DYNAMIC INVESTIGATIVE PRACTICE AT THE INTERNATIONAL CRIMINAL COURT

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I
INTRODUCTION

The authors in this issue seek to sketch and analyze the practice of various functions within the international criminal-prosecution process, in particular the functions of the International Criminal Court (ICC). As part of this project, I focus on the ICC's practice of investigation. I identify the challenges that ICC investigations face, and then articulate what can realistically be expected of these investigations, given the identified challenges.

Because of the types of cases investigated by the ICC's Office of the Prosecutor (OTP), the young age of the court, and the OTP's limited investigative powers, the ICC has no uniform investigative approach across cases. Although certain specific investigative practices exist in all cases—for example, those dictated by the Rome Statute of the International Criminal Court[1] (Rome Statute) and good investigative practice (such as the obligation to investigate incriminating and exonerating information equally and the obligation to protect witnesses)—each investigation is largely shaped by the constraints and opportunities peculiar to the situation at hand. Thus, ICC investigations are generally reactive, highly dynamic, and unpredictable. Over time, evidence can become available or can disappear depending on many factors, including political circumstances and issues of security.

Despite the general recognition of the investigative challenges and realities faced by the OTP, a different conception of the OTP's investigative practice—one that presumes more control over the investigation itself—often creeps into judicial decision-making and outside commentary. This is particularly apparent in the long, ongoing debate about when the OTP should be required to complete its investigation, with some judges and commentators insisting that, as a matter of law, investigations must be completed even before the pre-trial

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1. Rome Statute of the Int'l Criminal Court art. 126, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

chamber holds the confirmation hearing—the intermediate stage between arrest or summons and the trial.[2]

Nothing in the Rome Statute or the ICC's Rules of Procedure and Evidence (RPE)[3] compels this result. In fact, as has been pointed out by some dissenting judges, the opposite is true: The Rome Statute and RPE appear not only to allow continued investigation after the confirmation hearing, but to require it if there exist further opportunities to obtain evidence.[4] Rather, the impetus for some judges insisting that the prosecution complete its investigation appears to be a concern that the prosecution is not bringing strong enough cases, or that it is bringing cases with undeveloped evidence, with the hope of conducting substantial investigation as proceedings unfold.[5]

These concerns are to some extent valid. There is no question that there is room for improvement in the OTP's investigations, and that the OTP has not to date had the successes it had hoped for or expected.[6] And there is also no question that the investigative challenges faced by the OTP cannot be a reason to lower the standard of proof or undo essential procedural protections for the defense. Although the OTP must conduct focused investigations because of the limits on its tools and resources, it also has to offer sufficient evidence to prove its cases. Otherwise put, although the OTP may never be able to conduct investigations that are as comprehensive as what can be done in a national jurisdiction, it must do enough to meet the reasonable-doubt standard (or else not bring charges). And further, although the OTP must be allowed to continue investigating its case as long as there are opportunities to do so, the defense must be made aware of the allegations against it sufficiently before trial to allow it to investigate and prepare.

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2. *See* Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, ¶ 25 (June 3, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1599831.pdf.

3. Int'l Criminal Court, Assembly of States Parties, 1st Sess., Sept. 3–10, 2002, *Official Records*, pt. II.A., ICC Doc. ICC-ASP/1/3 and Corr.1 (Sept. 9, 2002) [hereinafter Int'l Criminal Court, RPE], *available at* http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf (setting forth the ICC's Rules of Procedure and Evidence).

4. *Gbagbo*, Case No. ICC-02/11-01/11, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, Dissenting Opinion of Judge Silvia Fernández de Gurmendi, ¶ 15 (June 3, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1599832.pdf; Prosecutor v. Kenyatta (*Kenya II*), Case No. ICC-01/09-02/11, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, Corrigendum of Concurring Separate Opinion of Judge Eboe-Osuji, ¶ 90 (May 2, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1589189.pdf.

5. *See Gbagbo*, Case No. ICC-02/11-01/11, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, ¶ 25 (June 3, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1599831.pdf; *Kenya II*, Case No. ICC-01/09-02/11, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, ¶¶ 117–123 (Apr. 26, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1585619.pdf.

6. In cases that have reached final judgment, the prosecution has achieved one conviction and one acquittal. Of the fourteen cases that have passed through the confirmation process, ten have been confirmed. The prosecution withdrew one case that was confirmed before trial began.

At the same time, the rigid and formalistic insistence that the prosecution complete its investigation before the confirmation hearing is flawed in two respects. First, it is at odds with the Rome Statute and the RPE.[7] Second, it presumes an unrealistic investigative practice: one that does not and cannot exist at the ICC.

In thinking about the prosecution's investigation timeline, a more nuanced and flexible understanding of the ICC's investigative practice—one that balances the realistic constraints on ICC investigations with the rights of the accused—is required. To that end, I will try to identify some of the specific challenges faced during ICC investigations to show that the manner in which the prosecutor approaches investigations—in particular, how far she takes investigations and when she "completes" them—are matters not necessarily completely within her control, but are instead a function of the investigative tools available to her and the nature of the crimes she must investigate. By understanding the investigative process, we can better determine what to properly expect from such investigations.

I will first examine the Rome Statute itself to see what it mandates in terms of the scope and timing of ICC investigations before considering the critiques of those investigations by judges and commentators. Then I will show how the realities of ICC investigations require a flexible approach to scope and timing questions, consistent with the rights of the accused.

II
THE ROME STATUTE AND THE ICC RULES OF PROCEDURE AND EVIDENCE: INVESTIGATION REQUIREMENTS

Article 54 governs the scope of ICC investigations, specifying that the prosecutor "shall . . . [i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally."[8] At first blush, the obligations seem broad, particularly given the reference to "all facts and evidence." Further, the provision seems to require the prosecutor to take a civil-law, investigative-judge approach, whereby the prosecutor gives equal weight to incriminating and exonerating circumstances (though only a mediocre prosecutor would not do the same in any adversarial system).

At the same time, article 54 does not oblige the prosecution to undertake an unlimited investigation, requiring only that the investigation cover those facts

7. *Gbagbo*, Case No. ICC-02/11-01/11, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, Dissenting Opinion of Judge Silvia Fernández de Gurmendi, ¶ 15 (June 3, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1599832.pdf; *Kenya II*, Case No. ICC-01/09-02/11, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, Corrigendum of Concurring Separate Opinion of Judge Eboe-Osuji, ¶ 90 (May 2, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1589189.pdf.

8. Rome Statute, *supra* note 1.

and evidence that are "relevant to an assessment of whether there is criminal responsibility under the [Rome] Statute."[9] What is required, then, in terms of scope of the investigation? Article 54 ties the prosecution's investigatory obligation to the relevance of the investigated evidence, but relevance is at each stage contingent. That is, the relevance of evidence will shift along with the substantive standard of proof. ICC proceedings involve three different standards of proof at different stages of the proceedings. For an arrest warrant or summons to appear, article 58 requires "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the court."[10] At the confirmation hearing, article 61 requires that the chamber find "sufficient evidence to establish substantial grounds to believe that the person committed the crime charged."[11] And then of course at trial, article 66 requires the prosecution to prove that the accused committed the crimes "beyond reasonable doubt."[12]

So does article 54 merely require the prosecutor to investigate just enough to pass each standard-of-proof threshold as she comes to the relevant stage of the proceedings (arrest, confirmation, and trial)? The Rome Statute does not appear to require any more than this, although as a matter of prudence and ethics, most prosecutors will refrain from embarking on an arrest or summons until they are sure they will be able to advance through the later stages of the process. But what does that mean? Should the prosecutor *always* have in hand sufficient evidence to convict beyond a reasonable doubt, and have "completed" her investigation, before even seeking an arrest warrant or summons? Is it ever justifiable to have less? Under what circumstances? The lines are not necessarily clear. And what happens if the evidence evolves after arrest? For example, what if witnesses drop out of the proceedings, or evidence that was not previously accessible becomes available—evidence that could be either incriminating or exonerating? What is the prosecutor to do then? There is no reason to think that the prosecutor's article 54 obligation to investigate—and it is an *obligation*—ceases simply because charges have been brought or proceedings are underway.

Neither the Rome Statute nor the RPE contains provisions restricting investigation timing. Article 61 provides that the pre-trial chamber (the body that manages the case through the confirmation proceedings, at which point it is handed off to the trial chamber for trial) shall confirm charges for which substantial grounds have been established, but it does not say anything about ending the investigation or freezing the facts or evidence at that stage.[13] Rule 76 of the RPE requires the OTP to disclose its list of witnesses "sufficiently in advance to enable the adequate preparation of the defence," but it also allows

9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

the prosecutor to add witnesses when she has decided to call them.[14] Article 64 of the Rome Statute requires the trial chamber to "provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial."[15] In practice, trial chambers have generally imposed a cut-off date before trial by which all disclosure must be completed, but have also allowed the prosecution to add limited additional evidence when the circumstances so warrant.[16]

In sum, then, the Rome Statute and the RPE require the prosecutor to investigate sufficiently to assess criminal liability, presumably to the requisite standard at each stage of the proceedings, and require that the defense be provided with the results of the OTP's investigation with sufficient time to prepare. There is no mandated *end* of the prosecution's investigation. In fact, as long as there exists evidence that is "relevant" to the prosecution's assessment of criminal liability, continued investigation appears to be required.

III

CHAMBERS AND COMMENTATORS: INVESTIGATION REQUIREMENTS

The appeals chamber first addressed the timing of prosecution investigations in *Prosecutor v. Lubanga*.[17] The pre-trial chamber below had concluded—in the course of articulating rules for disclosure and redactions at the confirmation hearing—that the prosecutor's investigation "must be brought to an end before the confirmation hearing, barring exceptional circumstances that might justify later isolated acts of investigation."[18] The appeals chamber *reversed* this holding, finding that, "[t]he duty to establish the truth [pursuant to article 54] is not limited to the time before the confirmation hearing. Therefore, the prosecutor must be allowed to continue his investigation beyond the confirmation hearing, if this is necessary in order to establish the truth."[19] In

14. Int'l Criminal Court, RPE, *supra* note 3, at 26.

15. Rome Statute, *supra* note 1.

16. Article 64(3)(c) of the Rome Statute, *supra* note 1, requires the Trial Chamber to "provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial." Regulation 35(2) of the Regulations of the Court is the vehicle for parties to submit evidence after the deadlines for disclosure. Int'l Criminal Court, Assembly of States Parties, 5th Sess., May 17–28, 2004, *Regulations of the Court*, regulation 35(2), ICC Doc. ICC-BD/01-03-11 (May 26, 2004) [hereinafter Int'l Criminal Court, Regulations], *available at* http://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf; *see, e.g.*, Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Prosecution Request for the Addition of Witness P-219 to the Prosecution List of Incriminating Witnesses and the Disclosure of Related Incriminating Material to the Defence (Oct. 23, 2009), http://www.icc-cpi.int/iccdocs/doc/doc767521.pdf (setting a deadline for incriminating material on January 30, 2009, but allowing Prosecution to add witness to the list).

17. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence" (Oct. 13, 2006), http://www.icc-cpi.int/iccdocs/doc/doc193057.pdf.

18. *Id.* ¶ 49.

19. *Id.* ¶ 52.

explaining its decision, the appeals chamber said that it

> accepts the argument of the Prosecutor that in certain circumstances to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence, including potentially exonerating evidence—particularly in situations where the ongoing nature of the conflict results in more compelling evidence becoming available for the first time after the confirmation hearing.[20]

Although the appeals chamber noted that "ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing," it plainly held that "this is not a requirement of the [Rome] Statute."[21] In other words, the appeals chamber expressed a purely aspirational goal, but not a legal requirement, that the prosecution complete investigation prior to the confirmation hearing.

Five years later, in *Prosecutor v. Mbarushimana*,[22] the appeals chamber again touched on the timing of the prosecution's investigation. The principal question on appeal was not actually about timing, but was rather how the pre-trial chamber should evaluate evidence at the confirmation hearing, given that it was generally reviewing witness statements and documents rather than hearing live testimony.[23] The prosecution argued that the role of the pre-trial chamber is simply to determine whether there exists sufficient evidence to send the case to trial and that it cannot, given the type of evidence it is reviewing, attempt to resolve apparent contradictions in the evidence or make credibility assessments.[24] Accordingly, the prosecution concluded that at the confirmation stage the chamber should presume the credibility of prosecution witnesses and should resolve perceived inconsistencies in the light most favorable to the prosecutor, unless the evidence presented is plainly incredible or unreliable.[25]

The appeals chamber rejected this position, concluding that the pre-trial chamber "must necessarily draw conclusions from the evidence where there are ambiguities, contradictions, inconsistencies, or doubts as to credibility arising from the evidence."[26] In support of its conclusion, the appeals chamber stated that "the investigation *should largely be completed* at the stage of the confirmation of charges hearing. Most of the evidence should therefore be available, and it is up to the prosecutor to submit this evidence to the Pre-Trial Chamber."[27]

To support its assertion that the investigation "should largely be completed"—which, it should be emphasized, is not the holding of the decision

20. *Id.* ¶ 54.

21. *Id.*

22. Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the Confirmation of Charges" (May 30, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1420080.pdf.

23. *Id.* ¶ 16.

24. *Id.* ¶ 24.

25. *Id.*

26. *Id.* ¶ 39.

27. *Id.* ¶ 44. (emphasis added) (footnote omitted).

but rather a rationale for the holding—the appeals chamber cited solely to its decision in *Lubanga*,[28] in particular its statement that "ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing."[29]

But the *Mbarushimana* appeals chamber took this language from *Lubanga* out of context, modified it, and completely changed its meaning. *Lubanga* holds that the prosecution does *not* need to complete its investigation before the confirmation hearing.[30] *Mbarushimana* changed the aspirational language from *Lubanga* from "ideally" to "should," thus suggesting that the prosecution has some obligation to complete, or largely complete, its investigation before the confirmation hearing.[31] But, again, the strict holding of *Mbarushimana* is only that the pre-trial chamber must critically evaluate the evidence at the confirmation stage, and does not reach the issue of prosecutorial duties.[32] Moreover, the appeals chamber in *Mbarushimana* cited to no provision in the Rome Statute or RPE, and no precedent aside from the *Lubanga* decision, supporting its assertion that the prosecution "should" largely complete its investigation before the confirmation hearing.[33]

Nonetheless, subsequent chambers and commentators have read the language from *Mbarushimana* to mean that there exists a legally enforceable presumption that the prosecution's investigation should be completed by the time of confirmation. In *Prosecutor v. Kenyatta* (*Kenya II*), the prosecution asked the pre-trial chamber, pursuant to article 61(9), to amend previously confirmed charges based on new evidence.[34] The single judge of the pre-trial chamber reviewed the *Mbarushimana* and *Lubanga* appeals chamber jurisprudence on the timing of the prosecutor's investigation and concluded that, "the principle approach is that the prosecutor should be ready with the investigation during said phase and any delay in doing so *is exceptional and should be justified*."[35] Based on this conclusion, the single judge requested "the Prosecutor to submit written observations clarifying the reasons for not

28. *Id.*

29. *Id.* ¶ 44 n.89.

30. *Lubanga*, Case No. ICC-01/04-01/06, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence," ¶ 54 (Oct. 13, 2006), http://www.icc-cpi.int/iccdocs/doc/doc193057.pdf.

31. *Compare id.*, *with Mbarushimana*, Case No. ICC-01/04-01/10, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the Confirmation of Charges," ¶ 44 n.89 (May 30, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1420080.pdf.

32. *Mbarushimana*, Case No. ICC-01/04-01/10, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the Confirmation of Charges," ¶ 39.

33. *See id.*

34. Case No. ICC-01/09-02/11, Decision Requesting Observations on the "Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute" (Jan. 29, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1546087.pdf.

35. *Id.* at ¶ 9 (emphasis added).

conducting the investigation in due course in compliance with the Appeals Chamber's jurisprudence."[36]

In its response, the prosecution objected to the single judge's requirement that it justify its postconfirmation investigation. The prosecution noted that the *Lubanga* decision, upon which *Mbarushimana* relied, had found no prohibition on the prosecution continuing to investigate after confirmation.[37]

Although the single judge ultimately granted the prosecution's request to amend the charges, she held firm to her view that "continuing investigations after the charges have been confirmed cannot be the rule, but rather the exception, and should be justified on a *case-by-case* basis."[38] Reviewing the *Lubanga* appeals chamber decision, she reasoned that the appeals chamber's *explanation* for why the prosecution must be able to continue its investigations after the confirmation hearing—the prosecution can continue investigating "in order to establish the truth," because if it cannot then "in certain circumstances" the chamber will be deprived of "significant and relevant evidence"—was in fact a *limitation* on these continued investigations.[39] Thus she found that the prosecutor could continue to investigate after confirmation only if she could show that it was "necessary in order to establish the truth" or if "certain circumstances" existed justifying further investigation.[40] The single judge concluded that

> continued investigation [after confirmation] should be related only to such essential pieces of evidence which were not known or available to the Office of the Prosecutor prior to the confirmation hearing or could not have been collected for any other reason, except at a later stage. In these circumstances, the Prosecutor is expected to provide a proper justification to that effect in order for the Chamber to arrive at a fair and sound judgment regarding any request for amendment put before it.[41]

The single judge's decision thus brought the law full circle, embracing, without any basis in the Rome Statute or the RPE, the approach that was explicitly rejected by the appeals chamber in *Lubanga*.[42] Although the single judge claimed to find support for her decision in the appeals chamber's *Lubanga* decision itself, she in fact turned it on its head. Even if in the end the prosecution is not absolutely prohibited from continuing its investigation after confirmation, it will still have to justify that investigation if it seeks to amend the charges and perhaps even if it seeks to introduce the evidence at trial.

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36. *Id.*

37. *Kenya II*, Case No. ICC-01/09-02/11, Prosecution Observations on the Conduct of Its Investigations, ¶¶ 8–9 (Feb. 7, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1549554.pdf.

38. *Kenya II*, Case No. ICC-01/09-02/11, Corrigendum to "Decision on the 'Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute,'" ¶ 35 (Mar. 21, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1571050.pdf.

39. *Id.* ¶¶ 35–36.

40. *Id.* ¶ 36.

41. *Id.* ¶ 37.

42. *Compare id.*, *with Lubanga*, Case No. ICC-01/04-01/06, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence," ¶ 54 (Oct. 13, 2006), http://www.icc-cpi.int/iccdocs/doc/doc193057.pdf.

In *Kenya II*, the defense objected to evidence collected by the prosecution after the confirmation hearing.[43] The majority of the trial chamber found strict limits on the prosecution's ability to continue investigating after the confirmation hearing, but struggled to justify these restrictions within the Rome Statute, RPE, or jurisprudence.[44] The majority conceded that "there may be no formal preconditions for the prosecutor to continue investigating the same facts and circumstances after they have been confirmed," but then nonetheless went on to describe limits to such investigative activity.[45] Without citing any authority, the majority declared that "the prosecution should not continue investigating postconfirmation for the purpose of collecting evidence which it could reasonably have been expected to have collected prior to confirmation."[46] The majority explained that a prosecution seeking to conduct postconfirmation investigation would bear the burden of showing that at least one of three exceptions applied: first, that the prosecution "could not with reasonable diligence have discovered [the evidence] prior to confirmation," second, that evidence that the prosecution had prior to confirmation had become unavailable for trial and therefore needed to be replaced, or third, that the prosecution had "justifiable reasons for believing" that it could not conduct certain investigative steps prior to confirmation because of security concerns that would be ameliorated only after confirmation.[47] The majority found that if the prosecution could not justify its continued investigation under one of these three exceptions, then evidence uncovered after confirmation could be excluded.[48]

In *Prosecutor v. Gbagbo*, the majority of the pre-trial chamber adjourned the confirmation hearing because it found the evidence presented by the prosecution to be inadequate to confirm the charges but sufficient to provide the prosecution with additional time to investigate.[49] In a section entitled *Chamber's Approach to Evidence*, the majority explained that it would evaluate the evidence at the confirmation hearing with the assumption that "the Prosecutor has presented her strongest possible case based on a largely completed investigation."[50] Elsewhere, the majority indicated that it was the prosecutor's responsibility to present "all her evidence" at the confirmation hearing.[51] Although it is often said that the confirmation is not to be a

43. *Kenya II*, Case No. ICC-01/09-02/11, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, ¶ 24 (Apr. 26, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1585619.pdf.

44. *Id.* ¶ 119–21.

45. *Id.* ¶ 119.

46. *Id.* ¶ 121.

47. *Id.* ¶ 120.

48. *Id.* ¶ 121.

49. *Gbagbo*, Case No. ICC-02/11-01/11, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Statute (June 3, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1599831.pdf.

50. *Id.* ¶ 25.

51. *Id.* ¶ 37.

"minitrial," it is difficult to see how the two are distinct if the prosecutor is largely obliged to complete her investigation before confirmation and present her strongest possible case, or all her evidence, at the hearing itself.

In both *Kenya II* (through a concurrence) and *Gbagbo* (through a dissent), one judge of the panel took issue with the majority's contention that the prosecution must complete its investigation by the time of the confirmation hearing, finding no support in the law or jurisprudence for this requirement. In *Kenya II*, Judge Eboe-Osuji wrote that

> [t]here is a concern that my colleagues' pronouncements amount largely to the beginnings of drips of dicta that will presently undermine the Prosecutor's confidence in conducting postconfirmation investigations when she sees the need; while possibly crystallizing in the future into a hard limitation that will forbid postconfirmation investigations, as a general rule, permitting them only in 'exceptional circumstances.' Such a development is unjustifiable as a matter of law and inhospitable to substantive justice. Additionally, its sustainability is highly questionable as a matter of policy and practical implementation.[52]

In addition to noting that the appeals chamber in *Lubanga* had specifically overturned a pre-trial chamber decision limiting the prosecution's ability to investigate postconfirmation, Judge Eboe-Osuji pointed out that the majority's approach would result in endless litigation about whether any "exceptions" permitted continued investigation by the prosecution.[53]

Similarly, in the *Gbagbo* case, Judge Silvia Fernández de Gurmendi dissented from the majority decision, finding, among other things, that the majority had misread *Mbarushimana* to undo the holding of *Lubanga*: "Regardless of the *desirability* of the ideal that investigations be largely completed before confirmation of charges, I find it problematic that a policy objective has been turned by the Majority into a legal requirement, something that cannot be done without amendments to the legal framework."[54] Judge Fernández found that the majority's approach would force the prosecution not just to "complete," as much as possible, its investigation before the confirmation hearing, but also to present all of its evidence during the hearing itself, which would turn the confirmation hearing into the trial.[55]

Commentators outside the court have also focused on the question of when the prosecution must complete its investigation. The Open Society Justice Initiative has recognized the potential import of the appeals chamber's decision in *Mbarushimana*. In an article entitled *ICC Judges Demand More, Earlier from Prosecutor's Office* it observed that although there exist strong reasons for allowing the prosecution to continue to build its investigation throughout the proceedings leading up to trial, the *Mbarushimana* judges nonetheless signaled

52. *Kenya II*, Case No. ICC-01/09-02/11, Corrigendum of Concurring Separate Opinion of Judge Eboe-Osuji, ¶ 87 (May 2, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1589189.pdf.

53. *Id.* ¶ 99 ("Contrary to public policy, it will merely invite endless interlocutory litigation, especially as to what amounts to 'proper' or 'thorough' or 'full' investigation.").

54. *Gbagbo*, Case No. ICC-02/11-01/11, Dissenting Opinion of Judge Silvia Fernández de Gurmendi, ¶ 15 (June 3, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1599832.pdf.

55. *Id.* ¶¶ 27–28.

that they expect investigations to be largely completed by the confirmation hearing stage.[56] The Open Society Justice Initiative concluded that "[t]hese judicial decisions will require a new approach from the ICC prosecution, placing greater demands at the investigative stage, which the prosecution must manage within the context of budget cuts and limited resources."[57]

On good practice rather than jurisprudential grounds, the American University Washington College of Law's War Crimes Research Office (WCRO) concluded in a recent report that "[a]bsent extraordinary circumstances, . . . a better solution would be for the ICC Prosecutor to wait until a case is trial-ready or almost trial-ready before any charges are ever presented to a judge."[58] Although the WCRO acknowledged that the OTP can, and often should, continue doing some investigation after confirmation, it nonetheless advocated that the prosecution should essentially complete its investigation—that is, be trial-ready—not just before confirmation, but even before any charges are brought.[59]

IV
THE REALITIES OF OTP INVESTIGATIONS

The judicial discussion and commentary concerning the OTP's investigations has focused on the Rome Statute and RPE, prior jurisprudence, and the desire to have stronger cases from the OTP. Missing from the discussion, however, has been any consideration of the realities of OTP investigations. Completing the investigation at an early stage sounds unobjectionable and desirable, but is it in fact possible?

It is important to consider this question because the relationship between the desirable and the possible is a dynamic one. The ideal requirements of the international criminal justice process should shape practice, but practice will also inevitably shape the requirements. Although there are minimum requirements below which the practice cannot fall—both substantively and procedurally—beyond these minimums there is enormous room for variability. The question here—the timing of the prosecution's investigation in relation to the confirmation hearing—presents precisely one such opportunity for variability. There is no explicit provision addressing the timing issue in the Rome Statute or the RPE, and no *a priori* requirement that the prosecution complete its investigation before the confirmation hearing (itself a procedural step that is not required by a fair trial). To be sure, there can be debates about

56. Alison Cole, *ICC Judges Demand More, Earlier from Prosecutor's Office*, OPEN SOC'Y FOUND. (June 5, 2012), http://www.opensocietyfoundations.org/voices/icc-judges-demand-more-earlier-prosecutor-s-office.

57. *Id.*

58. WAR CRIMES RESEARCH OFFICE, INVESTIGATION MANAGEMENT, STRATEGIES, AND TECHNIQUES OF THE INTERNATIONAL CRIMINAL COURT'S OFFICE OF THE PROSECUTOR 10 (2012), *available at* http://www.wcl.american.edu/warcrimes/icc/documents/ICCReport16.pdf.

59. *Id.* at 10–11.

whether such a timing requirement is consistent with the framework of the governing legal instruments, or is desirable for reasons of effectiveness, efficiency, or fairness. But these debates should be informed by what is possible regarding ICC investigations (itself shaped by the Rome Statute and the RPE).

The realities of the ICC's war crimes investigations counsel against an overly rigid approach to the timing of its investigations. The ICC OTP faces challenges that most national investigators and prosecutors do not. National investigators and prosecutors have the coercive power of the state behind them and can drive investigations.[60] They have an enormous range of tools with which to investigate, and can act both proactively and reactively.[61] Even when they are acting reactively, they largely have the power to control the progress of the investigation. Generally speaking, they can control a crime scene, obtain records, and compel witnesses.[62] The practice of national investigators is mostly within their control. They can shape that practice to maximize both effectiveness and efficiency, utilizing all of the tools at their disposal.

The practice of international investigators and prosecutors could not be more different. They have no coercive powers and are dependent entirely on the cooperation of states and individuals within those states.[63] They generally cannot control crime scenes, compel the production of documents, or compel witnesses.[64] They are almost entirely reactive, and cannot create a uniform or consistent practice. Although some aspects of the investigation are dictated by the Rome Statute, RPE, or minimum standards of investigative practice, in many ways international investigators have to shape their practice to each particular situation. In other words, there is no single practice, but lots of practices across all of the cases.

Four aspects of the OTP's investigations highlight the challenges of these investigations and the potential for variability of practice across cases: budget, cooperation, witness security, and the dynamic nature of war crimes investigations. Investigative challenges and variability suggest that it will be often difficult for the OTP to complete investigations at an early stage.

A. Budget

The 2013 budget for the ICC is €118.75 million, which is roughly equivalent to the annual budget of the International Criminal Tribunal for the former Yugoslavia (ICTY).[65] The difference is that the ICTY has been focused for

60. Mark B. Harmon & Fergal Gaynor, *Prosecuting Massive Crimes with Primitive Tools: Three Difficulties Encountered by Prosecutors in International Criminal Proceedings*, 2 J. INT'L CRIM. JUST. 403, 405–06 (2004) (cataloguing powers of national authorities to investigate crime).

61. *Id.*

62. *Id.*

63. *Id.* at 406; Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can be Justice Delivered*, 50 HARV. INT'L L.J. 323, 335–40 (2009) (exploring challenges to international investigations and prosecutions).

64. Harmon & Gaynor, *supra* note 60; Whiting, *supra* note 63.

65. The ICTY was established by the United Nations Security Council in 1993 to prosecute war

twenty years on three related wars in one region, while the ICC is presently investigating in eight different situation countries.[66]

Some commentators correctly identify the ICC budget as a cause of deficient investigations, but then go on to suggest that the limited budget is somehow the responsibility of the OTP. For example, the American University Washington College of Law's WCRO suggests that the limited budget has been driven by the prosecutor's "small team" approach to investigations and recommends that "the OTP may want to reconsider its small team approach and recruit more investigators."[67] Although few within the OTP would object to the bottom-line recommendation, the WCRO has the cause and effect precisely backwards. There has been no hint from the Assembly of States Parties (ASP) of a willingness to increase dramatically the budget of the ICC, and in fact in recent years the ASP has reduced the budget or held it at no growth, despite requests at times for additional resources.[68] Although there remains hope that the ASP will increase the OTP's budget in future years, nobody anticipates astronomical increases.[69]

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crimes, crimes against humanity and genocide in the territory of the former Yugoslavia. S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993) (establishing the ICTY). For the budget, compare Int'l Criminal Court, Assembly of States Parties, 11th Sess., Nov. 14–22, 2012, *Proposed Programme Budget for 2013 of the International Criminal Court*, ¶ 2, ICC Doc. ICC-ASP/11/10 (Aug. 16, 2012), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-10-ENG.pdf [hereinafter Int'l Criminal Court, *Proposed Programme Budget for 2013*] (proposing a total 2013 budget for the ICC of €118.75 million), with G.A. Res. 66/239, ¶ 15, U.N. Doc. A/RES/66/239 (Dec. 24, 2011), and Nerma Jelačić, Spokesperson, Registry and Chambers of the ICTY, Weekly Press Briefing (Jan. 11, 2012), *available at* http://www.icty.org/sid/10886 (characterizing the ICTY's gross budget for the 2012–2013 biennium as $281,036,100, or approximately €103.91 million per year).

66. *Compare* Int'l Criminal Court, *All Situations*, INT'L CRIM. COURT, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/Pages/situations%20index.aspx (last visited Oct. 1, 2013) (listing nine countries in which the ICC currently has open investigations), *with About the ICTY*, INT'L CRIM. TRIB. FOR THE FORMER YUGO., http://www.icty.org/sections/AbouttheICTY (last visited Oct. 1, 2013) (explaining that the ICTY's jurisdiction is limited to crimes committed between 1991 and 2001 in the former Yugoslavia).

67. WAR CRIMES RESEARCH OFFICE, *supra* note 58, at 5.

68. *Compare* Int'l Criminal Court, *Proposed Programme Budget for 2013*, *supra* note 65, at ¶ 2, *with* Int'l Criminal Court, Assembly of States Parties, *Proposed Programme Budget for 2012 of the International Criminal Court*, ¶ 12, ICC Doc. ICC-ASP/10/10 (July 21, 2011), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-10-ENG.pdf (proposing a total 2012 budget for the ICC of €117.73 million).

69. Thomas Escritt, *War Crimes Court Frustrated by Reliance on Witnesses*, REUTERS (Sept. 20, 2013 10:15 AM), http://www.reuters.com/article/2013/09/20/us-kenya-icc-investigations-idUSBRE98J0HY20130920 (indicating that OTP unlikely to get full budget increase it is seeking); Blake Evans-Pritchard, *Mali Case Throws Spotlight on ICC Budget Constraints*, INST. FOR WAR & PEACE REPORTING (Aug. 6 2012), http://iwpr.net/report-news/mali-case-throws-spotlight-icc-budget-constraints ("The latest report from the budget committee of the Assembly of States Parties, the ICC's governing body, recognises that the court needs more money to meet these additional expenses. Despite this, some member states are still reluctant to loosen the purse-strings."); *see also* William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 54 (2008) ("Neither the legal mandate of the ICC nor the resources available to it are sufficient to allow the Court to fulfill the world's high expectations.").

The budget and size of the court are a design reality of the ICC. States have deliberately designed the ICC to be a relatively small institution with a limited ability to investigate and prosecute cases.[70] This design is in keeping with the complementarity principle embedded in the structure of the court: the ambition of the ICC is to spur states to prosecute their own cases rather than having the ICC prosecute those cases.[71] In addition, the limited size and powers of the court no doubt reflect a certain ambivalence on the part of many states towards the project itself.[72] As Antonio Cassese has written, because of the stranglehold of the principle of sovereignty, "[s]tates have established international criminal courts and granted them authority to judge crimes of individuals—but they have stopped short of backing up this authority with all the enforcement tools required to make it fully operational."[73]

So how does the budget affect the OTP's investigations? Plainly it affects the number of investigators that can be assigned to any one particular case at a time. The WCRO notes in its report that the OTP has approximately forty-four investigators, and that there were at most twelve investigators assigned to the *Lubanga* case (which is, in fact, a typical number of investigators assigned to a case).[74] Further, it should be clear that this number of investigators would not change much even if the OTP dramatically reduced the number of situation countries in which it is investigating. The reality is that although the court is currently investigating in eight situation countries, it must focus its most intense investigations on just a few countries at a time.[75] Thus, even if the court reduced the number of situation countries, it is likely that it would nonetheless always be actively investigating several countries at once. Simply by doing the math, it becomes clear that there will be a limited number of investigators for each case at any given time.

Moreover, the limited budget might also affect the timing of investigations. If the prosecutor has a limited budget and faces multiple investigations with uncertain futures, then she will prioritize and focus on those investigations that

70. *See* Burke-White, *supra* note 69, at 60–61, 64–67 (noting that the ICC was designed to have limited jurisdiction and weak enforcement mechanisms).

71. *See* NIDAL NABIL JURDI, THE INTERNATIONAL CRIMINAL COURT AND NATIONAL COURTS: A CONTENTIOUS RELATIONSHIP 34 (2011) (explaining that the Rome Statute "primarily encourage[s] local prosecutions"); *see also* Burke-White, *supra* note 69, at 55 ("[T]he Prosecutor noted that a key strategic priority would be to take a 'positive approach to complementarity. Rather than competing with national systems for jurisdiction, we will encourage national proceedings wherever possible.'").

72. *See* Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 11–13 (2005) (characterizing state support for the ICC as "unenthusiastic").

73. Antonio Cassese, *Reflections on International Criminal Justice*, 9 J. INT'L CRIM. JUST. 271, 273 (2011).

74. WAR CRIMES RESEARCH OFFICE, *supra* note 58, at 24.

75. OPEN SOC'Y FOUNDS., PUTTING COMPLEMENTARITY INTO PRACTICE: DOMESTIC JUSTICE FOR INTERNATIONAL CRIMES IN DRC, UGANDA, AND KENYA 9 (2011), *available at* http://www.opensocietyfoundations.org/sites/default/files/putting-complementarity-into-practice-20110120.pdf ("While the ICC plays a critical role as a court of last resort, it will never have the capacity to deal with more than a handful of cases at one time."); WAR CRIMES RESEARCH OFFICE, *supra* note 58, at 24.

seem the most urgent or the most likely to move forward. As set forth in more detail below, the prosecutor is faced with a host of investigative options at any given time. There will be some investigable cases that are graver than others. There will be some where the crimes are ongoing, and therefore where there is pressure to act quickly in order to help stop the crimes. There will be cases where there is a greater likelihood to apprehend the accused than in other cases, and there will also be some cases with more international support (and therefore more investigative opportunities) than others. At each moment the prosecutor must calculate which case investigations are most urgent and most likely to advance, so that she can focus her resources there.

But these decisions are just educated guesses, and they can be based on shifting information. Take as a snapshot, for example, February 2011. Towards the end of 2010, the prosecutor brought a new case in the Democratic Republic of the Congo (DRC) against Callixte Mbarushimana and two significant cases in Kenya against six accused.[76] In December 2010, serious postelection violence broke out in Côte d'Ivoire, a country that the OTP was monitoring in a preliminary examination phase.[77] These events in Côte d'Ivoire led, in April 2011, to Laurent Gbagbo falling from power and his opponent, Alassane Ouattara, taking control of the government and renewing a request to the ICC to take jurisdiction and investigate crimes in the country.[78]

Then, on February 26, 2011, the UN Security Council unexpectedly and unanimously referred the unfolding situation in Libya to the International Criminal Court.[79] Although the OTP could supplement the budget with an application for more funds from the contingency fund, getting that money takes time and the OTP still had to face thebudget constraints described above.

What to do? The situation in Libya was unfolding and urgent, and the eyes of the international community were on the court to see how it would react. A significant investigative commitment was required, and potential witnesses were

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76. *See generally Kenya II*, Case No. ICC-01/09-02/11, Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (Mar. 8, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf (ordering the named defendants to appear before the court); Prosecutor v. Ruto & Sang (*Kenya I*), Case No. ICC-01/09-01/11, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (Mar. 8, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1037044.pdf (ordering the named defendants to appear before the court); *Mbarushimana*, Case No. ICC-01/04-01/10, Warrant of Arrest for Callixte Mbarushimana (Sept. 28, 2010), http://www.icc-cpi.int/iccdocs/doc/doc954979.pdf.

77. *See* Situation in the Republic of Côte d'Ivoire, Case No. ICC-02/11, Decision on the "Prosecution's Provision of Further Information Regarding Potentially Relevant Crimes Committed between 2002 and 2010," ¶¶ 16–19 (Feb. 22, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1341467.pdf; Adam Nossiter, *Hundreds of Thousands Flee Ivory Coast Crisis, U.N. Says*, N.Y. TIMES, Mar. 26, 2011, at A4.

78. *See* Adam Nossiter, Scott Sayare & Dan Bilefsky, *Leader's Arrest in Ivory Coast Ends Standoff*, N.Y. TIMES, Apr. 11, 2011, at A1; *see also* Letter from Alassane Ouattara, President of Côte d'Ivoire, to the President of the Int'l Criminal Court (Dec. 14, 2010), *available at* http://www.icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf (accepting ICC jurisdiction over the situation in Côte d'Ivoire).

79. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

fleeing Libya, offering ample investigative opportunities.[80] In time, a major investigative commitment would also be required in Côte d'Ivoire.[81] At the same time, the office had to continue to build its cases in Kenya and in the DRC. Throughout the year, therefore, the OTP had to constantly shift resources around among these various priorities in order to try to conduct sufficient investigations in each.[82] And during the year, events would change and develop, forcing the office to rethink its investigative strategy and commitments. As mentioned above, in April 2011 the government changed in Côte d'Ivoire and the need to investigate became more pressing. In August 2011, the Gaddafi regime fell and Muammar Gaddafi himself was killed.[83] Shortly thereafter, in November 2011, Saif Al-Islam Gaddafi, who by then had been charged by the ICC with crimes against humanity, was captured in Libya and the Libyan government indicated that it would itself seek to try the junior Gaddafi.[84] These significant events all required the office to react and to rethink whether to continue on its present course or to shift resources around to more urgent priorities.

Meanwhile, the OTP had a number of cases in the DRC and Uganda where there were outstanding arrest warrants and uncertain prospects of arrest.[85] Could the prosecutor afford to continue to spend additional investigative resources on those cases to ensure that the evidence remained current and fresh? Over time, after all, witnesses might lose interest or even pass away. But

80. Luis Moreno-Ocampo, Prosecutor, Int'l Criminal Court, Statement to the United Nations Security Council on the Situation in the Libyan Arab Jamahiriya, Pursuant to UNSCR 1970 (2011) (May 4, 2011) [hereinafter Moreno-Ocampo, Statement to the UN Security Council on the Situation in the Libyan Arab Jamahiriya] (transcript available at http://www.icc-cpi.int/NR/rdonlyres/0BDF4953-B5AB-42E0-AB21-25238F2C2323/0/OTPStatement04052011.pdf) (noting that the ICC's investigation of the Libya situation involved missions in ten states); *see also* Aaron Gray-Block, *Moussa Koussa Sought by ICC Prosecutor*, CHRISTIAN SCI. MONITOR (Apr. 6, 2011), http://www.csmonitor.com/World/Latest-News-Wires/2011/0406/Moussa-Koussa-sought-by-ICC-prosecutor.

81. *See generally* Situation in the Republic of Côte d'Ivoire, Case No. ICC-02/11, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire (Oct. 3, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1240553.pdf.

82. As a result of resource constraints, the OTP is organized to allow for resources to shift among investigative priorities. *See, e.g.*, Luis Moreno-Ocampo, Prosecutor, Int'l Criminal Court, Fifth Session of the Assembly of States Parties: Opening Remarks 7 (Nov. 23, 2006) (transcript available at http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/LMO_20061123_en.pdf) ("In terms of budget, my office is confident that it can carry out its tasks with the current level of resources. This is possible as a result of the rotational model employed by the Office, whereby joint teams move to different situations or cases.").

83. *See* Mary Beth Sheridan, *Moammar Gaddafi is Captured, Killed as Last Loyalist Holdout in Libya Falls*, WASH. POST, Oct. 20, 2011, http://articles.washingtonpost.com/2011-10-20/world/35279328_1_sirte-moammar-gaddafi-mahmoud-jibril.

84. Clifford Krauss & David D. Kirkpatrick, *Libyans Capture the Last Qaddafi Son at Large, a Onetime Heir Apparent*, N.Y. TIMES, Nov. 20, 2011, at A6; Francois Murphy, *Libya Vows It, Not ICC, Will Try Saif, Senussi*, REUTERS (Nov. 20, 2011, 10:32 PM), http://www.reuters.com/article/2011/11/21/us-libya-icc-idUSTRE7AK08K20111121.

85. *See* Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Warrant of Arrest (Aug. 22, 2006), http://www.icc-cpi.int/iccdocs/doc/doc305330.PDF; Prosecutor v. Kony, Otti, Odhiambo & Ongwen, Case No. ICC-02/04-01/05, Warrant for Arrest of Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005 (Sept. 27, 2005), http://www.icc-cpi.int/iccdocs/doc/doc97185.pdf.

the prosecutor will not likely be able to justify devoting resources to these dormant cases, even though an arrest can occur at any time. In fact, on March 18, 2013, Bosco Ntaganda, who had been a fugitive from the court for nearly seven years, unexpectedly surrendered himself to the U.S. Embassy in Kigali, Rwanda, asking to go to the ICC.[86] Suddenly the office was forced to begin reexamining its evidence in that case to ensure that the evidence was still available, and to see whether a new investigation would be necessary.

The point is that with a limited budget and uncertain and changing investigative needs, the Prosecutor must constantly react to shifting priorities and opportunities. She has limited control over her own agenda and work. She must not only predict where to focus her resources but also be prepared to shift those resources when circumstances change. Sometimes the prosecutor will be ahead of the curve, while other times she will have to play catch up, such as when unexpected developments occur. As a result, cases will end up in different stages of development, depending on many factors, one of them being the resources available at any given time to investigate each case.

How does this shape investigative practice? The limited budget and unpredictable circumstances mean that the practice must be flexible. Sometimes the OTP will have both the resources and the opportunities to investigate deeply and thoroughly. In other cases it will be more constrained. If resources restrict the prosecution to focused investigation, but a unique opportunity for arrest nonetheless arises, the office might feel compelled to move and to try to bolster the investigation later. In other cases, because of a lapse of time between the investigation and the arrest, the office might again have to supplement its original investigation. In sum, the OTP's limited resources make it extremely difficult for the office to have one set investigative approach in all of its cases.

B. Witness Protection

Article 68 of the Rome Statute mandates that "[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses."[87] This provision has been interpreted to compel the court to provide appropriate protection to any person who is put at risk as a result of his or her interaction with the court.[88] Witness protection requires a careful assessment of the risks faced by the prospective witness in the moment, as well as those that might be faced as future developments unfold.

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86. *U.S. Confirms Bosco Ntaganda Turned Himself in at U.S. Embassy in Kigali*, REUTERS (Mar. 18, 2013, 2:02 PM), http://www.reuters.com/article/2013/03/18/us-rwanda-warcrimes-usa-confirmation-idUSBRE92H0T620130318.

87. Rome Statute, *supra* note 1.

88. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements," ¶¶ 1, 44 (May 13, 2008).

ICC witness-protection requirements are particularly acute, even more so than most of those at the ad hoc tribunals (those tribunals established to prosecute cases from one particular conflict, such as the tribunals for the former Yugoslavia and Rwanda). As a permanent institution, the ICC is designed to react quickly and to investigate events shortly after they occur, or even as they are still unfolding. The cases investigated by the ICC are generally borne of intense political and social upheavals where violence becomes the norm.[89] Thus the ICC will often be investigating in the context of general instability and breakdown, with no expectation that national structures will be able to protect witnesses. Further, because the ICC must focus its efforts on the most responsible suspects, there will be an intense interest by those suspects to frustrate the work of the court.[90] The cost of any failure to protect witnesses will be high, not just to the witnesses at issue but to the work of the court as well.

At the same time, witness protection is extraordinarily expensive, as much to the witness and his or her family as it is to the court. In many cases, witness protection requires out-of-country relocation of the witness and his or her family. Relocation places an enormous burden on witnesses. Some contend that in poorer countries where the ICC investigates, relocation is actually a positive benefit that may cause some witnesses to fabricate their stories.[91] That is no doubt true in some cases. But in many cases, witness relocation is an enormous sacrifice and hardship for the witness. Often witnesses are forced to leave their home countries with little prospect of returning, and to go to an unfamiliar country where they must completely rebuild their lives.[92] And for the court, moving a witness and his or her family out of one country into a new one requires significant resources.

Because of the costs of witness protection (to both court and witness), the OTP will always prioritize nonwitness evidence (documents, video, recordings, and so forth) and will look for witnesses who have already made themselves safe (generally through their own relocations).[93] But the reality is that in many

89. Whiting, *supra* note 63, at 340.

90. OFFICE OF THE PROSECUTOR, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR (2003), *available at* http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf ("The global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a general rule, *the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.*").

91. *See, e.g.*, *Katanga*, Case No. ICC-01/04-01/07, Second Corrigendum to the Defence Closing Brief, ¶¶ 505–11 (June 29, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1436184.pdf (contending that credibility of relocated witnesses must be carefully scrutinized).

92. *See* CHRIS MAHONEY, THE JUSTICE SECTOR AFTERTHOUGHT: WITNESS PROTECTION IN AFRICA 43–44 (2010), *available at* http://www.issafrica.org/siteimages/WitnessProt.pdf (noting that the relocation process is "cumbersome" and can have an impact on the well-being of witnesses).

93. OFFICE OF THE PROSECUTOR, FIRST REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE UN SECURITY COUNCIL PURSUANT TO UNSCR 1970 (2011) ¶ 44 (2011) [hereinafter OFFICE OF THE PROSECUTOR, FIRST REPORT], *available at* http://www.icc-cpi.int/NR/rdonlyres/A077E5F8-29B6-4A78-9EAB-A179A105738E/0/UNSCLibyaReportEng04052011.pdf ("The

cases there exists very little nonwitness evidence, or if it exists it is not accessible or available.[94] The reality of the investigative practice at the ICC is that witnesses have been, and likely will continue to be, at the center of nearly all cases at the ICC.[95] Moreover, because the ICC sits far from the sites of the crimes it considers, it will necessarily depend heavily on "insider" witnesses who have relationships with suspects that allow the witnesses to provide critical information about those suspects.[96] Such witnesses are particularly at risk—because they are generally associated and allied with the suspected perpetrators, and their testimony will be perceived as a particular betrayal and especially threatening—and therefore almost always require significant protection.

Because of the protection challenges, the OTP has always sought to keep its investigations narrow and to rely on as few witnesses as possible.[97] The OTP is also extremely cautious about whom it interviews because even interviewing a person can subject him or her to risk, such that the person requires protection.[98] Therefore, the office takes steps, including the screening of witnesses before interview, to ensure that it only interviews individuals with relevant information.[99] Of course the prosecution has to develop sufficient evidence to prove its case (itself a judgment call), but how deep a bench of additional witnesses should it have? What is a "complete" investigation under these circumstances?

Office seeks to rely on the smallest number of witnesses necessary to prove its case by conducting focused investigations and by prioritizing the use of documentary and physical evidence. To the extent that the Office relies on evidence from witnesses, it prioritizes witnesses who reside in safe areas.").

94. INT'L BAR ASSOCIATION, WITNESSES BEFORE THE INTERNATIONAL CRIMINAL COURT 18 (2013) (noting the difficulty of obtaining nonwitness evidence); Patricia M. Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 218–19 (2002) (noting that ICTY cases are different from the Nuremberg trials insofar as in the former there is no paper trail and no heavy reliance on witnesses); Whiting, *supra* note 63, at 338 n.72, 348 (noting that, in modern conflicts, perpetrators take steps to insure that crimes are not documented).

95. INT'L BAR ASSOCIATION, *supra* note 94, at 12, 14 ("The ICC relies extensively on direct witness testimony in order to function effectively.").

96. Whiting, *supra* note 63, at 348 (critical role of insider witnesses).

97. MAHONEY, *supra* note 92.

98. *Id.* ¶ 43 ("The Office's mandate of protection is established by Article 68(1) of the Statute and extends to those persons who are at risk on account of their interactions with the Office. This includes witnesses, screened individuals and their immediate family members, intermediaries, sources, and staff members of the Office.").

99. *See* Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Public Redacted version of "Decision on the Defence Request for Disclosure of Pre-Interview Assessments and the Consequences of Non-Disclosure," ¶¶ 18, 31 (Apr. 9, 2010), http://www.icc-cpi.int/iccdocs/doc/doc857694.pdf ("Pursuant to Article 54 of the Statute, the prosecution argues that conducting a pre-interview assessment with a witness is a strategic, prosecutorial undertaking that should not be subject to scrutiny by the defence. . . . Screening notes . . . are the result of a preliminary procedure, conducted prior to taking a statement, during which the individual is assessed so that a decision can be made as to whether or not a statement is to be taken."); Interview by Tony Jones with Luis Moreno-Ocampo, Prosecutor, Int'l Criminal Court (Aug. 6, 2007) (transcript available at http://www.abc.net.au/lateline/content/2007/s1998168.htm) ("Because I have a duty to protect my witness I never went to Darfur to collect witness. So I had to screen witness in 17 countries around the world, and I choose 100 of them and I'm protecting them, yes.").

Moreover, in many cases, the chances of arresting the accused are uncertain. This means that the OTP will be cautious about taking on too many witnesses before arrest.[100] But then, once the arrest occurs, there can be a scramble to find and secure additional witnesses, a process that may not be complete by the time that the confirmation hearing arrives. Further, much can change with witnesses as time passes, whether before arrest or during the period between arrest and confirmation (or even after confirmation). Witnesses can become intimidated, they can lose interest, they can become less reliable, or they can have their weaknesses exposed. And at no time can the prosecution compel witnesses to come to the court and testify.[101] Even when witnesses and their families have been relocated at considerable expense, they can refuse to come before the court. And even when witnesses do testify, they will sometimes change their testimony or they will make a different impression on the judges than the prosecution expects. Given all of these uncertain factors, how many witnesses is enough? When has the prosecution done enough investigation?

These witness-protection realities require careful judgments by the prosecution. It cannot interview and protect endless numbers of witnesses, but it cannot take the risk of relying on too few either. Inevitably, however, witness-protection challenges will require continuing investigation and adjustments to the prosecution's evidence. It is hard to imagine that the prosecution could ever have a big enough reserve of witnesses on all key points to never have to conduct further investigations. The costs of such an approach would simply be too high. Besides, the prosecution must reserve resources for potential new witnesses. As time passes, witnesses who might have been unavailable or unwilling to cooperate at the early stages of the investigation may become available if the risks evolve or diminish. These new witnesses might offer better, more precise, or more complete information that should come before the court.

At some point or another, therefore, it is almost certain that the prosecution will have to bolster its case by replacing witnesses who disappear or become unwilling or unreliable. It is equally certain that the prosecution will at some point want to supplement its case with the testimony of witnesses who were previously unavailable. This, in turn, means that the prosecution must continue its investigation both before and after the confirmation hearing.

C. Cooperation

As is well known, the OTP relies on the cooperation of other actors—principally states as well as international and nongovernmental organizations (NGOs)—to investigate its cases.[102] Although it has investigators who work for

100. *See* Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Prosecution's Urgent Request to Postpone the Date of the Confirmation Hearing (May 23, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1595638.pdf (detailing challenges in investigations when arrests are uncertain or delayed).

101. INT'L BAR ASSOCIATION, *supra* note 94, at 15 ("All witnesses who appear to testify before the ICC do so voluntarily, even if they are key witnesses and their evidence is central to the case.").

102. *See* Rome Statute, *supra* note 1, pt. IX (outlining cooperation regime).

the OTP, they are dependent on the help of others to do their work. The OTP investigators are free to accept evidence that is voluntarily provided (including witness statements and documentary evidence), but even then they require the permission of relevant states to travel to collect the information.[103] In particular, if a situation country chooses not to cooperate with the OTP, or to cooperate incompletely, it can have dramatic consequences for the ability of the OTP to investigate.

The cooperation regime is set forth in part IX of the Rome Statute.[104] The cooperation of States Parties with the work of the court is, for the most part, mandatory. Article 86 establishes a general obligation to cooperate, stating that "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court."[105] Article 93 sets out a list of mandatory forms of cooperation, including identifying the location of persons and items, taking evidence, examining locations, providing documents, and executing searches and seizures.[106]

The difficulty, however, is not with the specified forms of cooperation, but rather with the enforcement. If states do not cooperate, or, as is more often the case, they cooperate in form but not in substance, then the only recourse available to the prosecutor is to raise the matter with the chamber. The judges can make a finding of noncooperation pursuant to article 87(7) and then "refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council."[107] This process offers an opportunity for other states to exert pressure on a noncompliant state, but it is hardly a sure way to obtain cooperation. The reality is that if states do not find it in their own interest to cooperate with the court and are not pressured by other actors in the international community who have the ability to exert pressure, then the OTP will be forced to find ways around the noncooperation.

Because cooperation is tied to state interests, it is rarely static. States can become cooperative after refusing to help, or can suddenly stop providing assistance after having been cooperative. In the former Yugoslavia, both Croatia and Serbia were initially reluctant to cooperate with the ICTY, but were later persuaded by pressure from the United States and the European Union to do so.[108] At the ICC, the government of Sudan has provided almost no cooperation to the court.[109] Kenya initially pledged to be cooperative with the

103. See *id.* at arts. 54, 87(1), 93. *But see id*. at art. 57(3)(d).

104. *Id.* at pt. IX.

105. *Id.*

106. *Id.*

107. *Id.*

108. Whiting, *supra* note 63, at 343–44.

109. *See* Fatou Bensouda, Prosecutor, Int'l Criminal Court, Statement to the United Nations Security Council on the Situation in Darfur, the Sudan, Pursuant to UNSCR 1593 (2005) ¶ 7 (Dec. 13, 2012) (transcript available at http://www.icc-cpi.int/iccdocs/PIDS/statements/UNSC1212/UNSCDarfurSpeechEng.pdf) (describing the Sudan government's lack of cooperation in the ICC's

prosecutor's investigation of postelection violence there, but cooperation slowed once significant actors in the country were charged.[110] When the UN Security Council referred the situation in Libya to the ICC, there was considerable interest and support from many countries that were willing to assist in the investigation.[111] Once the war ended and Gaddafi fell, however, the interest of these states diminished.[112]

The prosecution must both plan for the possibility that cooperation will disappear (which can also have an impact on witness security for those witnesses who remain within the situation country) and find ways to take advantage of cooperation opportunities that might arise. And it is rarely so simple as a matter of one country's cooperation or noncooperation. The investigations of the OTP focus always on one situation country, but the opportunities to gather evidence generally span many countries.[113] And states will sometimes be willing to cooperate on some aspects of an investigation, but not others.[114]

Because cooperation is largely outside the control of the office and is highly variable and unpredictable, the investigative practice of the office must adjust to different circumstances. When there is cooperation, the office will identify and interview witnesses and collect nonwitness evidence that may be available. When cooperation is limited, the investigators will have to become more creative in their search for evidence. If the situation country refuses to cooperate, for example, then the office will search for witnesses who have left the country voluntarily or will seek evidence collected by other parties with better access to the country.

In sum, the ability to investigate and to obtain information and evidence can be extremely variable in any given point in time, and is also constantly in flux.

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investigation).

110. *Kenya II*, 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" (May 10, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1591193.pdf.

111. OFFICE OF THE PROSECUTOR, FIRST REPORT, *supra* note 93, at ¶ 28 (characterizing the support of states parties for the Libya investigation as "excellent").

112. *Compare id.*, *with* OFFICE OF THE PROSECUTOR, FIFTH REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE UN SECURITY COUNCIL PURSUANT TO UNSCR 1970 (2011) ¶ 8 (2011), *available at* http://www.icc-cpi.int/iccdocs/otp/UNSC-report-Libya-May2013-Eng.pdf (noting that some requests to states for cooperation in the Libya investigation have not been fulfilled and urging States Parties to cooperate fully with the investigation); *see also* Patricia M. Wald, *Apprehending War Criminals: Does International Cooperation Work?*, 27 AM. U. INT'L L. REV. 229, 251–52 (2012).

113. *Ntaganda*, Case No. ICC-01/04-02/06, Prosecution's Urgent Request to Postpone the Date of the Confirmation Hearing, ¶ 28 (May 23, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1595638.pdf (support from multiple states in Libya investigation); Interview by Tony Jones with Luis Moreno-Ocampo, Prosecutor, Int'l Criminal Court, *supra* note 99 (discussing the screening of Darfur witnesses in 17 countries).

114. Wald, *supra* note 112, at 230, 245–46, 251 (describing how cooperation requirements interact with other foreign-policy imperatives).

This reality is yet another reason why it is extremely difficult, if not impossible, to finalize an investigation in any given point in time.

D. Dynamic Investigations

At any given time, the prosecutor has to consider and weigh all of the different variables when deciding where to investigate, what resources to dedicate, how fast to go, when there is enough evidence, and when to move to the next phase. To employ a cliché, planning and conducting an investigation at the ICC is like playing three-dimensional, or even four- or five-dimensional, chess. And to add to the factors that the prosecutor must consider, situation countries and the significant actors therein (including potential accused and witnesses) are themselves frequently in a state of flux (and may be taking steps to actively thwart the OTP's investigations).

The politics of a country that is in conflict, or is emerging from conflict, can change dramatically and quickly, affecting all those who are deeply embedded in political structures, with significant consequences for the investigation itself. And as noted above, unlike most domestic prosecutors (or investigating judges), prosecutors at the ICC have very few tools with which to control the variables they confront. They cannot lock down testimony, they cannot compel witnesses, and they cannot easily obtain nonwitness evidence (through, for example, wiretaps, document subpoenas, surveillance, and so forth).

Moreover, there is often a dynamic relationship between the ICC and the investigation itself. The progress of an investigation may have an influence on the willingness of witnesses to participate. For many, cooperating with an ICC investigation will amount to a significant political act: The cooperator will be siding with investigators against entrenched centers of power. That choice will be particularly acute for "insider" witnesses who are usually insiders precisely because they are close to the potential suspects. For them, choosing to cooperate with the ICC is often a life-changing event. Some will not be prepared to make this choice until they are certain that the ICC is going to act, or until they see that the suspect is going to be arrested, or until they know if the suspect will be detained, or even until they see if the judges will confirm the charges. At the same time, some witnesses will become more afraid or deterred once an investigation or prosecution progresses. Thus not only is the office investigating in a dynamic environment, it is *affecting* that environment through its investigative actions.

The office confronted many of these circumstances in the Libya investigation. As noted above, the Libya case was unexpectedly referred to the ICC on February 26, 2011, just eleven days after the conflict began.[115] The unanimous referral marked significant confidence in, and support for, the ICC, and many countries immediately offered to assist the office in its investigative

115. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

efforts.[116] At the same time, the prosecutor was justifiedly concerned that the support for the ICC's work would not necessarily last (in fact it did not), and he also thought that the ICC had an important role to play in immediately deterring ongoing crimes in the conflict.[117] For those reasons, he believed that it was important for the office to move as quickly as possible in its investigations.

The office faced serious witness-security challenges when beginning investigations. Although the eastern part of Libya quickly came under the control of the rebels, and many journalists and NGOs traveled to Benghazi and other cities in that area, the ultimate success of the rebels was far from certain.[118] The office had to consider that if investigators interviewed witnesses in Libya and Gaddafi's forces then retook control over the country, then the ICC would have no way of protecting those witnesses (who would no doubt be exposed as ICC contacts or witnesses). In addition, according to the information then available, even though the rebels controlled the eastern part of Libya, there were still Gaddafi loyalists who could threaten persons perceived as supporting the ICC.[119] Accordingly, at the beginning of the investigation, the office looked for evidence that was already outside of Libya or that was obtained by individuals who were able to travel into the country.[120] As a result of the conflict, many people, including many high-level insiders who defected, went to Egypt, Tunisia, other countries in the Middle East, as well as Europe.[121] In addition, many people who left brought out pictures, videos, and reports of events, as did many journalists and NGO investigators who went in and came out again.[122]

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116. *See* OFFICE OF THE PROSECUTOR, FIRST REPORT, *supra* note 93.

117. *See* Marlise Simons, *International Criminal Court Begins Libya Inquiry*, N.Y. TIMES (Mar. 3, 2011), http://www.nytimes.com/2011/03/04/world/africa/04hague.html?_r=0 (quoting ICC Prosecutor Luis Moreno-Ocampo as saying that ICC intervention in Libya would have a "deterrent effect").

118. *See generally* Martin Chulov, *Libyan City Dubbed 'Free Benghazi' as Anti-Gaddafi Troops Take Control*, GUARDIAN (Feb. 23, 2011, 9:08 AM), http://www.theguardian.com/world/2011/feb/23/libya-free-benghazi-anti-gaddafi-troops, Lauren Smith-Spark, *Are Libya's Rebels Edging Closer to Victory?*, CNN (Aug. 18, 2011, 1:00 PM), http://www.cnn.com/2011/WORLD/africa/08/17/libya.war.momentum/index.html.

119. *See* Adrian Blomfield, *Libyan Rebels Step up Purge against Gaddafi Loyalists*, TELEGRAPH (Aug. 1, 2011, 8:23 PM), http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8675874/Libyan-rebels-step-up-purge-against-Gaddafi-loyalists.html (indicating that Gaddafi loyalists continue to operate within rebel-controlled territory in Libya); Yaroslav Trofimov, *Gadhafi Loyalists Emerge in Rebel Areas*, WALL ST. J. (Mar. 16, 2011), http://online.wsj.com/article/SB10001424052748704396504576204621346511898.html.

120. *See* Moreno-Ocampo, Statement to the UN Security Council on the Situation in the Libyan Arab Jamahiriya, *supra* note 80 (noting that in the investigation's initial phase no interviews were performed inside Libya).

121. *See, e.g.*, *Another Senior Libyan Official Resigns*, NBC NEWS (Mar. 31, 2011, 1:27 PM), http://www.nbcnews.com/id/42354835/ns/world_news-europe/t/another-senior-libyan-official-resigns/#.Uj35Zj-Ak6k; John F. Burns & Scott Sayare, *Libyan Oil Minister Said to Defect to Tunisia*, N.Y. TIMES (May 17, 2011), http://www.nytimes.com/2011/05/18/world/africa/18libya.html; David D. Kirkpatrick & C.J. Chivers, *Anxiety Roils Libyan Capital Amid Top-Level Defections*, N.Y. TIMES (Mar. 31, 2011), http://www.nytimes.com/2011/04/01/world/africa/01libya.html?pagewanted=all.

122. *See, e.g.*, AMNESTY INT'L, THE BATTLE FOR LIBYA: KILLINGS, DISAPPEARANCES, AND TORTURE (2011), *available at* http://openanthropology.org/libya/AI_Battle_of_Libya.pdf; RICHARD

Many of the witnesses who left Libya were willing to talk, while some likely wanted to wait to see how events would unfold in Libya and who would come out on top.[123] Investigators had to consider that some who were implicated in the events but later defected might be willing to tell only part of the story, particularly in the early days, while others might be more forthcoming. In a period of approximately three months, the OTP was able to present an arrest-warrant application to the pre-trial chamber, and warrants for Muammar Gaddafi, his son Saif Al-Islam, and his Military Intelligence Chief Abdullah Al-Senussi were issued one month later.[124] The task was made easier because there was clear evidence that Muammar Gaddafi exercised tight control over the country and that the other two suspects worked closely with him.[125] The various military and security forces that violently suppressed the rebels would not have done so without clear direction from the top.[126] Evidence from witnesses, as well as video of Gaddafi and Saif and speeches by them, showed that the suspects directed the attacks on protesters.[127]

Was the prosecution's investigation complete? No. The limited access to Libya made that impossible. Should the OTP have continued collecting evidence before bringing an arrest-warrant application? It is difficult to argue that this would have been a wise approach. A few months after the arrest warrants were issued, the Gaddafi government fell and the war was over.[128] The

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SOLLOM & KATHERINE CLOSE, PHYSICIANS FOR HUMAN RIGHTS, WITNESS TO WAR CRIMES: EVIDENCE FROM MISTRATA, LIBYA (2011), *available at* https://s3.amazonaws.com/PHR_Reports/Libya-WitnesstoWarCrimes-Aug2011.pdf; *see also* Jeremy W. Peters, *Free Times Journalists Give Account of Captivity*, N.Y. TIMES (Mar. 21, 2011), http://www.nytimes.com/2011/03/22/world/africa/22times.html?pagewanted=all.

123. *See Libya: Col Gaddafi expected to be among ICC arrest warrants,* TELEGRAPH (May 16, 2011, 11:38 AM), http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8516171/Libya-Col-Gaddafi-expected-to-be-among-ICC-arrest-warrants.html; Luis Moreno-Ocampo, Prosecutor, Int'l Criminal Court, Statement by ICC Prosecutor on decision by Pre-Trial Chamber I to Issue Three Warrants of Arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi (June 28, 2011) (transcript available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/statement%20by%20icc%20prosecutor%20on%20decision%20pre_trial%20chamber%20i%20to%20issue%20three%20warra.aspx) (stating that inner circle can be part of the problem or part of the solution).

124. *See* Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11, Warrant of Arrest for Abdullah Al-Senussi (June 27, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1099332.pdf; Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi (June 27, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1099321.pdf; Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11, Warrant of Arrest for Saif Al-Islam Gaddafi (June 27, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1099329.pdf; Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11, Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi (May 16, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1073503.pdf.

125. *See* Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11, Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ¶¶ 1–7 (May 16, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1073503.pdf.

126. *See id.* ¶ 8–15, 35.

127. *See id.* ¶¶ 8–23.

128. *See Timeline: Libya's Civil War Nears End*, REUTERS (Oct. 20, 2011, 7:25 AM), http://www.reuters.com/article/2011/10/20/us-libya-events-idUSTRE79J24N20111020.

Libyan public's attention, and to a large extent the attention of the international community, turned away from what had happened during the war and towards rebuilding Libya, creating a new government, and enhancing security.[129] Had the prosecution waited, its work would have been far less relevant.

At the time the OTP sought arrest warrants, it already had strong evidence. But at that time the OTP also knew, from a practical perspective, that if the Libyan suspects were ever arrested and brought to The Hague, additional evidence would then become available by way of unfettered access to Libya. Thus although the investigation was incomplete, the OTP could have high confidence that it could prove its cases to the requisite standard.

By acting during the conflict, the court set down an important marker. The arrest warrants were welcomed by Gaddafi opponents within Libya.[130] Moreover, when the North Atlantic Treaty Organization war effort in Libya began to stall in the early summer of 2011, reports emerged that France was interested in negotiating a settlement.[131] The arrest warrants constrained the ability of international actors to consider granting any form of immunity to Gaddafi and his close associates. When the Gaddafi government fell, the existence of the warrants also served as a benchmark for the treatment of accused war criminals in the former regime. Although this process was not respected in the case of Gaddafi himself, who was captured and almost immediately executed by a mob, the emerging government of Libya has made a commitment to investigate and prosecute Saif and Al-Senussi.[132] Whether they succeed or not, the intervention of the ICC will serve as the standard by which their efforts are measured. In sum, then, it was important for the ICC to act, even if the investigation was not yet complete.

V
CONCLUSION

All of the different situations investigated by the ICC present, and will continue to present, different challenges. Sometimes, all of the various factors will point towards support for investigation and prosecution, and the work of the ICC will advance in an orderly fashion, allowing the OTP to complete all of its investigation before the confirmation hearing or even before bringing charges. But in most cases the investigative practice of the ICC will necessarily be reactive and dynamic. It will require adjusting practice in order to respond to

129. Mark Kersten, *Between Justice and Politics: The International Criminal Court's Intervention in Libya* 22, (Working Paper), *available at* http://www.academia.edu/1558775/Between_Justice_and_Politics_The_International_Criminal_Courts_Intervention_in_Libya (describing loss of interest by international community in pursuing justice in Libya).

130. *ICC's Ocampo: 'Justice will be done in Libya'*, ALJAZEERA (June 28, 2011, 11:53 AM), http://www.aljazeera.com/news/africa/2011/06/201162810322451 1523.html.

131. Ruth Sherlock & Richard Spencer, *Libya: France Risks NATO Split Over Call for Gaddafi Talks*, TELEGRAPH (July 11, 2011, 6:20 PM), http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8630778/Libya-France-risks-Nato-split-over-call-for-Gaddafi-talks.html.

132. Murphy, *supra* note 84.

changed circumstances and to take advantage of opportunities that arise.

Given all of the variables and the OTP's limited tools to control and manage all of the different moving parts, an overly rigid and formalistic approach that insists that the investigation be "complete" before arrest or confirmation is unwise. The procedures and process must account for the realities of practice at the ICC. Although the prosecution cannot investigate its case forever, and the rights of the defense require that it know the case that it must answer, there must be some flexibility in allowing the prosecution to continue its investigations even after confirmation in order to insure that it fulfill its obligation to uncover the truth.