g.*, *id.* at 837–41 (describing how the Nuremberg proceedings established the foundations of international criminal law; namely, noting that the trials signaled a change in states' conceptions of absolute sovereign power, the international community, and individual criminal responsibility in an international context).

20. *See, e.g.*, Philippe Kirsch, *Applying the Principles of Nuremberg in the International Criminal Court*, 6 WASH. U. GLOBAL STUD. L. REV. 501 (2007), http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1146&context=law_globalstudies [https://perma.cc/A84N-RBMF] (archived Feb. 17, 2016) (arguing that "the International Criminal Court is the continuation of the Nuremberg trials.").

21. *See, e.g.*, *id.* at 502 ("The Nuremberg trials rested on two fundamental principles. First, individuals can and should be held accountable for the most serious international crimes.").

documented historical record of the Holocaust and Nazi crimes.[22] Allied prosecutors relied extensively on records created by the Germans themselves.[23] The Nazis maintained precise documentation of their activities and were unsuccessful in destroying many of their records at the end of the war.[24] Consequently, Robert Jackson and his team of prosecutors had their pick of evidence as they prepared their case, ultimately sorting through thousands of *tons* of documents for trial.[25] Robert Jackson eschewed the use of victim testimony at Nuremberg, relying instead on "a straightforward paper trail of the case, one that would not be open to criticism directed towards the credibility of victim testimony."[26]

Unfortunately for the Office of the Prosecutor at the ICC, today such documentation of modern international crimes is hard to come by. Several reasons may explain why documentary evidence is often unavailable for a modern criminal trial.[27] A non-cooperative state may refuse to produce documents.[28] Militant groups, which lack the hierarchical structure of a military or government, may not give direct orders or maintain documentation of orders; moreover, actual chains of command may be different than those reflected on paper.[29] The current standards for evidence, especially as they relate to defendants' rights, may prohibit the use of Nuremberg-style documents even when they do exist.[30] As prosecutor Anton Steynberg

---

22. TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 16 (constituting the official record of the first Nuremberg trial).

23. *See id.* (including the evidence introduced by the prosecution during the course of the major Nuremberg trials).

24. *See, e.g., id.* (demonstrating, through the submitted evidence, the intensive recordkeeping of the Nazi regime); *Combating Holocaust Denial: Evidence of the Holocaust Presented at Nuremberg*, U.S. HOLOCAUST MEM'L MUSEUM [hereinafter *Combating Holocaust Denial*], http://www.ushmm.org/wlc/en/article.php?ModuleId=10007271 [https://perma.cc/78F2-3SWJ] (archived Feb. 17, 2016) ("While the Germans destroyed some of the historical record at the end of the war and some German records were destroyed during the Allied bombing of German cities, Allied armies captured millions of documents during the conquest of Germany in 1945.").

25. *See, e.g., Combating Holocaust Denial*, *supra* note 24 (noting the copious amounts of records recovered by the Allies, and stating that 3,000 tons were submitted at the major Nuremberg trials alone); Robert H. Jackson, Opening Statement Before the International Military Tribunal (Nov. 21, 1945) [hereinafter Jackson Opening Statement], https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/ [https://perma.cc/H2PX-JV9J] (archived Apr. 9, 2016) (recalling that only eight months prior to the first trial, "none of the hundreds of tons of official German documents had been examined").

26. Sonali Chakravarti, *More than "Cheap Sentimentality": Victim Testimony at Nuremberg, the Eichmann Trial, and Truth Commissions*, 15 CONSTELLATIONS 223, 225 (2008).

27. *See* Daniel Tilley, *The Non-Rules of Evidence in the Ad Hoc Tribunals*, 45 INT'L LAW. 695, 698 (2011).

28. *Id.*

29. *Id.*

30. *Id.*

observed during his opening statement at the trial of Kenyan defendants William Ruto and Joshua Sang:

> [T]he criminal organisation in question . . . was not a formal military or governmental body. It did not have formal ranks, offices, or letters of appointment. It did not keep formal records in the form of cabinet minutes, nor did it report its activities via military situation reports. Rather, this network was a criminal organisation in the style of a mafia group or a triad organisation; namely an association in fact of individuals connected by ethnic ties and a shared criminal purpose.[31]

This Note will demonstrate, as evidenced by the Prosecutor's investigations in Kenya, that when faced with multiple such situations, the ICC Prosecutor has primarily relied on alternate forms of evidence—namely witness testimony and the reports of non-governmental organizations (NGOs) and other third-party investigators.

This Note argues that the Office of the Prosecutor's use of such evidence is problematic because it fails to adequately follow the evidentiary rules of the Court and, subsequently, to protect the rights of witnesses and defendants. Moreover, the OTP's dependence on third-party evidence has stunted the Prosecutor's ability to carry out her mandate and achieve justice for victims of the most heinous international crimes, as illustrated by the Kenya investigations. The solution is to add an article to the Rome Statute—the governing document of the ICC that includes several procedural requirements governing the use of third-party evidence. This structural addition will properly strike the balance between the Prosecutor's need to rely on third-party evidence and defendants' rights. Far from extending the time and resources necessary to bring an international criminal prosecution to trial and conviction, including these additional procedural hurdles at an early stage in the investigation will ensure that the OTP is only investing its energy in those prosecutions it can successfully complete.

This Note proceeds in Part II by outlining the statutory framework governing ICC investigations. Part III analyzes several of the problems plaguing the current system of ICC investigations, employing the *Prosecutor v. Thomas Lubanga Dyilo* case and the investigations in Kenya as lenses through which to view the broader investigation infrastructure developed by the Office of the Prosecutor. This Part goes on to critique the resultant problems stemming from undue reliance on third-party evidence. Part IV evaluates the merits of a structural addition to the Rome Statute, aimed at better

---

31. Transcript of Trial Hearing at 26–27, Prosecutor v. Ruto, Case No. ICC–01/09–01/1126 (Sept. 10, 2013) [hereinafter Trial Transcript, Prosecutor v. Ruto], http://www.icc-cpi.int/iccdocs/doc/doc1643202.pdf [http://perma.cc/Q59R-DE9B] (archived Feb.17, 2016).

balancing the prosecution's need to rely on third-party sources of evidence with the accused's rights. Part V concludes by summarizing how a change in evidentiary procedure would help the ICC come closer to its intended goals of holding the most heinous international criminals responsible for their actions and ensuring the fair and just rule of law.

II. THE ROME STATUTE FRAMEWORK FOR INVESTIGATIONS

The Rome Statute is the treaty that established the ICC and that governs its operations.[32] The Statute entered into force in 2002 after being adopted at a conference of 160 nations in 1999.[33] Currently, 123 states are State Parties to the Rome Statute; notably, the United States is not a State Party.[34] The establishment of the ICC at the end of the twentieth century represented a decades-long effort to create a permanent international criminal court.[35] Several temporary ad hoc criminal tribunals with limited jurisdiction had previously been set up: the war crimes tribunals at Nuremberg and Tokyo in the wake of WWII, the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR).[36] The Rome Statute sets forth the jurisdictional and procedural rules governing the ICC and establishes its four organs, one of which is the Office of the Prosecutor.[37]

The following subparts provide an overview of the ICC Office of the Prosecutor and of the most significant sections of the Rome Statute as they relate to the procedures and limits governing the Prosecutor's investigations. Understanding these articles' prescriptions for regulation of the Prosecutor and protection of the accused is vital to evaluating how the limitations function in practice.

---

32. INT'L CRIMINAL COURT [ICC], UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 3, https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf [https://perma.cc/6LJ8-AKSE] (archived Feb. 17, 2016).

33. *Id.* at 1.

34. *The States Parties to the Rome Statute*, INT'L CRIMINAL COURT [ICC], https://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#U [https://perma.cc/X3AK-WWUP] (archived Feb.17, 2016).

35. *See generally* Leila Nadya Sadat, *The Evolution of the International Criminal Court: From The Hague to Rome and Back Again*, *in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 31 (2000) (documenting the history of the International Criminal Court and its predecessors).

36. *See id.* at 36–39 (describing the development of the ad hoc tribunals).

37. *See generally* Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute] (detailing, among other topics, "Jurisdiction, admissibility and applicable law" and "Composition and administration of the Court"). The other three organs are the Presidency, the Chambers, and the Registry. *Id.* art. 34.

A. *The Office of the Prosecutor*

The Office of the Prosecutor is one of the four organs of the ICC and is subdivided into three divisions: (i) Investigations; (ii) Jurisdiction, Complementarity, and Cooperation; and (iii) Prosecutions.[38] At last official count in November 2015, the Office of the Prosecutor employed 269 individuals, [39] only a portion of whom work for the Investigations Division. Currently, the Office is investigating nine situations.[40]

B. *Articles 12 and 13: Exercising Jurisdiction*

Articles 12 and 13 of the Rome Statute set forth the requirements that must be satisfied in order for the OTP to investigate and prosecute criminal allegations in a particular situation.[41] The ICC may exercise jurisdiction over a situation (i.e., an entire conflict, not merely the alleged wrongdoings of one side) under the following three scenarios: (1) a State Party to the Rome Statute refers the situation to the Prosecutor; (2) the UN Security Council refers the situation to the Prosecutor; or (3) the Prosecutor initiates a *proprio motu* (meaning "[o]f one's own accord") [42] investigation into the situation, in accordance with the requirements of Article 15 of the Statute.[43] If the situation in question involves the territory or nationals of a non-State Party (a state that has not signed and ratified the Rome Statute), that nation may opt to accept the jurisdiction of the Court.[44] Otherwise, the conduct at issue must have taken place within the territory of a State Party or the accused must be a national of a State Party.[45]

---

38. *Office of the Prosecutor*, Int'l Criminal Court [ICC] [hereinafter *Office of the Prosecutor*], http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/Pages/office%20of%20the%20prosecutor.aspx [https://perma.cc/4ZFL-MPFY] (archived Feb.17, 2016).

39. ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INT'L CRIMINAL COURT [ICC], FOURTEENTH SESSION, THE HAGUE, 18–26 NOVEMBER 2015: OFFICIAL RECORDS, VOL. I, at 17, ICC-ASP/14/20 (2015), https://www.icc-cpi.int/iccdocs/asp_docs/ASP14/OR/ICC-ASP-14-20-OR-vol-I-ENG.pdf [https://perma.cc/78LG-SQ6D] (archived Apr. 4, 2016).

40. *Office of the Prosecutor*, *supra* note 38.

41. *See* Rome Statute, *supra* note 37, arts. 12–13 (outlining the circumstances under which the ICC may exercise jurisdiction).

42. *Propio Motu*, BLACK'S LAW DICTIONARY (10th ed. 2014).

43. Rome Statute, *supra* note 37, arts. 13, 15.

44. *Id.* art. 12, ¶ 3.

45. *Id.* art. 12, ¶ 2.

C. *Article 53: Initiation of an Investigation*

An exercise of jurisdiction under Articles 12 and 13 is dependent upon a preliminary examination into the situation revealing that there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.[46] This preliminary examination may be based upon information submitted to the OTP by individuals, groups, states, or organizations; on referral by a State Party or the Security Council; or on a non-State Party's declaration that it accepts the jurisdiction of the Court.[47]

In the event that the Prosecutor determines that there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed, Article 53 provides that the Prosecutor "shall" initiate an investigation.[48] This phrasing is slightly confusing, as it implies that the Office of the Prosecutor, NGOs, states, or Security Council referrers have not already been "investigating." However, the investigation by these entities prior to an Article 53 initiation may more clearly be thought of as pre-investigation, or as the Office of the Prosecutor deems it, a preliminary examination.[49] Preliminary examination is the determination of whether there is in fact a crime to be investigated. The corollary in the U.S. system, for example, is the period of investigation prior to an arrest; investigators must complete preliminary investigations before they can demonstrate the probable cause required to arrest a suspect. "[T]he Office conducts a preliminary examination of all situations that come to its attention based on the statutory criteria and information available."[50]

The Prosecutor's initiation of an official investigation into a situation is further subject to the jurisdictional criteria of Articles 11 and 12, which respectively impose temporal and subject matter restrictions on the Court's jurisdiction.[51] Initiation of an investigation

---

46. *See id.* art. 53, ¶ 1.

47. INT'L CRIMINAL COURT [ICC] OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES (2015) 2, ¶ 2 (Nov. 12, 2015) [hereinafter *Preliminary Examination Report*], https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf [https://perma.cc/5MWX-7F7S] (archived Apr. 4, 2016).

48. Rome Statute, *supra* note 37, art. 53, ¶ 1.

49. *See generally Preliminary Examination Report*, *supra* note 47.

50. *Id.* at 2, ¶ 1.

51. *See* Rome Statute, *supra* note 37, arts. 11–12 (establishing the Court's jurisdictional limitations, "[j]urisdiction ratione temporis" and "[p]reconditions to the exercise of jurisdiction"].

is also subject to the admissibility requirements of Article 17[52] and "the interests of justice."[53]

D. *Article 54: Duties and Powers of the Prosecutor with Respect to Investigations*

Article 54 applies once an official investigation has been initiated by the Prosecutor and describes the Prosecutor's investigative duties and powers.[54] Article 54 imposes three responsibilities upon the Prosecutor.[55] First, she must "extend the investigation to cover all facts and evidence relevant . . . and, in doing so, investigate incriminating and exonerating circumstances equally[.]"[56] Second, she must "[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and . . . respect the interests and personal circumstances of victims and witnesses . . . [.]"[57] Finally, she must "[f]ully respect the rights of persons arising under this Statute."[58]

In addition, paragraph three of Article 54 articulates six investigative powers of the Prosecutor.[59] These include the power to (1) collect and examine evidence; (2) question victims, suspects, and witnesses; (3) seek the cooperation of a state or organization in an investigation; (4) make arrangements or agreements necessary to facilitate the cooperation of such state or organization; (5) execute confidentiality agreements regarding documents or information obtained, "*solely for the purpose of generating new evidence*"; and (6) take steps to ensure confidentiality of information, protection of individuals, and/or preservation of evidence.[60]

---

52. *See id.* art. 17 (setting forth several factors to be evaluated in the Court's determination of whether to admit a case into ICC jurisdiction, including whether a case is being prosecuted by a state with jurisdiction over it, and whether it is of "sufficient gravity" to justify action by the Court).

53. *Id.* art. 53, ¶ 1 (noting that, in evaluating the interests of justice, the Prosecutor should consider "the gravity of the crime and the interests of victims"); *see also Preliminary Examination Report*, *supra* note 47, at 2, ¶ 3 (describing the Article 53 legal requirements for initiation of an investigation and explaining that they are to be satisfied during a preliminary examination).

54. *See* Rome Statute, *supra* note 37, art. 54 (describing the guidelines under which the Prosecutor is to carry out an investigation).

55. *Id.* art. 54, ¶ 1 (articulating three things the Prosecutor "shall" do with respect to investigations).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* art. 54, ¶ 3.

60. *Id.* (emphasis added).

E. *Article 55: Rights of Persons During an Investigation*

Article 55(1) spells out the rights not of a *defendant*, but of any *person* involved in an investigation carried out by the ICC Prosecutor.[61] These rights include (1) the right against self-incrimination; (2) the right to be free from coercion, torture, or similarly cruel forms of threat or punishment; (3) the right to have an interpreter and/or translations provided free of cost if one is being questioned in a language one does not fully understand or speak; and (4) the right to be free from "arbitrary arrest or detention" and other deprivations of liberty, except as authorized by the Statute.[62]

Article 55(2) more specifically describes the rights of those persons for whom there are grounds to believe that he or she committed a crime under the Statute, as they apply to questioning during investigation.[63] Strikingly, these rights apply whether the Prosecutor or "*national authorities* pursuant to a request made under Part 9" of the Statute is conducting the questioning.[64] The person being questioned must be informed of his or her rights before being questioned[65] (just as, in the United States, an individual must be given his *Miranda* warning prior to interrogation). These rights are: (1) to be informed that there are grounds to believe that the person committed a crime under the Statute; (2) to remain silent and not have silence construed as determinative of guilt or innocence; (3) to have legal assistance "where the interests of justice so require" and free of charge if necessary; and (4) to have counsel present during questioning, absent a voluntary waiver of that right.[66]

F. *Articles 56, 61, and 64–67: The Rights of the Accused*

Numerous other articles in the Statute make provisions for "the rights of the defence."[67] Article 56 permits the Pre-Trial Chamber to take measures to ensure the integrity of certain kinds of investigative proceedings (namely those for which the opportunity to conduct them may only arise once), with examples of such measures being the appointment of counsel and the requirement that a record be made.[68] Article 61, providing for pre-trial confirmation of charges hearings, raises the evidentiary standard by which the prosecution is bound,

---

61. *See id.* art. 55, ¶ 1 (articulating the rights of a person "[i]n respect of an investigation under this Statute").
62. *Id.*
63. *See id.* art. 55, ¶ 2.
64. *Id.* (emphasis added) (stating when Article 55 protections apply to a suspect).
65. *Id.*
66. *Id.*
67. *Id.* art. 56, ¶ 1.
68. *Id.* art. 56.

from "reasonable grounds" to "substantial grounds" to believe that the accused committed a crime under the Statute.[69] Article 64 requires that the Trial Chamber "shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused."[70]

Articles 65 through 67 are the primary statutory safeguards of ICC defendants' rights. Article 65 requires that the Trial Chamber determine that an accused's admission of guilt meets several requirements.[71] An admission of guilt must be given voluntarily by an accused who understands the "nature and consequences" of his admission and has had a sufficient opportunity to consult with counsel.[72] The admission must be supported by facts that are accepted by the accused and contained in the Prosecutor's charges, supplemental materials submitted by the Prosecutor, and any other evidence, like witness testimony, presented by either party.[73] Article 65 further gives the Trial Chamber discretion to accept or deny an admission of guilt based on the facts presented and to either order that trial proceedings continue or require the prosecution to present further evidence before the defendant is convicted.[74]

Article 66 provides that a defendant is innocent until proven guilty beyond a reasonable doubt.[75] Article 67 is lengthy, requiring that the accused be given a fair, impartial, public hearing, subject to several "minimum guarantees."[76] Relevant for the purposes of this Note, the accused has the right to examine the witnesses against him and present witnesses on his behalf, and to present defenses and evidence in his defense.[77] Additionally, the accused must remain free from the burden of proof or rebuttal.[78]

Most important to a discussion of evidentiary considerations is paragraph two of Article 67, which guarantees an independent right of the accused, not exclusive to trial proceedings: "[T]he Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of

---

69. *See id.* art. 61, ¶ 7 ("At the hearing, the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime charged.").

70. *Id.* art. 64, ¶ 2.

71. *See id.* art. 65, ¶ 1 (providing for what the Trial Chamber "shall determine" when an accused makes an admission of guilt).

72. *Id.*

73. *Id.*

74. *Id.* art. 65, ¶¶ 2–4.

75. *Id.* art. 66.

76. *See id.* art. 67 (detailing the extensive "[r]ights of the accused").

77. *Id.*

78. *Id.*

the accused, or which may affect the credibility of prosecution evidence."[79]

G. *Articles 69 and 73: Evidence*

Article 69 sets forth several provisions regarding the presentation of evidence.[80] For example, witnesses must give an oath attesting to the truthfulness of their testimony.[81] Testimony must be given in person, subject to narrow exceptions for audio, video, or written testimony, but "[t]hese measures shall not be prejudicial to or inconsistent with the rights of the accused."[82] The Court ultimately determines the relevance and admissibility of each piece of evidence, and in doing so must consider the probative and prejudicial value of each piece of evidence.[83] The Court must defer to confidentiality privileges as laid out in the Rules of Procedure and Evidence.[84] There is also an exclusionary rule for illegally obtained evidence, although the rule is subject to considerations of fairness and reliability.[85]

Article 73 specifically addresses "[t]hird-party information or documents."[86] In full, it provides:

> If a State Party is requested by the Court to provide a document or information in its custody, possession or control, which was disclosed to it in confidence by a State, intergovernmental organization or international organization, it shall seek the consent of the originator to disclose that document or information. If the originator is a State Party, it shall either consent to disclosure of the information or document or undertake to resolve the issue of disclosure with the Court, subject to the provisions of article 72. **If the originator is not a State Party and refuses to consent to disclosure, the requested State shall inform the Court that it is unable to provide the document or information because of a pre-existing obligation of confidentiality to the originator.**[87]

III. EVIDENTIARY ISSUES IN ICC INVESTIGATIONS

This Part will evaluate the flaws in OTP investigations in two instances: the *Lubanga* case and the Kenya situation. Though *Lubanga* has been analyzed elsewhere in the literature, an overview of the fundamental (to ICC jurisprudence) evidentiary considerations

---

79. *Id.* art. 67, ¶ 2.
80. *See id.* art. 69.
81. *Id.* art. 69, ¶ 1.
82. *Id.* art. 69, ¶ 2.
83. *Id.* art. 69, ¶ 4.
84. *Id.* art. 69, ¶ 5.
85. *Id.* art. 69, ¶ 7.
86. *Id.* art. 73.
87. *Id.* (emphasis added).

in that case is necessary for any discussion of ICC investigations. The Kenya prosecutions are still ongoing; thus, the investigations of that situation may serve as an ideal catalyst for considerations of investigative reform. Part III will then conclude with a holistic evaluation of OTP investigative practices, especially in relation to the previously discussed provisions of the Rome Statute.

A. *The Lubanga Case*

The first case tried in the ICC was *The Prosecutor v. Thomas Lubanga Dyilo*.[88] Thomas Lubanga was convicted and sentenced to fourteen years' imprisonment[89] after proceedings fraught with evidentiary concerns.[90] Partly because Lubanga is one of only two defendants to have come all the way through the trial process to conviction,[91] the evidentiary issues confronted throughout his case are well documented.[92] Thus, his case is an optimal vehicle by which to examine the investigative practices employed by the Office of the Prosecutor.

Ongoing violence in the Democratic Republic of the Congo (DRC), from which the *Lubanga* case originated, impeded evidentiary fact-finding from the beginning of ICC investigators' efforts there.[93] The unstable environment meant that the Prosecutor's investigators were unable to establish a base in the country for two years and even then

---

88. Caroline Buisman, *Delegating Investigations: Lessons to Be Learned from the Lubanga Judgment*, 11 NW. J. INT'L HUM. RTS. 30, ¶ 1 (2013); *see ICC–01/04–01/06: The Prosecutor v. Thomas Lubanga Dyilo*, INT'L CRIMINAL COURT [ICC] [hereinafter *Lubanga* Summary], http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx [https://perma.cc/D5KS-XZSW] (archived Mar. 3, 2016).

89. *Lubanga* Summary, *supra* note 88.

90. *See, e.g.*, Buisman, *supra* note 88 (analyzing the evidentiary problems in the *Lubanga* proceedings presented by the use of third-party evidence, intermediaries, and other OTP investigative techniques).

91. *See Situations and Cases*, INT'L CRIMINAL COURT [ICC] [hereinafter ICC *Situations and Cases*], http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx [https://perma.cc/D7FA-ANNK] (archived Mar. 3, 2016) (reviewing status of proceedings in the nine situations investigated by the ICC, and noting only two convictions).

92. *See, e.g.*, Kai Ambos, *Confidential Investigations (Article 54(3)(E) ICC Statute) vs. Disclosure Obligations: The Lubanga Case and National Law*, 12 NEW CRIM. L. REV. 543 (2009) (evaluating the confidentiality and disclosure issues presented by, and decided by, the *Lubanga* case); Elena Baylis, *Outsourcing Investigations*, 14 UCLA J. INT'L L. & FOREIGN AFF. 121 (2009) (reviewing the OTP's use of third-party evidence through an analysis of the *Lubanga* case); Buisman, *supra* note 88; Christodoulos Kaoutzanis, *A Turbulent Adolescence Ahead: The ICC's Insistence on Disclosure in the* Lubanga *Trial*, 12 WASH. U. GLOBAL STUD. L. REV. 263 (2013) (closely analyzing the legal decisions made in *Lubanga* regarding evidence admission).

93. *See* Buisman, *supra* note 88, ¶¶ 9–12 (describing the safety and security concerns that prevented investigators from carrying out their mandate).

were unable to travel or interview witnesses freely.[94] This latter problem was due also in part to the risk to witnesses posed by association with the Court.[95] Subsequently, the Prosecutor chose to rely heavily on intermediaries, individuals with ties to the local communities who have the ability to contact and facilitate interviews with witnesses without suspicion and transmit information to the ICC investigators.[96] In addition, the Office of the Prosecutor gleaned information from the UN Organization Mission in the Democratic Republic of the Congo (MONUC),[97] the UN human rights mission in the DRC, as well as other NGO and third-party investigations.[98] Much of this information was provided to the OTP on condition of confidentiality, pursuant to Article 54 of the Rome Statute.[99]

But rather than relying on these sources as "lead evidence," as contemplated by Article 54, and following their trail to primary sources of evidence, the Prosecutor instead "[took] that information into court as evidence, at what appears to be an unprecedented level."[100] Indeed, evidence from third parties comprised 55 percent of pre-trial evidence submissions in the *Lubanga* case.[101]

Though the Pre-Trial Chamber admitted these pieces of third-party evidence despite "defense objections that they were anonymous hearsay the reliability of which could not be confirmed,"[102] conflicts arose at trial when the prosecution refused to disclose admittedly exculpatory evidence to the defense as well as to the judges because of the confidentiality agreements.[103] Indeed, "[w]ith the exception of the U.N., whose presence had been revealed by the OTP, [the defense and the Trial Chamber] did not even know who the information providers were."[104] Ultimately, after a stay in the proceedings and during review by the Appellate Chamber, the third-party investigators conceded that the exculpatory information they had supplied could be

---

94. *See id.*

95. *See id.* ¶ 12 ("[T]he investigators feared that informants would be subjected to threats or abduction from their own communities if it became known that they had given incriminating information against some of the still-popular militia leaders.")

96. *Id.* ¶¶ 15–16.

97. As of July 1, 2010, this organization was renamed the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). MONUC: UNITED NATIONS ORGANIZATION MISSION IN THE DEMOCRATIC REPUBLIC OF THE CONGO [hereinafter MONUC], http://www.un.org/en/peacekeeping/missions/past/monuc/ [https://perma.cc/H6Y8-8FFP] (archived Mar. 2, 2016).

98. Buisman, *supra* note 88, ¶ 15. *See generally* MONUC, *supra* note 97.

99. Kaoutzanis, *supra* note 92, at 277.

100. Baylis, *supra* note 92, at 130 (arguing that *Lubanga* revealed for the first time the extent to which the OTP relies on third-party evidence).

101. *Id.*

102. *Id.*

103. Buisman, *supra* note 88, ¶ 18.

104. Kaoutzanis, *supra* note 92, at 278.

provided to the judges of both the Trial and Appellate Chambers for a determination of which documents would be disclosed to the defense. [105] The prosecution directly disclosed some documents, without redaction, to the defense. [106] The Trial Chamber then determined what of the remaining confidential information required disclosure to the defense, making accommodations (such as providing "the disclosure of alternative evidence or summaries") when disclosure risked endangering a victim, witness, named individual, or their families.[107]

Moreover, beginning on day one of trial, several witnesses recanted, alleging that intermediaries had coerced them into lying or fed them stories.[108] Since the prosecution had not corroborated these witnesses' testimony with independent evidence, the Chamber, in coming to a decision, expended significant time and resources evaluating the credibility of these witnesses and the methods employed by the intermediaries.[109] The prosecution also refused to disclose the identities of most of the intermediaries; the result was another stay in the proceedings, and even the release of the defendant, while the prosecution refused to heed numerous orders from the Trial and Appellate Chambers to identify the intermediaries. [110] Ultimately, the prosecution did disclose the identities of or call to the stand the intermediaries, and the Trial Chamber determined that three had improperly influenced the investigative process.[111]

Despite the condemnation of the prosecution's use of intermediaries in the *Lubanga* judgment, the OTP continued to employ the very same individuals who were deemed to have acted improperly by the Trial Chamber. [112] One intermediary who continued to perform investigatory work for the Office of the Prosecutor was later revealed to have concocted threats against himself, his assistant, and his assistant's family and was almost certainly known, even as he completed assignments for the *Lubanga* investigation, to also be working as a government intelligence agent for the DRC.[113] Two other intermediaries were determined to have likely encouraged witnesses to provide false evidence.[114] As a result, all totaled, nine of the child soldier witnesses in the *Lubanga* trial

105. *Id.* at 278–82.
106. *Id.* at 280.
107. *Id.* at 281–82 (quoting opinion).
108. Buisman, *supra* note 88, ¶¶ 21–22.
109. *Id.* ¶¶ 25–26.
110. Kaoutzanis, *supra* note 92, at 290–94.
111. *Id.* at 294–95.
112. Buisman, *supra* note 88, ¶¶ 28–31.
113. *Id.* ¶¶ 27–29.
114. *Id.* ¶ 26.

were deemed not credible by the Trial Chamber.[115] As Dr. Caroline Buisman, the author of *Delegating Investigations: Lessons to Be Learned from the Lubanga Judgment*, contends, "Lubanga was convicted, but not on the evidence of those who were alleged to be the victims of the crimes he had committed."[116]

B. *The Kenya Investigations*

Of the nine situations into which the Office of the Prosecutor has initiated an investigation, only two have been the result of a *proprio motu* investigation,[117] which may indicate the reluctance of the Prosecutor to essentially override a state's sovereignty by declaring jurisdiction over a situation. The first *proprio motu* investigation was authorized in 2010;[118] the subject of the investigation was the post-2007 election conflict in Kenya.[119] Although the charges against Kenyan defendant Uhuru Muigai Kenyatta were withdrawn in December 2015,[120] prosecutions of other cases arising out of the situation in Kenya are ongoing.[121] The records of the investigations in Kenya reveal not the reliance on intermediaries condemned in the *Lubanga* decision, but the problems inherent in the OTP's depending on third-party investigators and information providers for the evidence used to directly prove the guilt of an accused.

Much like the *Lubanga* proceedings, the situation in Kenya and the cases it has produced have been defined, from the beginning, by issues concerning the prosecution's evidence. For example, during his opening statement in the joint trial of William Ruto and Joshua Sang, defense attorney Karim Khan unequivocally condemned the investigative practices of the Office of the Prosecutor:

> Because, your Honour, what the Prosecutor did, what Mr Ocampo did, is latch on to an infected information stream. It was convenient, it was easy - it may

---

115. *Id.* ¶ 3.

116. *Id.* ¶ 4.

117. ICC *Situations and Cases*, *supra* note 91.

118. *Id.*

119. *See* ICC *Situations and Cases*, *supra* note 91 ("On 31 March 2010, Pre-Trial Chamber II granted the Prosecution authorisation to open an investigation *proprio motu* in the situation of Kenya."). *See generally* Situation in the Republic of Kenya, Case No. ICC–01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010) [hereinafter Kenya Investigation Authorization], http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf [https://perma.cc/SJ9A-WRDB] (archived Mar. 3, 2016).

120. Notice of Withdrawal, *supra* note 1.

121. *See Kenya ICC–01/09: Situation in the Republic of Kenya*, INT'L CRIMINAL COURT [ICC], http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/Pages/situation%20index.aspx [https://perma.cc/X59Y-26SD] (archived Mar. 3, 2016) (summarizing the status of the cases against William Samoei Ruto, Joshua Arap Sang, and Walter Osapiri Barasa); *see also supra* Part I.

> even be described as lazy prosecution, lazy investigations - but he didn't have regard to the source of the information. He didn't have regard to the various undercurrents that exist in any sophisticated democracy or in Kenya, and because of that, the Prosecution were swept along to drawn in an ocean of their own making of errors, relying upon a drip, drip of evidence that selectively they have sought to put out, without any regard for the fact that the source of those drops is from a very polluted spring. They've been fed a lie.[122]

The "polluted spring" to which Mr. Khan refers is the documents from the Waki Commission, so termed after its chairman, Kenya Court of Appeal Judge Philip Waki.[123] The Waki Commission was established in 2008 by an agreement between the warring parties, brokered by Kofi Annan and the Panel of Eminent African Personalities,[124] and received funding from a UN-backed fund and the Kenyan government.[125] The Waki Commission's mandate was to investigate the violence that unfolded in the wake of the 2007 presidential election and make recommendations for legal, political, and/or administrative remedies.[126]

Unlike ICC investigators in the DRC, the Commission was able to safely operate in Kenya,[127] likely because it was a government-sanctioned organization that included several Kenyan nationals and enjoyed the support of local authorities.[128] In the course of its investigations, which took place over the course of just a few months,[129] the Commission conducted public hearings at seven different locations in Kenya, visiting several sites affected by the violence.[130] Commission members met with officials from different government agencies as well as political leaders, including the Commissioner of Police, the Attorney General, and the Prime Minister.[131] The Commission interviewed or took statements from

---

122. Trial Transcript, Prosecutor v. Ruto, *supra* note 31, at 51.

123. INT'L CTR. FOR TRANSITIONAL JUSTICE, THE KENYAN COMMISSION OF INQUIRY INTO POST-ELECTION VIOLENCE (Jan. 1, 2008) [hereinafter ICTJ Report], https://ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf [https://perma.cc/HC2T-R2UJ] (archived Mar. 2, 2016).

124. *Id.*

125. COMM'N OF INQUIRY INTO POST-ELECTION VIOLENCE, REPORT 1 (Oct. 15, 2008) [hereinafter Waki Commission Report], http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf [https://perma.cc/N6A4-T6N3] (archived Mar. 2, 2016).

126. ICTJ Report, *supra* note 123.

127. *See* Waki Commission Report, *supra* note 125, *passim* (describing the operations of the Commission on the ground in Kenya).

128. *See id.* at 1 (describing the establishment of the Commission).

129. *See id.* at 1, 3 (noting that the Commission was established in May of 2007 [sic] [actually 2008] and conducted hearings during July–September 2008); *see also* ICTJ Report, *supra* note 123 (stating Commission Report publication date of October 15, 2008).

130. Waki Commission Report, *supra* note 125, at 3.

131. *Id.* at 4–5.

dozens of witnesses, some privately and others publicly, including both victims and public officials.[132]

The Report is candid about the Commission's investigative methodology. It notes that the Commission relied on "background material and reports from government, nongovernmental, and community based organizations (NGOs and CBOs) and individuals; recorded statements of victims taken by our investigators and the sworn testimony, statements and exhibits of witnesses who came before [the Commission]" for its findings.[133] The Commission especially relied on the work of Kenyan civil society organizations, such as Kenyans for Peace with Truth and Justice, the Kenya Human Rights Commission, and several faith-based groups.[134] Such entities contributed to the work of the Commission in a number of ways: they (1) supplied the Commission with their own background reports on the history of human rights violations in Kenya; (2) gave the Commission access to witness statements and other records, such as mappings of sites important to the Commission's investigations; (3) put Commission members in contact with local leaders, victims, and other contacts in communities "where they had established trust and credibility"; and (4) provided emotional and other support to victims.[135] Additionally, the Commission permitted such organizations and other citizens' advocacy groups to participate in its investigations by granting them legal standing; their lawyers thus supplied witnesses who provided testimony to the Commission.[136]

The Commission Report declares that it "treated this [third-party] information as it did any other: testing and evaluating it independently to complement its own findings."[137] Yet it is unclear to what extent this statement is true. The report does not reveal the methodology or framework by which third-party evidence was corroborated. And the report is honest in its assessments of thoroughness. By way of example, in noting that the information gleaned from Commission work in a particular region appears not to reflect the full story available from that area, the Report explains that "the Commission received little or no assistance in the mobilisation of witnesses and individuals who could testify from organized groups within the region," with the result that the only

---

132. *Id.* at 8–15 (detailing the methodological practices of the Commission in gathering evidence).

133. *Id.* at 10.

134. *Id.* at 5–6 (stating that "[t]he Commission deliberately decided to work closely with Kenyan civil society organizations and seek their assistance with information, contacts, and expertise in areas related to post-election violence," and listing these organizations).

135. *Id.* at 6.

136. *Id.* at 6–7.

137. *Id.* at 8.

available witnesses were public officials. [138] This, of course, represents a substantial bias problem in an investigation of election violence. Further, such a statement reflects the extent to which the Commission's investigators were dependent on the work of organizations already embedded in the culture of a particular region in the country. As the report notes, even when the Commission itself took the testimony of witnesses, those witnesses were often supplied by NGOs or other civil society organizations.[139] There is no evidence to suggest that the Commission independently verified the identities or motivations of such witnesses.

In the same vein, the Commission Report readily admits that many aspects of the investigation were cut short or omitted in the interests of time. [140] Similarly, time and resource constraints frequently required that the Commission rely heavily on reports by government officials (presenting a significant bias problem) and/or situation reports by civil society organizations to construct the picture of violence in a particular area.[141] That is not to say that realistically, the Commission could have taken the testimony of every single victim of the post-election conflict, or that resource considerations are not significant. Every criminal investigation must be governed by a realistic and ongoing weighing of the costs and benefits of taking a particular witness's testimony, visiting a given site, or pursuing a newly discovered evidence trail. Moreover, it is a given that the Commission's task was to conduct a broad overview of the conflict in a very short amount of time. Nevertheless, the Commission's methodology and its potential weaknesses are important given the extent to which the ICC Prosecutor would come to rely on the Commission's findings.

Rather than encourage Kenya to domestically handle the prosecutions of those responsible for the post-election violence, the Commission effectively handed the Kenya situation directly to the OTP. The 518-page Commission Report concluded by recommending that a special tribunal be set up in Kenya to try those responsible for the post-election violence.[142] If such a tribunal was not established within sixty days of the Commission Report presentation (and an authorizing statute enacted within forty-five days of establishment),

---

138. *Id.* at 12–13 (describing the lack of hearings in Western Province).

139. *Id.* at 7–8 (discussing the diversity of witness perspectives brought before the Commission by the civil society groups granted legal standing).

140. *E.g.*, *id.* at 11 ("Owing to constraints of time, the Commission did not hold formal sittings in Central Rift."); *id.* at 12 ("The Commission did not conduct any hearings in Western Province due to time constraints.").

141. *See, e.g.*, *id.* at 14 ("Taking into account this paucity of information, the Commission relied heavily on NSIS [National Security Intelligence Service] Intelligence and situation reports, the KNCHR [Kenya National Commission on Human Rights] report and reports by various civil society organizations.").

142. *Id.* at 472.

the relevant information regarding the alleged perpetrators of the violence would be forwarded to the ICC Prosecutor.[143] This, of course, is exactly what happened.[144] Somewhat curiously, a sealed envelope containing the names of those the Commission believed to be most responsible for the violence was first given to Kofi Annan, the former Secretary-General of the United Nations, who then passed it along to the ICC Prosecutor.[145] Though the contents of the envelope have not been disclosed, the list appears to have been the starting point for the Prosecutor's investigation into the situation.[146] Along with the envelope were transmitted six boxes of Commission documents.[147]

One need only glance at the citations in the Pre-Trial Chamber's decision authorizing the Prosecutor's investigation in Kenya to discover how reliant the Prosecutor's preliminary examination of the situation—and the Chamber's subsequent authorization of an official investigation—was on third-party reports.[148] The decision makes numerous references to the CIPEV [Waki Commission] Report, the Kenya National Commission on Human Rights report, the Human Rights Watch report, and others in "examining the available information."[149] These reports, cited in the footnotes of and submitted by the Prosecutor as annexes to her request for authorization, comprise nearly the entirety of the factual basis for her request.[150]

---

143. *Id.* at 473.

144. Xan Rice, *Annan Hands ICC List of Perpetrators of Post-Election Violence in Kenya*, GUARDIAN (July 9, 2009), http://www.theguardian.com/world/2009/jul/09/international-criminal-court-kofi-annan [https://perma.cc/GW88-L9ZV] (archived Feb. 19, 2016).

145. *See id.* (describing the background and transmission of the envelope).

146. *See* Geoffrey Nyamboga, *Kenyan Cooperation Crucial to ICC Probe*, GLOB. POL'Y F. (Apr. 23, 2010), https://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/kenya/49057.html?Itemid-1437 [https://perma.cc/2EYV-S6WY] (archived Feb. 19, 2016) ("Moreno-Ocampo has been working from a list produced by Waki of 20 key suspects who were involved in the violence. The list has not been publicly disclosed and Moreno-Ocampo has not confirmed whether the individuals he is investigating also appear on the Waki list.").

147. Press Release, Int'l Criminal Court [ICC], ICC Prosecutor Receives Materials on Post-Election Violence in Kenya, ICC–OTP–20090716–PR438 (July 16, 2009), http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/press%20releases/Pages/pr438.aspx [https://perma.cc/5Y2A-NE94] (archived Feb. 19, 2016).

148. *See* Kenya Investigation Authorization, *supra* note 119, at 43–80 (reviewing the information submitted to the Court in support of the Prosecutor's request for authorization).

149. *See id.*

150. Situation in the Republic of Kenya, Case No. ICC–01/09, Request for Authorisation of an Investigation Pursuant to Article 15, *passim* (Nov. 26, 2009), http://www.icc-cpi.int/iccdocs/doc/doc785972.pdf [https://perma.cc/8DG2-S7L9] (archived Feb. 19, 2016); *Request for Authorisation of an Investigation Pursuant to Article 15*, INT'L CRIMINAL COURT [ICC] (Nov. 26, 2009), http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/court%20records/filing%20of%20the%20participants/office%20of%20the%20prosecutor/Pages/3.aspx [https://perma.cc/55CP-3F32] (archived Feb. 19, 2016) (providing links to the annexed documents).

Given the lower standard of proof at the point of investigation initiation, such reliance might not have been misplaced; a Prosecutor's request for authorization is essentially a request for permission to carry out a firsthand investigation. However, this rationale only extends up until the point that the Pre-Trial Chamber granted the official investigation request.

As described in the Introduction to this Note, the Prosecutor's investigation in Kenya, once authorized, was plagued by the Kenyan government's refusal to cooperate with the investigation.[151] Despite initial agreement to refer the situation to the ICC if domestic prosecution proved unworkable,[152] the government hotly resisted the investigation, with Parliament even voting to withdraw from the ICC.[153] During its investigation, the Office of the Prosecutor submitted numerous requests to the government for financial and other records of accused Uhuru Muigai Kenyatta.[154] In November 2013, the prosecution filed an application asking the Trial Chamber to find the government of Kenya (a party to the Rome Statute)[155] in noncompliance pursuant to Article 87(7) of the Statute,[156] which permits the Court to refer a non-cooperative State Party to the Assembly of States Parties[157] (the representative body charged with administration of the ICC).[158] The application alleged that during a year and a half of communications, the government had delayed handing over the records and made vague assertions that the request had been passed on to the proper government agencies.[159] The Trial

---

151. *See supra* Part I (describing the legal back-and-forth between the OTP and the Government of Kenya).

152. Nyamboga, *supra* note 146.

153. *See Kenya MPs Vote to Leave ICC over Poll Violence Claims*, BBC (Dec. 23, 2010), https://www.globalpolicy.org/international-justice/the-international-criminal-court/icc-investigations/kenya/49645.html?ItemId=49645 [https://perma.cc/2QXY-JH85] (archived Mar. 2, 2016) (describing how "Kenyan MPs . . . voted overwhelmingly for the country to pull out of the treaty which created the International Criminal Court" after the Prosecutor named six high-level political figures as suspects in the post-election violence); *see also supra* Part I (discussing the Kenyan government's resistance to the OTP investigation).

154. Prosecutor v. Kenyatta, Case No. ICC–01/09–02/11, Prosecution Application for a Finding of Non-Compliance Pursuant to Article 87(7) Against the Government of Kenya, ¶¶ 1–2 (Nov. 29, 2013) [hereinafter Prosecution Application], http://www.icc-cpi.int/iccdocs/doc/doc1692667.pdf [http://perma.cc/83E7-RPA6] (archived Feb. 19, 2016).

155. Press Release, Int'l Criminal Court Assembly of States Parties, Kenya Ratifies Rome Statute, ICC–CPI–20050316–93 (Mar. 16, 2005), http://www.icc-cpi.int/en_menus/asp/press%20releases/press%20releases%202005/Pages/kenya%20ratifies%20rome%20statute.aspx [https://perma.cc/WTA7-GEK9] (archived Feb. 19, 2016).

156. Prosecution Application, *supra* note 154.

157. Rome Statute, *supra* note 37, art. 87, ¶ 7.

158. *Id.* art. 112 (defining the Assembly of States Parties and its role).

159. *See* Prosecution Application, *supra* note 154, ¶¶ 6-21 (providing a timeline of the OTP's requests for information and the Kenyan government's responses).

Chamber's March 2014 decision on this application held that the Kenyan government was indeed noncompliant with the prosecution's request but that it would grant an adjournment of trial proceedings rather than refer Kenya to the Assembly.[160] Records were not forthcoming, and in December 2014, as noted, the OTP withdrew the charges against Mr. Kenyatta.[161]

The Prosecutor's decision to withdraw the charges against Mr. Kenyatta very publicly demonstrated the extent to which reliance on third-party information providers hinders the OTP's mission. Rather than conducting independent investigations to discover Mr. Kenyatta's records from another source, or to find corroborative evidence that would enable the OTP to proceed without cooperation from the Kenyan government, the prosecution single-mindedly continued to demand cooperation with its records requests. The result was that the victims of Mr. Kenyatta's actions will likely never see justice. To a rational (or perhaps cynical) observer, it was clear that the government was not going to cooperate with the OTP's demands, Article 87(7) of the Rome Statute notwithstanding. Yet the Prosecutor persisted in misplaced reliance on the letter of international law rather than realistic attention to the demands of prosecuting international criminals. The ICC, after all, only gains jurisdiction over a case when domestic prosecutions have failed;[162] it follows that such domestic systems will likely not be cooperative assistants to international prosecution.

Additionally, in the ongoing joint trial of Kenyan defendants William Ruto and Joseph Sang, the defense has pursued a strategy of challenging the validity and legality of the prosecution's evidence. For example, the defense contended that eight of the prosecution's witnesses had collaborated, in tandem with national and international organizations, to fabricate their testimony against Mr. Ruto.[163] The defense also opposed the witness preparation procedures proposed by the prosecution, relying heavily on the *Lubanga* decisions to argue that the prosecution was attempting to improperly

---

160. Prosecutor v. Kenyatta, Case No. ICC–01/09–02/11, Decision on Prosecution's Applications for a Finding of Non–Compliance Pursuant to Article 87(7) and for an Adjournment of the Provisional Trial Date, ¶¶ 46–52 (Mar. 31, 2014), http://www.icc-cpi.int/iccdocs/doc/doc1755190.pdf [https://perma.cc/Y8X5-GFC3] (archived Feb. 19, 2016).

161. Statement of the Prosecutor, *supra* note 14.

162. *See* Rome Statute, *supra* note 37, art. 17 (stating that "a case is inadmissible where [t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.").

163. Prosecutor v. Ruto, Case No. ICC–01/09–01/11, Defence Request Regarding the First Eight Witnesses to be Called by the Prosecution, ¶ 9 (July 19, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1621887.pdf [https://perma.cc/2HWA-EGHE] (archived Feb. 19, 2016).

influence witnesses' testimony.[164] In another motion, the defense opposed the redaction of the prosecution's screening notes, which it described as "contain[ing] the initial account of a witness of events that will later form the significant part of his evidence."[165] The defense went on to argue that the screening notes contained identifying information that could only be verified if the full record, in addition to other notations that could bear on the issue of witness credibility, was provided.[166] These concerns, of course, echo those that plagued the *Lubanga* trial, although the defense was careful to note that the disputed screening notes in that case were taken in regard to intermediaries, not witnesses.[167]

Nonetheless, the defense strategy in the Ruto-Sang proceedings reveals the problems posed by the OTP's reliance on evidence it does not disclose to the defense because of confidentiality considerations. Without being able to verify a witness's identity and fact-check his or her claims, the defense cannot point out weaknesses in the witness's story or make arguments as to questionable motivations. This practice by the OTP is akin to making prosecution evidence unassailable, even when it may not factually be so, with no reciprocal privilege for the defendant.

C. *Evaluating Reliance on Third-Party Evidence*

The use of third-party evidence, like that seen in the *Lubanga* case and the Kenyan election investigations, is an evidentiary development unlikely to fade away anytime soon. It is necessitated by the reality of conducting investigations in violent, unstable countries frequently hostile to outside attempts to impose justice.

It is notable, however, that the development is a fairly recent one.[168] Agnieszka Jachec Neale observes that the international criminal tribunals in Rwanda and the former Yugoslavia distrusted "the integrity and probative value" of human rights information, even

---

164. *See* Prosecutor v. Ruto, Case No. ICC–01/09–01/11, Joint Defence Response to Prosecution Motion Regarding Scope of Witness Preparation, ¶¶ 1–14 (Sept. 4, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1463053.pdf [https://perma.cc/48XS-JFRP] (archived Feb. 19, 2016) (arguing that the prosecution's proposed change in witness preparation protocol "blurs the line between investigation and proofing on the one hand and a rehearsal of the evidence on the other").

165. Prosecutor v. Ruto, Case No. ICC–01/09–01/11, Joint Defence Request to Be Provided with Full, Non-Redacted, Screening Notes, ¶¶ 7, 9 (Apr. 2, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1575644.pdf [https://perma.cc/J8Z3-9VAG] (archived Feb. 19, 2016).

166. *Id.* ¶ 10.

167. *See id.* ¶ 21 (arguing that *Lubanga* was inapposite).

168. *See* Agnieszka Jachec Neale, *Human Rights Fact-Finding into Armed Conflict and Breaches of the Laws of War*, 105 AM. SOC'Y INT'L L. PROC. 85, 88 (2011) (chronicling the rise in reliance on human rights investigative bodies by international criminal tribunals).

when used as background evidence.[169] Yet, only a decade later, the ICC Prosecutor utilized information gathered by UN fact-finding commissions in Sudan "without the necessary first-hand verification or corroboration of information, without conducting in situ visits, and without adequately exploring possibilities for cooperation with the government and two main rebel movements in Darfur."[170] This action was criticized on the basis that the fact-finding process evaluated evidence under a lower standard of proof than that required by the criminal justice process.[171]

This suspicion of third-party reports may be attributable to the fact that the ad hoc tribunals were established to conduct prosecutions subject to very narrow temporal, geographic, and subject matter constraints. The ICC, conversely, is responsible for prosecuting "the most serious crimes of concern to the international community as a whole."[172] The Office of the Prosecutor simply cannot maintain sufficient staff and resources to simultaneously investigate nine, or more, different situations all in different countries. Thus, it by necessity will need to "contract out" some of its investigations.

Some commentators argue that the Prosecutor's reliance on NGOs, UN fact-finding missions, and other third-party organizations is at the least inevitable but perhaps also desirable.[173] Elena Baylis, Professor at University of Pittsburgh School of Law, observes that because such entities are "long-term players" in a given location, they frequently have better contacts and deeper knowledge of relevant events than investigators who come in after the fact.[174] Mariana Pena, a public international law and international tribunals consultant, points out that though relying more heavily on national investigative resources would be theoretically possible, "the court comes in precisely because the national judicial system lacks sufficient will or capacity to investigate itself."[175]

Other commentators disagree. Buisman, for example, argues that "these organizations have a very different mandate" from the Office of the Prosecutor, "and do not apply the standard of proof

---

169. *Id.*
170. *Id.*
171. *Id.*
172. Rome Statute, *supra* note 37, Preamble.
173. *See, e.g.*, Baylis, *supra* note 92, at 144, 146 (concluding "that the ICC cannot afford to entirely exclude information garnered from third parties," but arguing that this may be advantageous, since it enables the OTP to tap into "a network of third parties [that] is already immersed in the country and has contextual knowledge and on the ground capacity that the ICC lacks"); Mariana Pena, *Criminal Investigations Overseas: Legal and Policy Issues for an International Prosecutor*, 28 CRIM. JUST. 22, 25 (2013) (explaining the investigative difficulties that have required the ICC to rely on secondary evidence).
174. Baylis, *supra* note 92, at 125.
175. Pena, *supra* note 173, at 25 (articulating why reliance on domestic prosecutions is often not feasible in practice).

beyond reasonable doubt."[176] She also notes that they do not apply a uniform methodology, are not subject to judicial oversight, and often do not possess a neutral view of the situation they are tasked with investigating.[177] Human Rights Watch, for instance, does not have the responsibility of assessing all the evidence it obtains objectively and coming to a dispassionate conclusion regarding the guilt of the accused. Rather, its self-described mandate is "to uphold human dignity and advance the cause of human rights for all."[178] These goals are hardly served by acquitting defendants, whether or not they are guilty.

Perhaps most significantly, these organizations and those acting on their behalf are not required to abide by any of the protections accorded defendants by the Rome Statute, namely those described in Part II of this Note.[179] There are abundant examples from the two investigations described above of the ways in which use of third-party evidence violates the rights of the defendant.

1. Lubanga and the Rome Statute

The UN fact-finding commission and other organizations that supplied evidence in the *Lubanga* case were not, during the course of their investigations, held to the same standards as the ICC Prosecutor. They were neither required to "extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute," nor to "investigate incriminating and exonerating circumstances equally."[180] Indeed, such organizations are usually entirely one-sided in their investigations, seeking only inculpatory evidence.

Nor were such entities subject to Article 55, requiring that any person suspected of committing a crime under the Statute be informed that he or she is a suspect, have access to legal assistance, be permitted to remain silent, and be questioned only in the presence of counsel.[181] The use of these organizations' collected evidence at trial without naming sources or witnesses, and the use of evidence acquired by anonymous intermediaries, also implicated Article 67's guarantee of the accused's right to confront the witnesses against

176. Buisman, *supra* note 88, ¶ 77.

177. *Id.* ¶¶ 78–79.

178. *About*, HUMAN RIGHTS WATCH, http://www.hrw.org/about [https://perma.cc/Y947-VEPD] (archived Feb. 19, 2016).

179. *See generally supra* Part II (analyzing relevant articles of the Rome Statute).

180. *See* Rome Statute, *supra* note 37, art. 54, ¶ 1 (setting forth the responsibilities of the Prosecutor).

181. *See id.* art. 55, ¶ 2 (providing for the rights of suspects during an investigation).

him.[182] As discussed, such evidence is essentially hearsay, which is inadmissible in many national courts.

2. Kenya and the Rome Statute

With regard to the Kenya investigations, the OTP's use of the Waki Commission Report and the reports of other human rights investigations raises similar issues. The format and nature of the hearings conducted by the Commission are given short shrift in the Commission Report, but the Commission was not required to "respect the interests and personal circumstances of victims and witnesses" during its investigations.[183] There was no legal prohibition against the Commission members employing coercion, threats, or other manipulative and cruel means of obtaining information.[184] If an individual being questioned by the Commission did not speak the questioner's language well, there was no guarantee of translation, and thus no guarantee that recorded witness testimony is accurate.[185]

Article 56's consideration of the protections that should govern a "unique investigative opportunity," a term which could certainly apply to many of the Commission interviews, also is not binding on third-party investigators.[186] This is despite the fact that failing to keep a record or take other steps to preserve evidence during a one-time opportunity to interview a particular witness, and then relying on the information gained from that interview at trial, presents a significant violation of a defendant's rights to hear testimony in person and to confront witnesses against him at trial.[187]

More troublingly, though the Commission of course did not conduct official trials, the sealed envelope containing the list of primary suspects has likely influenced the Prosecutor's selection of

182. *See id.* art. 67, ¶ 1 (articulating the right of a defendant to examine witnesses against him).

183. *See id.* art. 54, ¶ 1 (setting forth the responsibilities of the Prosecutor with respect to investigations).

184. *See id.* art. 55, ¶ 1 (providing that a person being investigated "[s]hall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment").

185. *See id.* (providing for questioning only in a language the individual fully speaks and understands, or in the alternative, interpreting or translation at no cost).

186. *See id.* art. 56 (applying protections to testimony or evidence "which may not be available subsequently for the purposes of a trial").

187. *See id.* (establishing special provisions to ensure the integrity of investigation during the gathering of unique evidence or testimony); *id.* art. 67, ¶ 2 (stating that "[t]he testimony of a witness at trial shall be given in person," subject to certain narrow exceptions); *id.* art. 67, ¶ 1 (providing for the right of an accused to examine witnesses against him).

defendants.[188] This suggests that the protections contained in Article 67, which apply "[i]n the determination of any charge," should apply to the Commission's interviews with the accused (if any exist).[189] Yet of course there is no such requirement that civil society organizations make an accused aware of the charges against him or not impose upon him the burden of proof. But that is exactly what the use of confidential and therefore irrefutable third-party evidence by the ICC Prosecutor has done: without knowledge of the identities of witnesses and the sources of evidence used against him, a defendant cannot mount an adequate defense, attuned to the nature of the facts levied against him. The prosecution is able to assert a case against a defendant without having to prove it, meaning the accused has effectively been assigned the burden of proving his innocence. Finally, unlike the Prosecutor under Article 66, groups like Human Rights Watch are not bound to presume that every person they interview is innocent.[190]

Taking a broader view of the Kenya proceedings, there is also the reality that the Prosecutor's reliance on the findings of the Commission is the use of not just secondhand, but of third-hand evidence. Rather than relying directly on third-party investigations, the Prosecutor, in many cases, is utilizing the *Commission's* collection of evidence from NGOs and civil society organizations. The risk of corruption, unreliability, and violation of the rights of victims, witnesses, and defendants alike is thus magnified that much more.

IV. PROPOSED SOLUTION: ARTICLE 72 *BIS*

In the wake of the Kenya investigation failures, the OTP is uniquely positioned to make changes that will prevent future thwarted prosecutions. This Part will discuss the need for a structural, procedural solution to the problems presented by ICC investigations, as opposed to mere changes in policy, as have previously been suggested.

A few options for remedying the problems presented by the Office of the Prosecutor's current investigative infrastructure have already been suggested. Buisman, for example, discusses (1) increasing the budget of the Investigations Division and implementing a plan for utilizing funds more efficiently; (2) adopting a new investigative strategy that focuses on conducting field investigations prior to deciding which situations necessitate the opening of an official

---

188. *See* Nyamboga, *supra* note 146 (discussing the ICC Prosecutor's use of the Commission's "key suspect" list).

189. *See* Rome Statute, *supra* note 37, art. 67 (providing for the rights of the accused "[i]n the determination of any charge").

190. *See id.* art. 66 (providing for a presumption of innocence).

investigation; (3) establishing a permanent presence in regions where investigations are ongoing; (4) verifying evidence collected from third-party sources; (5) creating guidelines for third-party organizations to follow when carrying out investigations that may contribute to criminal prosecutions; and (6) enhancing cooperative measures with states and private institutions and individuals.[191]

What is needed, however, to effectuate a practical change in investigative practice is not more policy recommendations, but a structural change to the Rome Statute that will balance the need for efficient and thorough investigations with defendants' rights. The problem, after all, is not that the Statute does not protect defendants' rights; it is that the Statute does not apply to third-party investigations. A new article inserted after Article 72—a 72 *bis*, as similarly inserted additions in the Statute have been captioned[192]—would be the ideal format.

Though this addition could contain any number of provisions, the most significant would be a requirement for a pre-trial and pre-charge evidentiary hearing, requiring the Prosecutor to present all evidence collected on which she might rely in determining charges. Pursuant to its powers under Article 56, which permits the Court to appoint counsel "to attend and represent the interests of the defence" when there has not yet been an arrest, the Court could name an attorney to represent the defense at this hearing. This evidentiary hearing would allow both the prosecution and the defense to examine all the available evidence without charges coloring the way in which the evidence is viewed. The collectors of third-party evidence to be examined would be subject to cross-examination, and their testimony in turn would be preserved on the record without having to jeopardize the safety of victims and witnesses by exposing their identities. Further, because Article 54 only permits the Court to respect confidentiality agreements when they are made with respect to *leading* evidence,[193] such a process would ensure that the only evidence the prosecution would be able to use throughout proceedings would be evidence collected firsthand *or* secondary evidence the credibility and reliability of which may be evaluated.

When practicable, this hearing should be held at the domestic level, relying on the infrastructure and resources of national court systems. Of course, as pointed out previously, the Office of the Prosecutor is often investigating in the first place because national judicial systems have proven unable to conduct proceedings. But collaboration with domestic systems to carry out functions of the Court could be a method of rebuilding broken domestic judicial structures. The fundamental objective of the Court, after all, is to

---

191. Buisman, *supra* note 88, ¶¶ 170–92.
192. *See, e.g.*, Rome Statute, *supra* note 37, art. 8 *bis*.
193. *Id.* art. 54, ¶ 3.

only prosecute those crimes of concern to the entire international community, thereby reinforcing states' role as the primary enforcers of criminal law. The Preamble of the Rome Statute alludes to this idea several times, as when it "emphasiz[es] that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions[.]"[194] Building a new system of justice from the ground up certainly requires guidance from the more experienced, and such an arrangement would typify the kind of symbiotic relationship between states and the Court originally envisioned by the Statute.

Secondly, this article would require the verification and corroboration of any third-party evidence that the Prosecutor presents at the evidentiary hearing. Such a requirement ensures that judges are not the sole gatekeepers determining the credibility of a given piece of evidence or a particular witness's testimony after the fact, during the process of writing an opinion. Rather, the presentation of evidence would speak for itself, and like evidence presentation in any adversarial system, the prosecution would be incentivized to pursue and corroborate only the most promising evidence. This requirement would help to implement the original intent of Article 54's focus on leading evidence: confidentially obtained evidence was never meant to be the primary factual basis for the prosecution's case; it was meant to be evaluated and independently verified by the Office of the Prosecutor.[195]

Thirdly, this article would establish the ability of the Prosecutor to set up an investigative fact-finding commission, similar to a UN fact-finding commission, for the sole and specific purpose of carrying out the Prosecutor's investigations in a given situation. Rather than relying on the findings of a commission after the fact or eschewing the valuable expertise of NGOs entirely, this setup allows for an NGO with ties in a region to deploy its experts under the close oversight of the Office of the Prosecutor. By way of instructive example, an NGO fact-finding mission in Kosovo collected nearly 5,000 records from victims and witnesses in the form of documented answers to a predetermined set of questions, rather than in the form of statements.[196] The records were stored in an electronic database and submitted to the ICTY; the commission also provided the tribunal with a list of witnesses investigators could choose to interview in depth.[197]

---

194. *Id.* Preamble.

195. *See id.* art. 54, ¶ 3 (permitting confidentiality agreements to obtain evidence used "solely for the purpose of generating new evidence").

196. HUMAN RIGHTS FIRST, THE ROLE OF HUMAN RIGHTS NGOS IN RELATION TO ICC INVESTIGATIONS 7 (Sept. 2004), http://www.iccnow.org/documents/HRF-NGO_RoleInvestigations_0904.pdf [https://perma.cc/6RKM-J59P] (archived Feb. 19, 2016).

197. *Id.*

One benefit of this addition to the Rome Statute would, of course, be the bolstered protection of defendants' rights. If the primary criticism levied at Nuremberg was the cry of "victor's justice," the ICC Prosecutor has arguably struggled most publicly with failing to protect the rights of the accused. An evidentiary hearing would fulfill the Prosecutor's mandate to "investigate incriminating and exonerating circumstances equally" by enabling the defense and presiding judges to review the evidence and point out weakness and potential inconsistencies with the Court's evidentiary requirements.[198] This would also fulfill the statutory requirement arguably at the core of the evidentiary issues in the *Lubanga* and Kenya cases: Article 67's requirement that the Prosecutor disclose any potentially exculpatory evidence.[199] That mandate, which provides that "the Prosecutor shall, as soon as practicable, disclose to the defence" any exculpatory evidence,[200] points strongly in favor of an enforcement mechanism, such as the procedural reforms described here. Given the current state of OTP investigations, an honor system is clearly insufficient motivation to ensure that the Prosecutor discloses all the evidence that might be helpful to the defendant. A screening hearing and evidence verification requirements would effectuate Article 67(2)'s purpose.

By excluding from consideration uncorroborated third-party evidence and requiring the prosecution to disclose any evidence it intends to use at trial, an Article 72 *bis* would also expedite proceedings. Opponents of this procedural addition might claim that it only adds to the many hurdles the Prosecutor must clear before a criminal can be brought to justice. However, it would do just the opposite by eliminating from the criminal process thousands of pages of inscrutable evidence and hours of unreliable witness testimony. Currently, cases at the ICC require years to be resolved, which has cut strongly against the Court's image as the primary enforcer of international criminal law. Had an Article 72 *bis* been included in the Rome Statute when the Kenya investigations began, the Kenyatta prosecution would never have dragged on for so long or dealt such a devastating blow to the OTP's reputation.

Exposing more of the Prosecutor's investigative process to the scrutiny of judges would, further, independently promote better evidence and thus more accurate outcomes. Evidence not up to statutory snuff would either fail to be gathered in the first place or

---

198. *See* Rome Statute, *supra* note 37, art. 54, ¶ 1 (denoting the Prosecutor's responsibilities).

199. *See id.* art. 67, ¶ 2 ("[T]he Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.").

200. *Id.*

would be thrown out earlier in the proceedings. More rigorously obtained and vetted evidence helps criminal prosecutions come as close as they possibly can to ascertaining the truth.

Critics may contend that the pre-trial confirmation of charges hearing already adequately performs the function that would be served by a pre-charge evidentiary hearing. As discussed in Part II of this Note, Article 61 applies a "substantial grounds" standard at the confirmation of charges hearing.[201] The provisions of Article 61 itself impose few restrictions on the evidence that may be used to show "substantial grounds."[202] In practice, the Pre-Trial Chamber has passed the buck to the Trial Chamber, treating the confirmation of charges evaluation much like a ruling on a motion to dismiss in the American system.[203] In other words, all facts alleged are construed in favor of the Prosecutor, and the Pre-Trial Chamber does not assess the sufficiency of the evidence used to support the OTP's allegations.[204] There is little in the way of guidance in ICC case law to direct the Pre-Trial Chamber in confirming or rejecting the charges, so there is consequently nothing to prevent the confirmation of charges hearing from remaining toothless.

Likely the most substantial problem posed by this solution is the question of whether it will be adequately enforced, given that the OTP has successfully skirted other provisions of the Statute. Provisions of the Rome Statute are only relevant so long as the organs of the ICC follow them, and changes in practice at the level of the Investigations Division will be necessary to implement an Article 72 *bis*. But this is certainly also true of any other proposed change to the methodology of ICC investigations. And a permanent and binding statutory addition possesses more authority than changes that can be amended or revoked. Moreover, a formal hearing and exclusionary rule are much more difficult to avoid than are procedural requirements that lack enforcement mechanisms.

---

201. *Id.* art. 61, ¶ 5; *see also supra* Part II (analyzing relevant provisions of the Rome Statute).

202. *See id.* ("The Prosecutor may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial.").

203. *See, e.g.*, Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Public Redacted Version, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2011), https://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf [https://perma.cc/7GSN-5QYY] (archived Apr. 9, 2016) (confirming all but one of the charges against Kenyatta before they were withdrawn by the Prosecutor for lack of evidence).

204. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (citing *Bell Atlantic Corp v. Twombly*, 550 U.S. 544, 556, 570 (2007))).

Furthermore, this proposal is not mutually exclusive with policy changes such as those that have been recommended elsewhere. A structural addition to the Statute does not preclude the Office of the Prosecutor from making internal procedural changes or from promulgating guidelines for civil society investigators.

V. CONCLUSION

The ICC Prosecutor holds a tremendously powerful position, which entails both great privilege and great responsibility: she has the ability to prosecute and hold responsible those individuals responsible for the most heinous crimes committed across the globe. This authority stands as a lasting testament to the first international criminal prosecutions at Nuremberg. However, vesting such power in a single office compels the stringent protections of victims', witnesses', and defendants' rights as they are set forth in the Rome Statute. Ensuring that the Prosecutor can effectuate her mandate while not trampling upon these protections entails a delicate balancing of interests that is best effectuated by permanent statutory determination rather than flexible (and thus easily ignored) policies. Thus, the conflicts with statutory protections that arise from the OTP's current investigative infrastructure are best addressed by amending the Statute itself.

Moreover, such an amendment ensures that the Prosecutor is able to perform her duties to the fullest. When the Prosecutor's investigators exceed the bounds of their power in the interests of "doing justice," they, ironically, defeat the aim for which the ICC was established. As Robert Jackson famously stated in his opening address at Nuremberg, "That . . . great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."[205] The authority of the ICC Prosecutor, then, must similarly be subject to the limits of the law.

Jennifer Stanley[*]

---

205. Jackson Opening Statement, *supra* note 25.

* J.D. Candidate, 2016, Vanderbilt Law School. My deepest gratitude goes to Professor Michael Newton and the staff of the Vanderbilt Journal of Transnational Law for their wise counsel and encouragement.

***