

DEFENSIVE PRACTICES: REPRESENTING CLIENTS BEFORE THE INTERNATIONAL CRIMINAL COURT

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I

INTRODUCTION

When examining particular aspects of the work of defense counsel, especially at the international level, it is useful to first take a step back and consider the role and function of the defense in the system of criminal justice. Certain commonalities exist in the practices of defense counsel, regardless of the jurisdiction or legal system in operation. For one, the core obligation of a defense counsel is to provide effective representation to the client. This general obligation begs the question, What is meant by “effective representation”? Certainly, it entails a duty to provide objective legal advice to the client and to be an advocate on his behalf in all litigation. This necessarily encompasses written and oral advocacy on behalf of the client at all stages of the criminal process.

The relationship between client and counsel is built upon trust and confidence, which must be fostered. Attorney–client privilege is the bedrock of this relationship. It is now well accepted that counsel must take instructions from a client and heed the objectives set by the client, to the extent that such

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objectives are lawful and do not run afoul of rules of deontology.¹ The strategy by which such lawful objectives are achieved is, however, a matter for counsel to determine, albeit that counsel necessarily has a duty to consult with and explain to the client the approach taken.

That much is uncontroversial. However, defense strategy is very often an area where equally equipped and experienced counsel may diverge. Accordingly, are there any general practices that can be discerned as “best practice” to guide counsel in deciding upon an appropriate defense strategy? At the very least, are there any challenges frequently encountered that commend a particular solution?

As a general proposition, it should be recognized that defense work is not for the fainthearted. This is true in both domestic and international practice. In each, the typical defense team is outnumbered, out-resourced and overworked, and is defending individuals very often already convicted, by one-sided media coverage and popular sentiment in the court of public opinion. In the case of a client suspected or accused of committing international crimes, the public perception of the client’s guilt is often further magnified by the assistance of well-financed civil-society groups, nongovernmental organizations, and international media pushing a narrative that becomes accepted as the “truth” even before the client appears in court. How then can a defense counsel swim against the tide to provide effective representation to his or her client?

Most essential, perhaps, is that defense counsel must understand not only his or her role, in a functional sense, in the criminal justice system, but also the manner in which a defense counsel must conduct him or herself while discharging this responsibility. It is apt to recall Robert F. Kennedy’s well-known statement on the most essential quality of an attorney: “Courage is the most important attribute of a lawyer. . . . It can never be de-limited, dated or outworn, and it should pervade the heart, the halls of justice, and the chambers of the mind.”² The eloquence of the formulation used by the former attorney general of the United States should not disguise the substance and truth underpinning his message. It was not a mere rhetorical flourish. A defense counsel must act courageously in defense of his or her client, to the extent permitted by the law and the applicable codes of ethics. Perhaps it is Lord Brougham who is best known for encapsulating the high duty counsel owes in discharge of his or her responsibilities. Lord Brougham’s submissions before the

1. See, e.g., Int’l Criminal Court, Assembly of States Parties, *Code of Professional Conduct for Counsel*, res. 1, art. 14(2), ICC Doc. ICC-ASP/4/Res.1 (Dec. 2, 2005), available at http://www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1_English.pdf (“When representing a client, counsel shall: (a) Abide by the client’s decisions concerning the objectives of his or her representation as long as they are not inconsistent with counsel’s duties under the Statute, the Rules of Procedure and Evidence, and this Code; and (b) Consult with the client on the means by which the objectives of his or her representation are to be pursued.”).

2. RICHARD ZITRIN AND CAROL M. LANGFORD *THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER, AND GREED* 1 (1999).

court when robustly defending Queen Caroline against King George IV in 1820 do lean towards hyperbole on occasion, but the essential duty counsel owes to the client that he tried to convey both resonates and remains relevant today:

An advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means,—to protect that client at all hazards and costs to all others, and among others to himself,—is the highest and most unquestioned of his duties; and he must not regard the alarm—the suffering—the torment—the destruction—which he may bring upon any other. Nay, separating even the duties of a patriot from those of an advocate, and casting them, if need be, to the wind, he must go on reckless of the consequences, if his fate it should unhappily be, to involve his country in confusion for his client's protection!³

Such traditional notions, garbed in rich language, may sometimes appear outdated and irrelevant in an age of electronic courts, electronic disclosure, and saturated media coverage. But rather than being quaint relics of a bygone age, they are qualities without which an accused cannot be adequately represented. They not only constitute values and, perhaps, even moral qualities personal to each advocate, but also provide touchstones of principle that can guide a counsel's path and enhance justice when applied consistently by the defense bar. Accordingly, when examining the practices of the defense before the International Criminal Court (ICC)—or any court—it is important to always keep in mind these core principles with which a defense counsel must act to provide effective representation to his or her client.

It is impossible to commence a discussion of defense practices before the ICC without acknowledging the critical role played by the ad hoc and hybrid courts and tribunals in the establishment and work of the ICC. That said, it is important to recognize that the ICC is, foundationally, quite different than its sister ad hoc international and hybrid tribunals and courts—namely, the International Criminal Tribunal for the former Yugoslavia (ICTY),⁴ the International Criminal Tribunal for Rwanda (ICTR),⁵ the Special Court for Sierra Leone (SCSL),⁶ the Special Panel for Serious Crimes (SPSC),⁷ the Special

3. HENRY LORD BROUGHAM, *Speeches in Defence of Her Majesty Queen Caroline*, in 1 SPEECHES OF HENRY LORD BROUGHAM 105 (1838) (quoted in Lawrence J. Vilaro & Vincent Doyle, *Where did the Zeal go?*, 38 LITIG. 1, 2 (2011)).

4. See S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993) [hereinafter ICTY Statute] (establishing the ICTY).

5. See S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute] (establishing the ICTR).

6. See S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000) (requesting “the [UN] Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with this resolution”). The UN Secretary-General did in fact establish the SCSL. See U.N. Secretary-General, Letter dated Mar. 6, 2002 from the Secretary-General addressed to the President of the Security Council, attachment, U.N. Doc. S/2002/246, art. 11 (Jan. 16, 2002) [hereinafter SCSL Statute].

7. See S.C. Res. 1272, U.N. Doc. S/Res/1272 (Oct. 25, 1999) (establishing the United Nations Transitional Administration in East Timor (UNTAET), which in turn established the SPSC). The UNTAET established the SPSC in 2000. See United Nations Transitional Administration in East Timor

Tribunal for Lebanon (STL),⁸ and the Extraordinary Chambers in the Courts of Cambodia (ECCC).⁹ The ad hoc international and hybrid tribunals and courts, as their titles generally indicate, were created to investigate and prosecute persons alleged to have been responsible for the commission of international crimes—crimes against humanity, war crimes, genocide, and, in the case of the STL, serious violations of the Lebanese Criminal Code, including terrorism¹⁰—that had taken or were taking place within the particular states over which these judicial entities exercised jurisdiction at particular times.

The ICC, by contrast, is a permanent and global international criminal institution whose historical and societal importance,¹¹ fundamental purpose,¹² and complementarity of jurisdiction¹³ are all recognized in the preamble to its statute. In addition, the process of establishing and governing the ICC, a treaty-based organization with the above-mentioned goals and purpose, has involved a much wider range of actors than that involved in the creation and governance of the ad hoc international and hybrid tribunals and courts.¹⁴ This, in turn, has

Reg. 2000/15, Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000) [hereinafter SPSC Statute]. The SPSC had jurisdiction over crimes of genocide, crimes against humanity, and war crimes allegedly committed in East Timor in 1999, and operated within the District Court of Dili in East Timor until 2005.

8. S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007) [hereinafter STL Statute] (establishing the STL).

9. G.A. Res. 57/228, U.N. Doc. A/RES/57/228 (May 22, 2003) (approving the establishment of the ECCC). The ECCC was subsequently established by way of agreement between the United Nations and Cambodia. *See* Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, June 6, 2003, 2329 U.N.T.S. 117 [hereinafter ECCC Statute].

10. STL Statute, *supra* note 8, at art. 2.

11. Rome Statute of the Int'l Criminal Court pmb., July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute] (stating the parties are “[m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”).

12. *Id.* (stating the parties “[a]ffirm that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,” and are “[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”).

13. *Id.* (stating the parties “[r]ecall that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”).

14. The ad hoc international and hybrid tribunals and courts are either creations of the fifteen-member UN Security Council acting pursuant to chapter VII of the UN Charter, *see* ICTR Statute, *supra* note 5; ICTY Statute, *supra* note 4; SPSC Statute, *supra* note 7, or institutions based upon agreements between the UN and the state in question, *see* ECCC Statute, *supra* note 9; STL Statute, *supra* note 8; SCSL Statute, *supra* note 6. For a synopsis of the decades-long process that culminated in the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, Rome, It., June 15–July 17, 1998, *Rome Statute of the International Criminal Court and the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court [with an annex containing the resolutions adopted by the Conference]*, U.N. Doc. A/CONF.183/13 (Vol. I) (July 17, 1998) (better known as the “Rome Conference”), which commenced in 1998 and was attended by representatives of 160 states, various intergovernmental

impacted the foundational documents of the ICC—the Rome Statue of the International Criminal Court (Rome Statute) and the Rules of Procedure and Evidence (RPE)¹⁵—and the manner in which the ICC functions.

In this article, we provide our perspective—as two practitioners who have each had the privilege of appearing for the defense in several cases before the ICC—on a few selected issues relevant to defense practice. In particular, we will endeavor to show how the nature of the ICC’s jurisdiction and its organizational structure impact the decision-making and practice of the defense in certain general respects. These encompass issues such as the allocation of limited personnel and material resources, the conduct of evidence review and investigations, and broader strategy.

In commencing this discussion it is important to consider the impact of the above-mentioned foundational differences between the ICC and its ad hoc and hybrid brethren on the court as an institution. The first prosecutor of the ICC was not faced, upon election, with an immediate and clear imperative to commence large-scale and intensive investigations and prosecutions in any particular country. In this respect, the prosecutor was in a far more privileged position than the first prosecutors of the ICTY and ICTR who faced the massive crime scenes of the former Yugoslavia and Rwanda respectively. The judges and Registry also had time before having to confront real issues of concern to the defense.¹⁶ Whilst this gave the prosecutor and the other organs of the court time to prepare for the first case that would come before it, it seems that the luxury of time may have had an unintended but direct effect. The lack of cases before the court led to staff members having an abundance of time in which many theoretical discussions took place internally in and between the various organs of the court. Administrative structures and modalities were set up and promulgated, without any input from the practicing defense and without regard to the actual demands of court work. In the early days, it may not be too brutal to characterize the ICC as a think tank of a court divorced or unfamiliar with the realities of criminal investigations and courtroom litigation—at least from the defense perspective. In short, these discussions have contributed to internal policies being adopted that are sometimes unduly rigid, and excessively bureaucratic. It seems that only as the court gets busier will some of these

entities and hundreds of nongovernmental organizations, see WILLIAM SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 1–27 (2010).

15. 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).

16. For example, the transfer of the first suspect into the ICC’s custody, Thomas Lubanga, occurred only on March 16, 2006. See *The Prosecutor v. Thomas Lubanga Dyilo*, INT’L CRIM. CT., 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 (ICC website providing a summary of the case and linking to case documents).

impractical and inefficient policies be replaced by ones that are more sensitive to the real demands that the main court actors (judges, prosecution, legal representatives for the victims and the defense, including suspects and accused persons) actually encounter.

Additionally, it is our view that the ICC prosecutor's single but lengthy term of appointment¹⁷ has, arguably, made the court less dynamic and less capable of amending and revising procedures and practices once established. Such a long term for prosecutor hampers the ability of the Assembly of State Parties, which supervises the ICC, from actually pausing after a period and assessing whether the prosecutor of the ICC is discharging his or her responsibilities as anticipated, and in a manner that is fostering greater respect for the rule of law and accountability—or the converse. Much damage can be caused to the integrity and credibility of the Office of the Prosecutor—and therefore the ICC itself—in nine years. The risk of such a “rogue” or “inept” prosecutor would be somewhat mitigated by having the prosecutor elected for a shorter (but renewable) term. This risk is simply not present in the case of judges who are elected for a similar term. No one judge sets the law for the ICC. There are a minimum of three judges that make all decisions of great importance and there are at least eleven judges elected and serving at any one time, whereas there is only one person—the prosecutor—who sets the policy of his or her office.

We offer our perspective on defense practices in six parts (the first being this introduction). In part II we detail the specific factors and tensions that inform defense practice at the ICC. As suggested above, from a macroperspective the work of the defense takes place within a system that has resulted from a particular confluence of historical, political, moral, legal, and administrative circumstances and influences. In part II we focus on defense practices from a more micro perspective. In this regard, the work of the defense is largely reactive in nature, in that it is the actions of other participants in the ICC criminal process—the prosecution, chambers, Registry, and States Parties to the Rome Statute—to which the defense must respond and that shape the manner in which the defense undertakes its work.

In parts III, IV, and V we examine particular areas of the criminal process before the ICC, and activities related thereto, within which defense practices take place. In this article we will draw heavily upon our experiences to provide practical insight into defense practices before the ICC.

In part III we explore the disclosure process between the prosecution and defense before the ICC, a particularly ripe area for discussion of defense practices given the centrality of disclosure in driving defense investigations and strategy throughout the preconfirmation and pretrial phases of a case. We submit that the manner and timing of prosecution disclosure, the legal regime

17. The standard term for the prosecutor of the ICC is nine years, Rome Statute, *supra* note 11, at art. 42(4), which is more than double the (renewable) four year term applicable to the prosecutor of the ICTY and ICTR.

for disclosure at the ICC, and, to a lesser extent, the process of defense disclosure at the confirmation-of-charges stage, place a heavy burden on defense resources and unnecessarily hinder the defense's ability to efficiently and effectively carry out its primary duty as the legal advocate of a suspect or accused person facing the most serious of criminal charges.

In part IV we examine defense practices with respect to the confirmation-of-charges process (a procedural stage unique to the ICC). In particular, we examine strategic considerations for the defense in view of the possible outcomes following a confirmation hearing. We highlight the potential risks and benefits arising from putting forth a robust and evidence-heavy defense at the confirmation stage as well as the uncertain legal position of suspects against whom judges have declined to confirm any charges.

In part V we explore the conduct of defense investigations before the ICC, namely, the impact on defense investigative practices flowing from (1) the reality of the ICC as an institution exercising global criminal jurisdiction (which necessarily limits the expertise and resources allocable to any particular situation), (2) the basis of the court's jurisdiction (which impacts the prosecution's approach to investigations, and state cooperation with the court), and (3) the process of disclosure at the ICC (which is examined in detail in part III).

In part VI we conclude the article with a summary of key findings from parts III through V and provide further analysis of defense practices within these three areas from the perspective of practice theory.

II

DEFENSIVE PRACTICES

In this article we examine the work of the defense before the ICC through the lens of practice theory. Practice theorists seek to describe and provide understanding of "social and human phenomena"¹⁸ by identifying and analyzing the "bundles of [recurrent] practices"¹⁹ that underlie such phenomena. Practice theorists assert that the actions of individual actors "take place and are intelligible only as part of an ongoing practice and against the 'more or less stable background of other practices,'"²⁰ but recognize that "[p]ractices are . . . always necessarily open to contestation and this keeps them continuously in a state of tension and change."²¹

Defense teams practicing before the ICC are small ad hoc entities, not permanent institutions like the four organs of the court.²² Nonetheless, the

18. DAVIDE NICOLINI, PRACTICE THEORY, WORK, AND ORGANIZATION: AN INTRODUCTION 6 (2013).

19. *Id.* at 2.

20. *Id.* at 5 (citation omitted).

21. *Id.* at 6.

22. These are the Presidency, chambers, the Office of the Prosecutor, and the Registry. Rome

utility of practice theory is not limited to larger organizations.²³ Practice theory can therefore serve as a valuable tool for identifying common issues facing the defense at the ICC and understanding the wider context within which ICC defense counsel operate. This in turn provides insight into the decision-making and actions of defense counsel in carrying out their core duties of providing effective representation to the client. Additionally, and as recognized above, the actions of individual defense counsel in deciding upon a particular course of action can influence how future counsel (as well as the organs of the court) will make decisions and act with respect to similar issues. Such practical “precedents” are perhaps of greater significance at the ICC, which is still a relatively young institution with a very wide mandate.

On an average day, the work of a defense team practicing before the ICC at the preconfirmation or pretrial stage of a case may involve, for example, the following: consultation with the client on case strategy, evidence analysis, or team administration matters; receipt, organization, and analysis of prosecution disclosure; drafting of a motion seeking particular relief or responding to a motion from another party or participant; drafting of legal memoranda on procedural or substantive-law issues; communications with the prosecution seeking disclosure of information or items relevant to the defense’s preparation; communications with the court’s Registry on legal aid, third-party cooperation, or witness protection matters; interviewing a potential witness in person or over the phone; and interteam discussion and decision-making on investigative and legal strategy and work distribution. The lead defense counsel, whom the client has retained to represent him or her before the ICC, may be directly involved in these activities, or lead counsel may oversee and provide appropriate instruction to other members of the defense team in conducting these activities. During the confirmation hearing and trial proceedings, the defense will also engage in activities such as preparing and conducting cross-examination of prosecution witnesses, examining defense witnesses, and making submissions on the admissibility and probative value of items of proposed evidence.

The above-described activities underlie the wider “phenomena” (to use the language of practice theory) of particular defense practices. As set out in part I, in this article we focus on three such phenomena: (1) defense approaches to prosecution disclosure at the ICC, (2) strategic considerations for the defense at the confirmation-of-charges stage, and (3) defense investigations. In each of these three areas, outside factors play a significant role in determining how the “bundles of practices”²⁴ underlying these phenomena take place.

For example, when receiving disclosure from the prosecution, a defense team must conduct a preliminary review of and then organize the items received

Statute, *supra* note 11, at art. 34.

23. See NICOLINI, *supra* note 18, at 4 (analyzing a single “class” in a school—composed of, among other things, a teacher and students—through practice theory).

24. NICOLINI, *supra* note 18, at 2.

in a manner that allows for the proper analysis of each item vis-à-vis other items and relevant information (such as which witnesses may have knowledge of the item) as well as with respect to where the item of evidence fits within the prosecution's theory of the case. The defense must then analyze in-depth the content and value of each disclosed item. Following this, the pertinent information extracted from each item of evidence must be incorporated into the defense's wider analysis of the prosecution's case theory as well as into the defense investigation plan.²⁵ As will be examined below, the manner in which the defense undertakes these practices when approaching the issue of prosecution disclosure is shaped and impacted by the following factors, among others: the timing of prosecution disclosure including of the prosecution's core charging document, the Document Containing the Charges (DCC); the scope of any redactions applied to an item, including to the identity of a witness; the gradual disclosure of less-redacted versions of an item; and the legal parameters of the disclosure regime itself, as set out in the Rome Statute, RPE,²⁶ and ICC jurisprudence.

The practices underlying the other two phenomena examined in this article are similarly shaped by factors outside the defense's control. With respect to the issue of strategic considerations for the defense at confirmation (examined in part IV), article 61(7) and (8) of the Rome Statute sets out the legal outcomes that the defense may face following a pre-trial chamber's decision on the confirmation-of-charges hearing.²⁷ However, each future defense counsel will need to take into account the record of the outcomes of actual confirmation hearings and, if applicable, subsequent trial proceedings when considering the appropriate case strategy for his or her client at the confirmation stage.

The practices underlying defense investigations (examined in part V)—such as the creation of an investigation plan, conducting investigations in the field, and seeking the assistance of states—are shaped and impacted by the context in which these investigations take place (the state of the *locus in quo* of the alleged crime and the type of jurisdiction exercised under article 13 of the Rome Statute) as well as by the issue addressed in part III, the disclosure regime at the ICC.

By examining these three areas of defense phenomena before the ICC through the lens of practice theory, as well as from the perspective of practitioners at the ICC, we aim to provide a greater understanding of the day-to-day functioning of the defense before the ICC as shaped by both external factors and the decision-making of individual defense counsel.

25. Naturally, the processes discussed—organization, analysis and incorporation—are not separated by strict boundaries and each may involve, to varying degrees, aspects of the other processes.

26. Int'l Criminal Court, RPE, *supra* note 15.

27. Rome Statute, *supra* note 11.

III

THE PRACTICE OF *INTER PARTES* DISCLOSURE AT THE INTERNATIONAL CRIMINAL COURT

Article 67(1)(b) of the Rome Statute guarantees a suspect or accused person adequate time and facilities for the preparation of his or her defense.²⁸ Article 67(1)(a) requires that a suspect or accused must “be informed promptly and in detail of the nature, cause and content of the charge[s]” against him or her.²⁹ Unfortunately, the practice that has developed at the ICC with respect to the manner and timing of prosecution disclosure to the defense at the confirmation and trial stages has undercut these fundamental rights, led to delays in proceedings, and caused unnecessary resource expenditure on the side of the defense.

This practice of prosecution disclosure additionally exacerbates the already heavy burden placed on the defense, with its comparatively limited resources, in having to comply with the requirements of the “E-court Protocol”³⁰ applicable in each case to *inter partes* disclosure and the provision of evidence to the ICC Registry.

A. Disclosure Practices and Their Impact on the Functioning of the Defense

With respect to the practice of the Office of the Prosecutor’s disclosure to the defense, this unfortunate state of affairs at the ICC has arisen for primarily three reasons: (1) late disclosure; (2) a regime for the protection of identifying information related to witnesses, potential witnesses, victims and “others at risk on account of the activities of the Court”³¹ that is overly broad, does not properly distinguish between the general public on the one hand and the suspect or accused on the other, and, at least at the confirmation stage, allows the prosecutor to submit and rely on anonymous summaries of witness evidence that may be significantly lacking in substance, coherence, or both; and (3) a cumbersome, lengthy, and resource-intensive process for the imposition and lifting of redactions.

28. *Id.*

29. *Id.*

30. See, for example, the e-court protocol applicable at the confirmation stage in *Prosecutor v. Kenyatta (Kenya II)*, *Kenya II*, Case No. ICC-01/09-02/11, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, ¶ 18-20 (Apr. 6, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1052098.pdf>. The version of the e-court protocol applicable at the confirmation stage in *Kenya II* is included as an annex to the above-cited decision. Int’l Criminal Court, Registry, *Unified Technical Protocol (“E-court Protocol”) for the Provision of Evidence, witness and victims information in electronic form*, ICC Doc. ICC-01/09-02/11-48-Anx1 (Apr. 7, 2011), available at <http://www.icc-cpi.int/iccdocs/doc/doc1052099.pdf>.

31. *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,” ¶ 54 (May 13, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc492175.pdf>.

1. Late Prosecution Disclosure

At the first modern international criminal tribunal, the ICTY, the prosecution provides the disclosure it relied upon to obtain the indictment against the accused to the defense at or shortly after the initial appearance of the accused.³² At the ICC this does not occur. Instead, a “final” deadline for prosecution disclosure at the confirmation stage is set at thirty days prior to the start of the confirmation hearing,³³ with the general disclosure process and other timelines at the confirmation and trial stages governed by decisions of the pre-trial and trial chambers.

The ICC prosecution’s approach has been to view this thirty-day “final” deadline for disclosure of its evidence, its DCC, and its list of evidence as a standard and permissible deadline for disclosure of core items of evidence and specific allegations against the suspect, with this mentality then carrying over to the disclosure process at the trial stage.

The practice in the case of *Prosecutor v. Abu Garda* is emblematic of this approach. The initial appearance of Mr. Abu Garda was held on May 18, 2009.³⁴ The defense did not receive a single item of disclosure from the prosecution until more than three months later, on August 24, 2009.³⁵ The confirmation hearing began on October 19, 2009,³⁶ with final substantive prosecution disclosure taking place on September 14, 2009, a few days prior to the thirty-day deadline.³⁷ This final disclosure included revised versions of summaries³⁸ of interview transcripts of six prosecution witnesses, core evidence in the case.³⁹ The DCC was disclosed only four days prior to this.⁴⁰

32. Rule 66 of the ICTY Rules of Procedure and Evidence mandates that the prosecutor shall make available to the defense “within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused.” Int’l Criminal Tribunal for the former Yugoslavia, 2d Sess., Jan. 17–Feb. 11, 1994, *Rules of Procedure and Evidence*, ICTY Doc. IT/32/Rev. 49 (May 22, 2013) [hereinafter Int’l Criminal Tribunal for the former Yugoslavia, RPE] (first adopted on Feb. 11, 1994), available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev49_en.pdf.

33. Int’l Criminal Court, RPE, *supra* note 15, at r. 121(3).

34. *Prosecutor v. Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, ¶ 5 (Feb. 8, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc819602.pdf>.

35. *Abu Garda*, Case No. ICC-02/05-02/09, Prosecution’s Communication of Potentially Exonerating Evidence Disclosed to the Defence on 24 August 2009 (Aug. 25, 2009), <http://www.iccpi.int/iccdocs/doc/doc731916.pdf>.

36. *Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, ¶ 13 (Feb. 8, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc819602.pdf>.

37. *Abu Garda*, Case No. ICC-02/05-02/09, Prosecution’s Communication of Incriminating Evidence Disclosed to the Defence on 14 and 17 September 2009 (Sep. 18, 2009), <http://www.iccpi.int/iccdocs/doc/doc745350.pdf>.

38. Pursuant to article 61(5) of the Rome Statute, the prosecution may rely upon summary evidence at the confirmation-of-charges hearing. Rome Statute, *supra* note 11.

39. This statement is based on the authors’ knowledge.

40. See *Abu Garda*, Case No. ICC-02/05-02/09, Public Redacted Version of Prosecution’s “Document Containing the Charges Submitted Pursuant to Article 61(3) of the Statute” filed on 10

The defense is required to file its list of evidence fifteen days prior to the start of the confirmation hearing pursuant to rule 121(6) of the RPE,⁴¹ so the three-person legal aid-funded defense team (including the authors) was left with effectively one and a half months to review, organize, and analyze thousands of pages of prosecution disclosure, consult with the client, and conduct defense investigations in circumstances where the defense was barred from entering the state (Sudan) where the three war crimes charges alleged were said to have occurred.⁴²

The following year, in the case of *Prosecutor v. Banda*, which involves the same factual matrix as the *Abu Garda* case, the single judge warned that he did not want a recurrence of the situation in the *Abu Garda* case, where core substantive disclosure to the defense—including the DCC—had occurred “so close to the 30 days’ deadline.”⁴³

Although tardy disclosure at the confirmation stage was not a significant issue in the *Banda* case given that the evidence being disclosed was substantially the same as that in the *Abu Garda* case, delayed disclosure continues to be standard operating procedure for the prosecution, to the detriment of the defense and the fundamental rights of suspects and accused persons. In *Prosecutor v. Kenyatta (Kenya II)*, the defense of Ambassador Muthaura placed the prosecution and pre-trial chamber on notice more than five months prior to the start of the confirmation hearing regarding the concerns of the defense as to the prosecution’s approach to disclosure.⁴⁴ At a status conference held on April 18, 2011, the Muthaura defense submitted as follows:

[The thirty-day final deadline for disclosure] is not a licence for the Prosecution to ride rough shod over the Defense Article 67 rights . . . [T]imely disclosure will depend upon the facts of the case, and it must always be seen through the prism of making the confirmation hearing effective and meaningful . . .

[T]he position of the Muthaura team is that your Honours must look at the case in hand, the complexity of case, the nature of the allegations and the types of evidence that the Prosecution wish to rely upon. And you cannot be hamstrung or handcuffed to a rigid rule that, in all cases, 30 days before the [confirmation] hearing is consistent with the obligations or consistent with the rights of the suspect to have adequate time and facilities and also a reasonable time before the hearing to get all the evidence.⁴⁵

Despite this, exactly at the thirty-day deadline, the prosecution disclosed to the defense its DCC, a more than 6600 page “in-depth analysis chart,”

September 2009 (Sep. 24, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc746719.pdf>.

41. Int’l Criminal Court, RPE, *supra* note 15.

42. This statement is based on the authors’ knowledge.

43. *Prosecutor v. Banda*, Case No. ICC-02/05-03/09, Transcript of Status Conference, 14 (June 23, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc899239.pdf>.

44. The confirmation-of-charges hearing in the *Kenya II* case commenced on September 21, 2011. *Kenya II*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 16 (Jan. 23, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>.

45. *Kenya II*, Case No. ICC-01/09-02/11, Transcript of Status Conference, 12:22–13:2, 18:14–20 (April 18, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1060257.pdf>.

purportedly meant to assist the defense and judges in understanding the evidentiary basis of the prosecution's case, and an additional 1300 pages of incriminatory disclosure, including more than 1200 pages of transcripts of witness interviews.⁴⁶ Thus, in addition to continuing its ongoing investigations based on the article 58 summons decision and previous prosecution disclosure in the case, the defense now had fifteen days to analyze the DCC and the 6600-page analysis chart, review hundreds of pages of new interview transcripts of a key prosecution witness, and, after this, undertake new or adapt ongoing investigations in Kenya based on these late disclosures.

The defense of Ambassador Muthaura, for example, within this fifteen-day period, and after undertaking the above-mentioned review, was able to arrange and conduct interviews with fifteen new witnesses, including eight within a twenty-four hour period,⁴⁷ and take signed statements from all of these individuals. Although the defense could undertake these investigations by working on a round-the-clock basis with senior attorneys moving from one interview to the next and junior members of the team immediately turning to the task of obtaining signed statements from witnesses, this hardly undermines or weakens the complaint that the defense did not have "adequate time" for its preparation. Moreover, the defense team of Ambassador Muthaura was funded from outside the legal-aid system and had more resources available to it (particularly with respect to manpower) than the average legal aid-funded defense team, such as that of Mr. Abu Garda.

This pattern of significantly delayed disclosure continues at the trial stage. At a status conference in the *Kenya II* case held on February 14, 2013, two months prior to the scheduled trial commencement date of April 11, 2013, the defense of both accused persons were adamant that the trial date must be vacated in view of the present state of disclosure and the fair-trial rights of the accused persons.⁴⁸ The Defense of Ambassador Muthaura submitted that

the disclosure system in this case is not fit for purpose. It is not working. . . . [W]e get a situation today where a fair trial is impossible in April not because of anything we have done, but because of the massive violations in the OTP. Your Honours, the reason I wished the Prosecution in all honesty to be invited to address the Bench as to the viability of the commencement date is because in other cases, for example in the Banda and Jerbo case, and your learned brother in this trial sits in that case also, the Prosecutor at the end Mr. Sachdeva sits in that case, the Prosecution with a straight face said that they would complete their disclosure in March and the Defense should be expected to be ready for trial in March. There is a pattern of conduct that besets

46. *Kenya II*, Case No. ICC-01/09-02/11, Prosecution's Document Containing the Charges, List of Evidence and Comprehensive In-Depth Analysis Chart of Evidence Included in the List of Evidence Submitted Pursuant to Article 61(3) and Rule 121(3) (Aug. 19, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1207444.pdf>. The number of pages referenced is based on the authors' knowledge.

47. See *Kenya II*, Case No. ICC-01/09-02/11, Muthaura Defense Notice of Withdrawal of Its Request for Adjournment of the Confirmation Hearing (Sept. 6, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1227231.pdf>.

48. *Kenya II*, Case No. ICC-01/09-02/11, Transcript of Status Conference, 18:23–25, 25:18–25 (Feb. 14, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1552621.pdf>.

this Court in my submission where the Prosecution are not taking their disclosure obligations seriously. . . . We are asking this Court to suspend the principle of expediency and the right of expedition to enable us to have adequate time to prepare our defense under Article 67, as well as to have proper disclosure during that period so that we may prepare for trial.⁴⁹

The defense of Mr. Kenyatta provided the following details regarding the amount of evidence the prosecution intended to rely upon at trial that was attributable to witnesses whose identities remained redacted from the defense, materials that had been disclosed only recently to the defense, or both:

The next point that I have concerns the number of witnesses whose identity has not been revealed to date . . . it's not again just the fact - the very important fact - of the name. It's the extent of the percentage of evidence that is related to the number of witnesses that are either unknown to the Defense or for example evidence which has been collected post-confirmation and served within the last few months. An initial calculation of the amount of evidence that the Prosecution seeks to rely on that was collated post-confirmation is 84 per cent.⁵⁰

On March 7, 2013, Trial Chamber V of the court vacated the April 11th trial date, provisionally rescheduling the commencement of trial for July 9, 2013, on the basis of, inter alia, "the defense submissions relating to the impact of delayed disclosure, which the Chamber must resolve."⁵¹

As alluded to in the above submissions of the Kenyatta team, the timing and continuation of prosecution investigations after the issuance of a summons to appear or arrest warrant, or the occurrence of the confirmation-of-charges hearing, is a major factor in the prosecution's practice of disclosing a significant amount of substantive material on the eve of, if not the day of, the final deadline for such disclosure. For example, in the case of *Prosecutor v. Abu Garda*, where the confirmation-of-charges hearing began on October 19, 2009, more than one-third of the witness statements relied upon by the prosecution were obtained as late as July and August of that year.⁵² However, with respect to the slightly less than one-third of the relied-upon statements that were obtained in 2008, it is unclear why at least these materials could not have been disclosed shortly after the May 2009 initial appearance of Mr. Abu Garda.

Needless to say, given the consistent practice of dilatory prosecution disclosure at the ICC, the defense must be vigilant regarding and devote significant resources toward the litigation of disclosure-related issues to protect the fundamental fair-trial rights of their clients. The defense should likewise expect to receive critical and substantial amounts of disclosure very close to the start of the confirmation hearing or the commencement of trial, including the prosecution's core charging document, and therefore make all possible efforts to organize, assess, and act upon this information once received within a limited

49. *Id.*

50. *Id.* at 29:1–10.

51. *Kenya II*, Case No. ICC-01/09-02/11, Order Concerning the Start Date of Trial, ¶ 10 (Mar. 7, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1564494.pdf>.

52. This statement is based on the authors' knowledge.

timeframe.

2. The Protection Regime of the ICC and the Manner of Prosecution Disclosure

Late prosecution disclosure is only one aspect of a troubled ICC disclosure regime. Once the defense receives prosecution disclosure it must of course be able to effectively analyze and utilize such disclosure for the purposes of investigations and preparations for the defense case.

Article 61(5) of the Rome Statute permits the prosecutor, at the confirmation-of-charges hearing, to rely on anonymous or summarised versions of witness interviews as opposed to interview transcripts, signed statements, or oral testimony.⁵³ However, as occurred in the *Kenya II* case, when such an anonymous summary consists of three-quarters of one page,⁵⁴ there is hardly any meat for the defense to sink its investigative teeth into.

On the opposite end of the spectrum, when the prosecution discloses hundreds of pages of transcripts of witness interviews that meander from topic to topic and feature unclear or contradictory timelines and answers, the defense is hard-pressed and must expend significant resources to decipher, organize, and understand a coherent prosecution narrative upon which to base its investigations. As addressed above, late disclosure further exacerbates this problem.

In a February 17, 2012 judgment in the *Banda* case,⁵⁵ the appeals chamber held that the prosecution cannot be required, pursuant to rule 112 of the RPE, to produce organized and signed statements of a witness's interview.⁵⁶ Rule 112 mandates that, pursuant to article 55(2) of the Rome Statute, interviews of persons whom the prosecution has grounds to believe committed a crime within the jurisdiction of the court (including, for example, a low-level direct perpetrator or a mid-level coperpetrator), must be audio or video recorded.⁵⁷ The transcripts produced from these recordings result in the aforementioned hundreds of pages of meandering narrative.

However, once the prosecution has actually made a decision as to which witnesses it shall rely upon for the purposes of the confirmation hearing and certainly for trial, there is, arguably, nothing preventing it from producing organized statements based on the interview transcripts that a witness can review and if necessary correct before signing—as is the normal course of

53. Rome Statute, *supra* note 11.

54. This statement is based on the authors' knowledge of a summary of the evidence of the individual designated as prosecution Witness 1.

55. Case No. ICC-02/05-03/09, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber IV of 12 September 2011 Entitled "Reasons for the Order on Translation of Witness Statements (ICC-02/05-03/09-199) and Additional Instructions on Translation," (Feb. 17, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1335042.pdf>.

56. *Id.* at ¶¶ 26-28.

57. Int'l Criminal Court, RPE, *supra* note 15.

events at most international tribunals—especially where the defense does not object to such an exercise being undertaken. Such a statement could be disclosed along with the transcripts of the interview, and would be in the interests of justice and certainly of great assistance to the defense in attempting to efficiently understand the prosecution’s case.⁵⁸

The scope of protective measures—in particular redactions—applied at the ICC is an additional cause of concern for the defense. At the very least it is one where defense counsel needs to be ever vigilant. At the ad hoc and hybrid international courts and tribunals, protective measures including redactions are primarily applied to the identity of witnesses and their families, with the anonymity of particularly at-risk witnesses lifted a certain number of months or weeks prior to the start of trial or the witness’s testimony.⁵⁹ The ICC likewise follows such an approach with respect to prosecution witnesses.⁶⁰

However, as established by the ICC appeals chamber in a May 13, 2008 judgment in the *Prosecutor v. Katanga* case,⁶¹ the relevant provisions of the Rome Statute⁶² and RPE,⁶³ when read together⁶⁴ oblige the prosecution, Registry, and chambers to assess the situation and provide for the protection of an additional and broad category of individuals: “others at risk on account of the activities of the Court.”⁶⁵

This is, of course, an admirable goal and decision of the appeals chamber. However, the implementation of this responsibility has resulted in a sweeping and resource-intensive redaction regime that is highly prejudicial to the ability of the defense to analyze prosecution disclosure and conduct investigations.

For example, in the case of *Prosecutor v. Banda*, many of the very same redactions that had, in the *Abu Garda* case, been instituted, for the most part, only after approval by the pre-trial chamber (whether proposed by the prosecution through the application process, or applied *proprio motu* by the pre-trial chamber), were approved for the current case and continued to apply at

58. The trial chamber arguably has the power to order the taking of such statements pursuant to its article 64(2) obligation to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused.” Rome Statute, *supra* note 11.

59. See, for example, Rule 69 of the ICTY Rules of Procedure and Evidence. Int’l Criminal Tribunal for the former Yugoslavia, RPE, *supra* note 32.

60. Rome Statute, *supra* note 11, at art. 64(3)(c); Int’l Criminal Court, RPE, *supra* note 15, at r. 76.

61. *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,” ¶ 54 (May 13, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc492175.pdf>.

62. Rome Statute, *supra* note 11.

63. Int’l Criminal Court, RPE, *supra* note 15.

64. Rome Statute, *supra* note 11, at arts. 43(6), 68(4) & 54(3)(f); Int’l Criminal Court, RPE, *supra* note 15, at rs. 76(4), 81(4) & 87(1).

65. *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,” ¶ 54 (May 13, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc492175.pdf>.

the trial stage.⁶⁶ This resulted in redactions that make the redacted documents difficult to comprehend.⁶⁷ For example, the names of individuals with whom a prosecution witness had happened to be visiting several years prior to, and in a wholly different part of Darfur than the African Union base that forms the subject of the case, were redacted.⁶⁸ The names of two high-ranking officials from an international organization who had briefly met with a prosecution witness in Darfur were also redacted.⁶⁹ Another individual in a witness's statement was simply identified by name (which was redacted from the defense) and described as a guest who was visiting from a particular European country.⁷⁰

In these circumstances, for the prosecution to submit or for a chamber to find that the appeals chamber's requirement of an "objectively justifiable risk" to the individual in question "aris[ing] from disclosing the particular information to the Defence"⁷¹ has been fulfilled is worrying. And these are not isolated examples.

Even more troubling are the redactions applied to individuals who are not prosecution witnesses or potential prosecution witnesses, but who are undoubtedly "potential witnesses" in the broader sense of the word. In the *Banda* case, redactions applied to the names and other identifying information of certain individuals who were present inside the African Union base in the months and days leading up to the attack on the base, and who therefore are persons whom the defense would wish to locate and speak to, were lifted more than two years after the prosecution completed the bulk of its disclosure to the defense, and only after months of defense-driven litigation seeking the lifting of these redactions.⁷²

The withholding of such information from the defense for such a long period is especially concerning in a case in which the defense cannot even enter the state in which the crimes alleged are said to have occurred. The proportionality test established by the appeals chamber for considering the appropriateness of imposing or continuing to impose redactions at the ICC requires a pre-trial or trial chamber to evaluate whether the redactions requested are "prejudicial to

66. Regulation 42 of the Regulations of the Court mandates that protective measures imposed in one case "continue to have full force and effect in relation to any other proceedings before the Court . . . subject to revision by a Chamber." Int'l Criminal Court, Assembly of States Parties, 5th Sess., May 17-28, 2004, *Regulations of the Court*, ICC Doc. ICC-BD/01-01-04 (May 26, 2004), available at http://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf.

67. This conclusion is based on the authors' knowledge.

68. This statement is based on the authors' knowledge.

69. This statement is based on the authors' knowledge.

70. This statement is based on the authors' knowledge.

71. *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," ¶ 71 (May 13, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc492175.pdf>.

72. This statement is based on the authors' knowledge.

or inconsistent with the rights of the accused and a fair and impartial trial.”⁷³ These redactions have been prejudicial to the fair-trial rights of the accused in view of the significant time and investigatory opportunities lost as a result of the delayed lifting of these redactions.

Apart from the individuals covered by these redactions, the manner in which redactions are applied, even at the trial stage, may render the disclosed material of limited value to the defense. Lead counsel for Mr. Kenyatta in the *Kenya II* case recently expressed the difficulties inherent in attempting to analyze disclosed materials and conduct investigations thereon, when the item in question is so heavily redacted:

I’ve done many cases in my career whereby I have put up with levels of redaction, or late information, and the trial goes on and I know I’ll be able to deal with it later on, but in this exceptional case which has great importance in relation to the nature of the evidence being alleged, I am advising the Court that I am not in a position now because I have not even been able to read the detailed evidence that [Prosecution counsel] Mr Manoj has said “Ah, because that could identify him or others, we can’t express who was at the meeting, we have to redact that because that might reveal who it was.” Well, I have news for the Prosecutor. That’s what a criminal case is about. That’s what we are entitled to do, and by their [the Prosecution’s] own admission they are failing to put us in that position.⁷⁴

Faced with such a heavy regime of protective measures, the defense must adapt accordingly. As mentioned above, the defense must be vigilant and proactive on disclosure issues, including challenging requests for the imposition of redactions and seeking the review and lifting of redactions when imposed. Admittedly, the task is a difficult one given that the defense must work from versions of the prosecution’s applications requesting redactions and the court’s decisions thereon that are themselves heavily redacted. Where feasible, and as discussed in the next part, the defense should also consider the logging of redactions as they are lifted so as to ensure that critical information is not overlooked as the disclosure and investigation process proceeds.

There is also a more fundamental danger with what has become a regime of almost reflexive imposition of redactions at the ICC—namely, that the process of application for, judicial review of, and imposition of redactions has become so unwieldy and unmanageable that outright miscarriages of justice may occur. As detailed below, the circumstances in the *Kenya II* case surrounding the failure of the prosecution, at the preconfirmation stage, to disclose an item of critical exonerating value related to a core prosecution witness—“Witness 4”—is a case in point.

73. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo Against the Decision of Pre-Trial Chamber I Entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81,” ¶ 34 (Dec. 14, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc243667.pdf>.

74. *Kenya II*, Case No. ICC-01/09-02/11, Transcript of Status Conference, 25:4–12 (Feb. 14, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1552621.pdf>.

The defense of both accused persons in the *Kenya II* case filed applications with the trial chamber in February 2013 seeking, inter alia, the referral of the case back to the pre-trial chamber or an available judge of the pre-trial division to determine whether the confirmation process was fatally flawed due to, among other things, the above-mentioned nondisclosure.⁷⁵ In its consolidated response to these filings, the prosecution “acknowledge[d] and regret[ed] its error in not disclosing Witness 4’s asylum affidavit prior to confirmation.”⁷⁶

As a reading of the defense applications and the prosecution’s response reveal, the written statements of Witness 4 were put forward by the prosecution, and relied upon by the pre-trial chamber, to establish, to the requisite standard of proof, the alleged existence and content of two meetings at which the supposed common plan in the case was said to have been formulated and implemented.⁷⁷ As submitted by the defense of Ambassador Muthaura,

The [pre-trial chamber] relied principally on the evidence of Witness 4 to establish these meetings. Indeed, the Majority stated at paragraphs 311 and 342 respectively of the Confirmation Decision that “*the occurrence of this meeting is established to the requisite threshold by the testimony of Witness OTP-4 who was present as a Mungiki representative and who provides a detailed account thereof*”. . . . It is clear, on any fair reading of the evidence or the Confirmation Decision, that without the evidence of Witness 4, there would not have been any sufficient basis to find the existence of a common plan to commit the crimes alleged in Nakuru and Naivasha, or accordingly, to confirm the case against Ambassador Muthaura.⁷⁸

In the aforementioned asylum affidavit, Witness 4 contradicts his statements to the prosecution that he attended one of the key meetings in question and provides information demonstrating that he could not have been present at the other meeting.⁷⁹ In short, and even as the prosecution admitted with respect to

75. *Kenya II*, Case No. ICC-01/09-02/11, Public Redacted Version of “Defence Application Pursuant to Article 64(4) for an Order to Refer Back to Pre-Trial Chamber II or a Judge of the Pre-Trial Division the Preliminary Issue of the Validity of the Decision on the Confirmation of Charges or for an Order Striking Out New Facts Alleged in the Prosecution’s Pre-Trial Brief and Request for an Extension of the Page Limit Pursuant to Regulation 37(2)” (Feb. 7, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1549410.pdf>; *Kenya II*, Case No. ICC-01/09-02/11, Defence Application to the Trial Chamber Pursuant to Article 64(4) of the Rome Statute to Refer the Preliminary Issue of the Confirmation Decision to the Pre-Trial Chamber for Reconsideration (Feb. 5, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1548545.pdf>.

76. *Kenya II*, Case No. ICC-01/09-02/11, Public Redacted Version of the 25 February 2013 Consolidated Prosecution Response to the Defence Applications Under Article 64 of the Statute to Refer the Confirmation Decision Back to the Pre-Trial Chamber, ¶ 31 (Feb. 25, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1557330.pdf>.

77. *Id.* ¶ 9.

78. *Kenya II*, Case No. ICC-01/09-02/11, Public Redacted Version of “Defence Application Pursuant to Article 64(4) for an Order to Refer Back to Pre-Trial Chamber II or a Judge of the Pre-Trial Division the Preliminary Issue of the Validity of the Decision on the Confirmation of Charges or for an Order Striking Out New Facts Alleged in the Prosecution’s Pre-Trial Brief and Request for an Extension of the Page Limit Pursuant to Regulation 37(2),” ¶ 14 (Feb. 7, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1549410.pdf> (internal citations omitted).

79. *Id.* ¶ 16.

Ambassador Muthaura,⁸⁰

Witness 4 was the principal source of evidence that supported the Prosecution's charges against Mr Muthaura at the confirmation stage. . . . [T]here would not have been sufficient evidence to confirm the charges against Mr Muthaura without Witness 4's evidence. . . . [T]he Prosecution's disclosure error could conceivably have affected the Pre-Trial Chamber's decision to commit Mr Muthaura to trial. In sum, Mr Muthaura presents the extremely rare case where it is appropriate to contemplate sending the case back to the Pre-Trial Chamber for reconsideration on the basis of the withheld Affidavit, and to consider the impact that the inconsistent statement might have on the confirmation decision.⁸¹

Accordingly, charges against at least one individual who appeared as suspect before the ICC were very likely wrongly confirmed for trial, resulting in concomitant stress and mental anguish to the individual and his family, damage to the individual's reputation, and the unnecessary expense of time and resources by the court, prosecution, and non-legal aid-funded defense. This injustice was only rectified on March 11, 2013, more than a year after the issuance of the confirmation decision in this case,⁸² when the prosecutor notified the trial chamber of her intention to withdraw all charges against Ambassador Muthaura.⁸³ The trial chamber subsequently authorized the termination of proceedings against Ambassador Muthaura on March 18, 2013.⁸⁴

Of course, of particular interest in the context of this article is the genesis of this cascading set of events—that is, the nondisclosure of Witness 4's asylum affidavit. As the defense submitted, the affidavit had been obtained by the prosecution more than one year prior to the confirmation-of-charges hearing in

80. With respect to Mr. Kenyatta, the prosecution submitted that [s]ending the confirmation decision back to the Pre-Trial Chamber for reconsideration would serve no purpose. . . . Assuming new confirmation proceedings were ordered, the evidence cited in the Prosecution [Pre-Trial Brief] and list of evidence would comfortably surpass the 'substantial grounds' threshold required to send a case to trial.

Kenya II, Case No. ICC-01/09-02/11, Public Redacted Version of the 25 February 2013 Consolidated Prosecution Response to the Defence Applications Under Article 64 of the Statute to Refer the Confirmation Decision Back to the Pre-Trial Chamber, ¶ 42 (Feb. 25, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1557330.pdf>. The defense of Mr. Kenyatta, not surprisingly, disputes the prosecution's position. See *Kenya II*, Case No. ICC-01/09-02/11, Public Redacted Version of the Defence Reply to the "Confidential Redacted Version of the 25 February 2013 Consolidated Prosecution Response to the Defence Applications Under Article 64 of the Statute to Refer the Confirmation Decision Back to the Pre-Trial Chamber" (March 8, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1565223.pdf>.

81. *Kenya II*, Case No. ICC-01/09-02/11, Public Redacted Version of the 25 February 2013 Consolidated Prosecution Response to the Defence Applications Under Article 64 of the Statute to Refer the Confirmation Decision Back to the Pre-Trial Chamber, ¶ 44 (Feb. 25, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1565223.pdf>.

82. *Kenya II*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>.

83. *Kenya II*, Case No. ICC-01/09-02/11, Prosecution Notification of Withdrawal of the Charges Against Francis Kirimi Muthaura, ¶ 1 (Mar. 11, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1565549.pdf>.

84. Prosecutor v. Muthaura & Kenyatta, Case No. ICC-01/09-02/11, Decision on the Withdrawal of Charges Against Mr Muthaura (Mar. 18, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1568411.pdf>.

the case, but was disclosed only a year after the confirmation decision.⁸⁵ The prosecution provided the following explanations as to why it had applied to the single judge of the pre-trial chamber to withhold in full the affidavit from the defense—as opposed to redacting or summarizing the affidavit—and the propriety of this application:

With the benefit of hindsight, the affidavit could and should have been disclosed to the Defence prior to the confirmation hearing, with redactions to information that could have revealed Witness 4's place of residence. The Prosecution acknowledges that the reasoning contained in its redactions application was insufficient in light of the potential significance of [the exculpatory information] and provided the Single Judge with inadequate information. The reality is, however, that a review of the relevant records demonstrates that the potential significance of [the exculpatory information] was not discovered until after the confirmation hearing

The Prosecution's [] records reveal that the affidavit was reviewed for relevance and disclosure by at least two Prosecution staff prior to the confirmation hearing. . . . The significance of the other sentence at issue – Witness 4's statement that someone told him about the Nairobi Club meeting – was not recognized. One must be familiar with Witness 4's statements that he attended the Nairobi Club meeting to spot the apparent inconsistency, and through an oversight,⁸⁶ the inconsistency was not identified during the disclosure review.

The defense of both accused persons challenged the above narrative that the prosecution put forth. For example, the Muthaura defense detailed the numerous opportunities various senior members of the prosecution, including those who interviewed the witness and took receipt of the affidavit, would have had to rectify the nondisclosure, and the fact that it was the defense that had to bring this most serious issue to the attention of the prosecutor and then the trial chamber.⁸⁷

Even if one were to accept, as the prosecution submits, that what occurred with respect to Witness 4's asylum affidavit was mere “error” or “oversight,” leaving disclosure review of documents pertaining to a key witness to a “junior ‘reviewer’”⁸⁸ who, according to the prosecution, was not familiar with the core evidence of the witness, speaks to a systemic failure in the Office of the

85. *Kenya II*, Case No. ICC-01/09-02/11, Public Redacted Version of “Defence Application Pursuant to Article 64(4) for an Order to Refer Back to Pre-Trial Chamber II or a Judge of the Pre-Trial Division the Preliminary Issue of the Validity of the Decision on the Confirmation of Charges or for an Order Striking Out New Facts Alleged in the Prosecution's Pre-Trial Brief and Request for an Extension of the Page Limit Pursuant to Regulation 37(2),” ¶ 17 (Feb. 7, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1549410.pdf>.

86. *Kenya II*, Case No. ICC-01/09-02/11, Public Redacted Version of the 25 February 2013 Consolidated Prosecution Response to the Defence Applications Under Article 64 of the Statute to Refer the Confirmation Decision Back to the Pre-Trial Chamber, ¶ 37–38 (Feb. 25, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1557330.pdf>.

87. *Kenya II*, Case No. ICC-01/09-02/11, Public Redacted Version of “Defence Reply to Confidential Redacted Version of the 25 February 2013 Consolidated Prosecution Response to the Defence Applications Under Article 64 of the Statute to Refer the Confirmation Decision Back to the Pre-Trial Chamber”, Submitted on 7 March 2013, ¶ 7–19 (Mar. 8, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1565107.pdf>.

88. *Id.* ¶ 3.

Prosecutor.⁸⁹ This error was compounded by the incorrect decision of the prosecution to represent to the single judge that a redacted or summarized version of the affidavit would have rendered it useless for the purposes of the defense.⁹⁰ Although it is the judges who are ultimately responsible for authorizing the nondisclosure of information, as noted by the Muthaura defense in this circumstance, “the order of the Single Judge granting the OTP’s application . . . was clearly predicated on her expectation that ‘the Prosecutor had carefully reviewed the evidence in his possession . . . both incriminatory and exculpatory.’”⁹¹

The above-mentioned reflexive, if not cavalier, attitude toward redactions by the ICC prosecution, and the wide scope and imposition of redactions at the ICC—beyond merely witnesses and their families—has resulted in a bureaucratic, overbroad, and resource-draining redaction regime. At its worst, such a regime risks resulting in a fundamental miscarriage of justice, and otherwise greatly hinders the work of the defense.

The defense, therefore, in addition to challenging applications for and continued imposition of redactions, should be prepared to carefully examine the reasoning behind redactions once they are lifted, seek the underlying applications requesting and decisions granting nondisclosure when these are not made immediately available,⁹² and decide whether action need be taken based

89. Regarding the prosecution’s actions with respect to the evidence of Witness 4, Judge Christine Van den Wyngaert commented in a concurring opinion,

[T]here can be no excuse for the Prosecution’s negligent attitude towards verifying the trustworthiness of its evidence. In particular, the incidents relating to Witness 4 are clearly indicative of a negligent attitude towards verifying the reliability of central evidence in the Prosecution’s case The Prosecution offered a number of explanations for overlooking the problems with Witness 4’s evidence. However, what all these explanations reveal is that there are grave problems in the Prosecution’s system of evidence review, as well as a serious lack of proper oversight by senior Prosecution staff. Clearly, thorough and comprehensive due diligence with regard to the reliability of the available evidence is an ongoing obligation of the Prosecution under article 54(1)(a), which is as important as the collection of that evidence itself.

Kenya II, Case No. ICC-01/09-02/11, Concurring Opinion of Judge Christine Van den Wyngaert, ¶ 4 (April 26, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1585626.pdf>; cf. *Kenya II*, Case No. ICC-01/09-02/11, Decision on Defence Application Pursuant to Article 64(4) and Related Requests (April 26, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1585619.pdf> (internal citation omitted).

90. *Kenya II*, Case No. ICC-01/09-02/11, Public Redacted Version of “Defence Application Pursuant to Article 64(4) for an Order to Refer Back to Pre-Trial Chamber II or a Judge of the Pre-Trial Division the Preliminary Issue of the Validity of the Decision on the Confirmation of Charges or for an Order Striking Out New Facts Alleged in the Prosecution’s Pre-Trial Brief and Request for an Extension of the Page Limit Pursuant to Regulation 37(2),” ¶ 18 (Feb. 7, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1549410.pdf> (“Astonishingly, the OTP deliberately misled the Single Judge into believing that even ‘an anonymous summary of the material is likely to be [. . .] meaningless.’”).

91. *Id.* (quoting *Kenya II*, Case No. ICC-01/09-02/11, Decision on the “Prosecution’s Application Requesting Disclosure After a Final Resolution of the Government of Kenya’s Admissibility Challenge” and Establishing a Calendar for Disclosure Between the Parties, ¶ 17 (April 20, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1061306.pdf>).

92. *Kenya II*, Case No. ICC-01/09-02/11, Public Redacted Version of “Defence Reply to

on the information revealed. Where applicable, the defense should consider using the submissions of the prosecution in the less redacted versions of these applications in support of motions for the nonimposition or lifting of proposed or existing redactions. In particular, the defense may be able to demonstrate that the reasoning underlying the prosecution's previous applications for redactions is without sufficient basis and that future applications for redactions should not be granted on this faulty basis.

3. The Process of Imposing and Lifting Redactions and Its Impact on Defense Practices

As discussed, the scope of redactions applied to the identifying information of witnesses, potential witnesses, victims, and "others at risk"⁹³ is very wide under the court's present practice. The imposition and then lifting of these redactions is a time-consuming and cumbersome process that is a drain on the prosecution and chamber's time and resources and results in a negative impact on the work of the defense and fundamental rights of a suspect or accused person.

Until the trial stage of *Prosecutor v. Ruto & Sang (Kenya I)* and *Kenya II* cases, the practice of the ICC pre-trial and trial chambers had been to approve each and every redaction applied for by the prosecution for, at the very least, all incriminating disclosure.⁹⁴ Trial Chamber V, in the two *Kenya* cases, sought to minimize the burden and delay caused by the court's existent redaction regime, approving a proposal by the parties in which redactions to certain standard categories of information were imposed *inter partes*, without the chamber's direct involvement.⁹⁵ Under the protocol certified by the chamber the defense

Confidential Redacted Version of the 25 February 2013 Consolidated Prosecution Response to the Defence Applications Under Article 64 of the Statute to Refer the Confirmation Decision Back to the Pre-Trial Chamber", Submitted on 7 March 2013, ¶ 19 (Mar. 8, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1565107.pdf> (detailing the efforts undertaken by the defense of Ambassador Muthaura and the defense of Mr. Kenyatta to obtain, from the prosecution, information relevant to the nondisclosure of Witness 4's affidavit).

93. *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," ¶ 54 (May 13, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc492175.pdf>.

94. *See Kenya I*, Case No. ICC-01/09-01/11, Decision on the protocol establishing a redaction regime, ¶¶ 13-15 (Sep. 27, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1477182.pdf>; *Prosecutor v. Muthaura and Kenyatta*, Case No. ICC-01/09-02/11, Decision on the protocol establishing a redaction regime, ¶¶ 13-15 (Sept. 27, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1477186.pdf>. In both decisions Trial Chamber V noted that Pre-Trial Chamber I in the Katanga case and Pre-Trial Chamber III in the Gbagbo case had required a case-by-case review of redactions requested for incriminatory materials, whereas here Trial Chamber V was authorizing a disclosure regime in which a case-by-case review would not be required for all types of disclosure (incriminatory, rule 77, and potentiality exonerating) with respect to certain standard categories of information for which redactions were requested.

95. *Kenya I*, Case No. ICC-01/09-01/11, Decision on the protocol establishing a redaction regime, ¶¶ 13-15 (Sep. 27, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1477182.pdf>; *Kenya II*, Case No. ICC-01/09-02/11, Decision on the Protocol Establishing a Redaction Regime, ¶¶ 13-15 (Sept. 27, 2012),

may now seek clarification from the prosecution as to the imposition of these *proprio motu* redactions and then seek relief from the chamber if the matter cannot be settled *inter partes*.⁹⁶

However, as the authors' experiences in both the *Kenya I* and *Kenya II* cases have revealed, the presumed benefit of speedier disclosure to the defense comes with a significant new burden in the defense having to review the *proprio motu* redactions imposed by the prosecution, with little information as to the specific underlying justification for the redactions. The defense must decide for each disbursement of disclosure, and in a short time frame, whether further explanation need be sought from the prosecution for a redaction, and, if necessary, a challenge filed with the chamber seeking the immediate lifting of the redaction.

The practical effect is the prosecution's imposition of a high volume of redactions largely without the review of a chamber. This is no small thing given, as discussed above, the scope of redactions applied at the ICC and the risk of the imposition of improper redactions and withholding of information even with a chamber's specific review of prosecution applications for nondisclosure.

The process of lifting redactions presents its own set of difficulties for the defense. In particular, redactions to a single document are often lifted in piecemeal fashion over an extended period of time. In the *Banda* case, for example, this piecemeal approach to lifting redactions resulted in the disclosure of witnesses' statements four, five, and even six times, with a few more redactions lifted on each occasion. Multiply this across various statements and annexes thereto, including hundreds of photographs, as well as videos, and the burden on the defense in having to continually reanalyze these disclosed items and act upon the newly revealed information is significant.

Cocounsel for Mr. Kenyatta in the *Kenya II* case explained the situation facing the defense as such:

So to touch upon the first point, if I may, the necessity of re-review, and I'd like to give you a concrete example. I'm going to take the witnesses 11 and 12, key witnesses which remain in this case relied upon by the Prosecution. The Prosecution has served 79 transcripts of evidence in respect of these two witnesses together. Out of the 1,415 pages, 1,021 pages were re-served lesser redacted and I can inform your Honours that from my personal experience of reading, re-reading, analysing and then of course preparing to segment the information that is necessary to be investigated, that this is not only an arduous task, but the fact of the lesser redaction makes it a task that must be repeated so that the key allegations are found and investigated properly in readiness for trial. . . . From the Defence perspective in terms of preparation for trial, the practical task of firstly counsel reviewing the material, and your Honour can imagine 79 transcripts takes time, each of which may be between ten to 25 pages, once

<http://www.icc-cpi.int/iccdocs/doc/doc1477186.pdf>.

96. See *Kenya I*, Case No. ICC-01/09-01/11, Protocol Establishing a Redaction Regime in the Case of The Prosecutor v. William Samoei Ruto and Jousha Arap Sang (Oct. 5, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1480387.pdf>; *Kenya II*, Case No. ICC-01/09-02/11, Protocol Establishing a Redaction Regime in the Case of The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta (Oct. 5, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1480394.pdf>.

that task has been done, in the process of movement towards trial, the Prosecution has served the same material again to some extent with lesser redactions. So as counsel I need to go back through the material to see where the lesser redactions are and to review them within the context of the evidence that I had initially seen. . . . So your Honour can imagine the onerous nature of which that task is in respect of the Defence preparations and the Defence resources that need to be employed to make sure that that work is conducted properly.⁹⁷

With these experiences in mind, the defense should not blindly accept the presumed benefit of quicker disclosure that might come with a protocol-based disclosure process. In any event, the defense should expect to receive multiple less redacted versions of the same disclosed item and should take this into consideration for the planning of investigative activities, the organization of the defense team, and the allocation of resources.

A defense counsel should put in place a system for reviewing and incorporating into defense analyses and investigative plans the various lesser-redacted versions of a disclosed item as they are received from the prosecution. A defense team may wish to consider putting in place a system to log the location of redactions deemed to be of particular significance to ensure that when these redactions are lifted, the information is quickly and properly reviewed and utilized for the purposes of investigations and understanding the prosecution case theory. Further, as has been emphasized, the defense should be proactive in seeking information from the prosecution on the imposition of particular redactions and, if necessary, challenging the application of remaining redactions before the chamber.

Of course, from the perspective of the defense, the end result of the disclosure and redaction regime that has developed at the ICC over the course of the last ten years is the necessity of allocating a substantial portion of limited defense time and resources to managing and litigating disclosure-related issues and the related difficulties imposed on defense investigations. All things being equal, the defense's time and resources are better spent on the core defense activities of analyzing prosecution disclosure, conducting defense investigations, and building the defense's strategy and theory of the case.

B. The Burden and Consequences of Electronic Disclosure and the E-Court Protocol

Pursuant to "E-court protocols" that have been drafted by the Registry and implemented by the chambers of the court since the case of *Prosecutor v. Lubanga*,⁹⁸ evidence that a party intends to rely upon in court must be submitted in electronic format and in accordance with the requirements of the

97. *Kenya II*, Case No. ICC-01/09-02/11, Transcript of Status Conference, 26:15–27:21 (Feb. 14, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1552621.pdf>.

98. *See, e.g.*, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Second Decision on the E-Court Protocol (Mar. 13, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc454350.PDF>.

e-court protocol in effect for that case.⁹⁹ Although e-court protocols were not intended to apply to *inter partes* disclosure, out of practical necessity the prosecution has aimed to fulfill its disclosure obligations in accordance with the relevant e-court protocol.

Because the e-court protocol requires that parties populate evidentiary disclosures with “metadata”—file identifying information—the prosecution has structured its (potential) evidence collection and processing framework with a view to meeting this requirement. Given that the prosecution has already processed its potential evidence in this manner, it is logical and efficient for the prosecution to disclose material to the defense in the same manner, instead of creating and utilizing a separate system for *inter partes* disclosure.

Although perhaps pedantic, it is worth listing for sake of context the standard fields applicable in an e-court protocol using the e-court protocol implemented by the pre-trial chamber in the *Kenya II* case¹⁰⁰: document ID, date filed in the record, document date, estimated date, document type, confidentiality level, title, author, author organization, recipient, recipient organization, parties to an agreement, language of the item, translation status, redaction version, redaction approval date, excerpt history, host document number, participant introducing the document, chain of custody, date source restriction lifted, source identity, search limitations (text searchable or not), and disclosure package.

One need not understand the meaning of each of the fields listed to know that, in principle, such information may be of value and use to the defense (and later the judges) in understanding the provenance, background, and other pertinent information related to an item of evidence. However, the value of such information is only as good as the quality of the data entered into these fields. As we can attest, errors in the metadata attached to prosecution disclosure are not infrequent, sometimes resulting in the need for re-disclosure of the information. Differences in the parties’ understanding of the appropriate use and scope of metadata fields can also lead to confusion and disputes that weigh upon defense time and resources.

Additionally, because e-court protocols are equally applicable to the prosecution and defense, the burden on the defense in complying with an e-court protocol, particularly at the confirmation-of-charges stage, is especially great. While the prosecution has an entire section of professionals—the Knowledge Base Unit¹⁰¹—dedicated to e-court related issues, a defense team

99. See, e.g., *Kenya II*, Case No. ICC-01/09-02/11, Decision Setting the Regime for Evidence Disclosure and Other Related Matters (April 6, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1052098.pdf>.

100. *Kenya II*, Case No. ICC-01/09-02/11, Unified Technical Protocol (“E-court Protocol”) for the Provision of Evidence, Witness and Victims Information in Electronic Form (April 7, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1052099.pdf>.

101. See, e.g., *Prosecutor v. Abu Garda*, Case No. ICC-02/05-02/09, Prosecution’s Observations on the Revised Version of the E-court Protocol as Submitted by the Registrar (Aug. 17, 2009),

will generally have a single case manager responsible for the electronic processing of and manual input of the various metadata fields for each item of evidence it wishes to present at the confirmation hearing and at trial in accordance with the e-court protocol.

As discussed earlier, the practice of the prosecution to disclose significant and substantial items of evidence, as well as the DCC, close to or at the thirty-day deadline for preconfirmation disclosure, leaves the defense with scant time to process this information and modify and conduct additional investigations thereon. A defense team must therefore include within its plans the time necessary to transmit the evidence it collects and decides to rely upon at confirmation to its team members in The Hague for processing on an ICC computer, as well as undertake the task of metadata entry. At the confirmation stage of the *Kenya II* case, we can attest to a round-the-clock work schedule stretching over several days by the members of the Muthaura defense, both in Kenya and The Hague, in order to collect and process into the court's electronic evidence system the results of last-minute defense investigations to meet the fifteen-day final deadline for the submission of defense evidence.¹⁰² Under these circumstances, errors in the electronic processing of evidence and the entry of metadata are to be expected, and the defense may find it necessary to request extensions of time to submit its evidence due to these severe time and resource constraints.

The judges of the court, the Registry, the Office of the Prosecutor and the Offices of Public Counsel for the Defense (OPCD) and for Victims (OPCV) have recognized the centrality of the e-court system to the functioning of the court and the need to continually review and improve this system based on the experiences of the organs of the court and the defense.¹⁰³ To this end, the Registry, in September 2010, established an E-court User Group made up of representatives from each of the organs of the court as well as the OPCD, OPCV, and the defense, with a mandate to discuss, research, and make recommendations regarding e-court issues.¹⁰⁴ The group has, for example, drafted a unified e-court protocol to serve as a template upon which e-court

<http://www.icc-cpi.int/iccdocs/doc/doc728461.pdf>.

102. For example, at the confirmation stage in the *Kenya II* case the Muthaura defense submitted into evidence the signed statements of fifty-one witnesses, plus summaries of the expected oral testimony of two additional witnesses. The prosecution relied upon the statements, interview transcripts, and summaries of evidence of twelve witnesses at the confirmation stage. *See generally Kenya II*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf> (detailing some of the witness evidence submitted by the parties). The specific witness figures provided above are based on the authors' knowledge.

103. This conclusion is based on one of the author's experiences as a member of the E-court User Group since March 2011.

104. Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Submission of the Generic eCourt Protocol, 3 n. 3 (Dec. 16, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1290865.pdf>.

protocols in future cases may be based¹⁰⁵ and has sought to address the particular difficulties facing the defense in working remotely in the field, especially with respect to access to and use of items disclosed electronically by the prosecution.¹⁰⁶

From the perspective of the defense, resolving disclosure-related issues at the ICC may often be the most pressing task confronting counsel in the process of defending his or her client. The defense must dedicate significant time and resources to understanding the disclosure system in place at the ICC, negotiating *inter partes* on disclosure matters, litigating and relitigating disclosure issues, planning investigative activities in light of the ICC redaction regime and practice of delayed prosecution disclosure, and complying with the e-court protocol. Although disclosure may seem to involve the most mundane of issues in the context of defending against the crimes specified in the Rome Statute, a defense counsel practicing before the ICC would be wise to plan for and address disclosure matters at the earliest of stages—as well as to be vigilant with respect to disclosure issues throughout a case. Such best practices will allow a defense counsel to focus defense resources and attention, in the most effective manner, on the core activities of the defense: analyzing the prosecution's evidence and case theory, conducting defense investigations, and developing the defense's own theory of the case.

IV

THE CONFIRMATION-OF-CHARGES STAGE: THE EVOLUTION OF DEFENSE PRACTICES

The nonconfirmation of any charges against Callixte Mbarushimana (a former suspect in the situation in the Democratic Republic of the Congo) in December 2011,¹⁰⁷ and Henry Kosgey¹⁰⁸ and Mohammed Hussein Ali¹⁰⁹ (former suspects in the situation in the Republic of Kenya) in January 2012, as well as the prosecution's admission that the charges against Ambassador Francis Muthaura in the *Kenya II* case “conceivably” should not have been confirmed,¹¹⁰ have demonstrated that the first decision of the court to decline to

105. *Kenya I*, Case No. ICC-01/09-01/11, Registry submissions on the Generic E-court Protocol pursuant to Order ICC-01/09-01/11-427, 3 (Jul. 5, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1437587.pdf>.

106. This information is based on one of the author's personal knowledge as a member of the E-court User Group.

107. Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges (Dec. 16, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1286409.pdf>.

108. *Kenya I*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf>.

109. *Kenya II*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 26, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>.

110. *Kenya II*, Case No. ICC-01/09-02/11, Public Redacted Version of the 25 February 2013

confirm any charges against a suspect in *Prosecutor v. Abu Garda* in February 2010¹¹¹ was no aberration. Including the case of Ambassador Muthaura, against whom all charges have now been withdrawn,¹¹² the prosecution has had a success rate of below sixty-five percent in those cases in which a confirmation decision has been rendered.¹¹³ The applicable standard of proof at the confirmation stage—“sufficient evidence to establish substantial grounds to believe”¹¹⁴—is, of course, lower than the beyond-a-reasonable-doubt standard required to obtain a conviction at the trial stage.

This high rate of defense success (or prosecution failure, depending upon one’s point of view) at the confirmation stage obscures the uncertainty that still exists with the confirmation process at the ICC and the risks for the defense in putting forth a full defense at confirmation. Article 61(8) of the Rome Statute provides that “where the Pre-Trial Chamber declines to confirm a charge, the

Consolidated Prosecution Response to the Defence Applications Under Article 64 of the Statute to Refer the Confirmation Decision Back to the Pre-Trial Chamber, ¶ 44 (Feb. 26, 2013), http://www.icc-cpi.int/iccdocs/doc/d_0c1557330.pdf (“[T]he Prosecution’s disclosure error could conceivably have affected the Pre-Trial Chamber’s decision to commit Mr Muthaura to trial.”).

111. Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges (Feb. 8, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc819602.pdf>.

112. *Kenya II*, Case No. ICC-01/09-02/11, Decision on the Withdrawal of Charges Against Mr Muthaura (Mar. 18, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1568411.pdf>.

113. The other individuals against whom charges have been confirmed are Thomas Lubanga Dyilo, *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF>, Germain Katanga and Mathieu Ngunjiri Chui, *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges (Sep. 30 2008), <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf>, (Mr. Chui has since been acquitted), Jean-Pierre Bemba Gombo, *Prosecutor v. Bemba*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (Jun. 15, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf>, Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus, *Prosecutor v. Nourain*, Case No. ICC-02/05-03/09, Corrigendum of the “Decision on the Confirmation of Charges” (Mar. 7, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1036947.pdf> (the case against Mr. Jerbo has since been terminated following Mr. Jerbo’s reported death), William Samoei Ruto and Joshua Arap Sang, *Kenya I*, Case No. ICC-01/09-01/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf>, and Uhuru Muigai Kenyatta, *Kenya II*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>. On June 3, 2013, in the case of *Prosecutor v. Gbagbo*, Pre-Trial Chamber I of the ICC issued the Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute. Case No. ICC-02/11-01/11, <http://www.icc-cpi.int/iccdocs/doc/doc1599831.pdf>. The majority of the chamber adjourned the confirmation-of-charges hearing and requested that the prosecution consider providing further evidence or conducting further investigation with respect to the charges preferred against the former Ivorian President Laurent Gbagbo. *Id.* ¶ 44. (Judge Fernández filed a dissenting opinion in the case. *Prosecutor v. Gbagbo*, Case No. ICC-02/11-01/11, Dissenting Opinion of Judge Silvia Fernández de Gurmendi (Jun. 3, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1599832.pdf>). The Chamber directed that the prosecution submit any further evidence no later than November 15, 2013, along with a revised DCC. *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, 23 (June 3, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1599831.pdf>.

114. Rome Statute, *supra* note 11, at art. 61(5).

Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence.”¹¹⁵ Accordingly, even if the defense is wholly successful at confirmation, the prosecutor has the right to seek a new confirmation-of-charges hearing on the nonconfirmed charges based on “additional evidence.”¹¹⁶

For example, with respect to Mr. Abu Garda, more than three years after Pre-Trial Chamber II declined to confirm any of the three war crimes charges preferred against him by the prosecution, the prosecution’s written briefing for the period of August 1 through 30, 2013 categorizes Mr. Abu Garda’s case under the heading “Prosecution to present additional evidence.”¹¹⁷ The court has not yet had the opportunity to address the scope and definition of “additional evidence” for the purposes of article 61(8).

The nonconfirmation of all charges against a suspect is undoubtedly the optimal outcome for the defense. However, defense counsel should advise a client in the event of such an outcome that no statute of limitations exists for crimes under the Rome Statute, and that there is the possibility of a new confirmation hearing pursuant to article 61(8) of the Rome Statute. A counsel may wish to warn a client to act with caution and perhaps even consult with counsel when discussing matters related to the case with any person or party, such as members of the media. Further, counsel may need to consider what is the appropriate time period to retain the defense case file following a total nonconfirmation of charges.¹¹⁸

On the opposite end of the spectrum, if the defense decides to put on as full a defense as is possible within the constraints of the confirmation-of-charges process, and one or more charges are confirmed against a suspect, the prosecution will have been given a full preview, if not the details, of the defense’s case strategy and potential evidence. With this information in hand, the prosecution can adapt its case strategy and continue its investigations within the framework of the confirmed case with a view to countering the defense’s expected case at trial.

This reality begs a further question confronting defense counsel regarding the prosecution’s article 54(1)(a) obligation to “establish the truth” by “extend[ing] the investigation to cover all facts and evidence relevant to an

115. *Id.* at art. 61(8).

116. *Id.*

117. Briefing, Office of the Prosecutor, Issue #146, at 3 (Aug. 1–30, 2013), available at <http://www.icc-cpi.int/iccdocs/otp/wb/OTP-Briefing-ED146-Eng.pdf>.

118. Article 19 of the Code of Professional Conduct for counsel requires a defense counsel to retain “files containing documents and records of work carried out in fulfillment of the [representation] agreement for five years,” after which “counsel shall seek instructions from the former client . . . with due regard to confidentiality.” Int’l Criminal Court, Assembly of State Parties, *Code of Professional Conduct for Counsel*, Res. 1, ICC Doc. ICC-ASP/4/Res.1 (Dec. 2, 2005), available at http://www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6AB4BEBD55BE2/140121/ICCASP432Res1_English.pdf.

assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.”¹¹⁹ To what extent can the prosecution continue its investigations following the confirmation-of-charges hearing, and what is the authority and responsibility of a pre-trial or trial chamber to evaluate whether a prosecution has in good faith sought to abide by its article 54(1)(a) obligations?

As discussed above in the context of the *Kenya II* case,¹²⁰ it appears the chambers of the court have thus far been willing to give the prosecution leeway in continuing its investigations after the confirmation-of-charges hearing and are reluctant to pass final judgment on whether the prosecution is properly fulfilling its article 54(1)(a) obligations.¹²¹ To give a concrete example, the prosecution’s case theory in the *Kenya II* case at confirmation was centered on three meetings during which the common plan was hatched and implemented.¹²² The prosecution relied on the witness statements, interview transcripts, and summaries thereof of twelve witnesses at the confirmation-of-charges hearing, a handful of whom allegedly attended these supposed meetings, and who name other individuals who also supposedly attended these meetings.¹²³

It seems logical that the prosecution, pursuant to its article 54(1)(a) obligation to “extend the investigation to cover all facts and evidence relevant”¹²⁴ and to “investigate incriminating and exonerating circumstances equally”¹²⁵ would have at least attempted to contact the numerous individuals named by these witnesses as allegedly attending the meetings to verify the occurrence and content of these meetings. The prosecution did not.

Instead, it was the defense of the three suspects that managed in just the few months prior to the confirmation hearing to contact and take sworn statements from almost every individual named by the prosecution’s witnesses as allegedly attending these meetings as well as individuals who would have had knowledge of events taking place at the sites of the alleged meetings or of the whereabouts of the suspects on the days of the alleged meetings.¹²⁶ All of these individuals informed the defense that they were not aware of any attempt by the Office of the Prosecutor to contact them.¹²⁷ Further, all of these individuals provided

119. Rome Statute, *supra* note 11.

120. *See supra* Part III.A.1.

121. *See Kenya II*, Case No. ICC-01/09-02/11, Decision on Defence Application pursuant to Article 64(4) and Related Requests, ¶¶ 117-125 (Apr. 26, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1585619.pdf> (noting that postconfirmation investigation by the prosecution may be appropriate in certain circumstances).

122. *Kenya II*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶¶ 309-359 (Jan. 23, 2012), <http://www.iccpi.int/iccdocs/doc/doc1314543.pdf>.

123. *Id.*

124. Rome Statute, *supra* note 11.

125. *Id.*

126. This statement is based on the authors’ knowledge.

127. This statement is based on the authors’ knowledge.

information that refuted the fact that two of the meetings had taken place,¹²⁸ and with respect to the third meeting, stated that the content of the meeting was not what the prosecution's witnesses claimed it to be.¹²⁹

The defense teams of all three suspects in the *Kenya II* case raised at the confirmation-of-charges hearing the issue of the prosecution's article 54(1)(a) failures.¹³⁰ In the decision on the confirmation of charges the majority

accept[ed] the argument of the Prosecutor that his alleged investigative failure does not fall within the scope of the Chamber's determination pursuant to article 61(7) of the Statute. . . . [T]he scope of determination under article 61(7) of the Statute relates to the assessment of the evidence available and not the manner in which the Prosecutor conducted his investigations.¹³¹

However, defense counsel appearing before the ICC, when considering case strategy, should not yet write off the prosecution's article 54(1)(a) obligations as mere window dressing without any direct consequence in the event of breach. Certain voices emanating from the bench hold the view that the chambers of the ICC retain the authority to rule upon issues arising from the prosecution's article 54(1)(a) obligations. In a dissent from the same decision on the confirmation of charges, Judge Hans-Peter Kaul

underline[d] . . . the absolute necessity for the Prosecutor to exhaust all ways and means to make the investigation *ab initio* as comprehensive, expeditious and thus as effective as possible, as required by article 54(1) of the Statute. I hold that it is not only desirable, but necessary that the investigation is complete, if at all possible, at the time of the Hearing, unless the Prosecutor justifies further investigations after confirmation with compelling reasons. . . . In case a Pre-Trial Chamber is not convinced that the investigation is complete, it may use its powers under articles 61(7)(c) and 69(3) of the Statute in order to compel the Prosecutor to complete his investigation before considering committing any suspect to trial. I consider this issue to be of utmost importance for the success of this Court.¹³²

Judge Christine Van den Wyngaert, in a concurring opinion in the same case at the trial stage, analyzed the prosecution's investigations during the confirmation and postconfirmation stages as follows:

[T]here are serious questions as to whether the Prosecution conducted a full and thorough investigation of the case against the accused prior to confirmation. In fact, I believe that the facts show that the Prosecution had not complied with its obligations under article 54(1)(a) at the time when it sought confirmation and that it was still not even remotely ready when the proceedings before this Chamber started. In this

128. See *Kenya II*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶¶ 337–40, 345, 348–55, 358 (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>.

129. See *id.* ¶¶ 319–324.

130. See *id.* ¶¶ 61–65.

131. *Kenya II*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ¶ 63 (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>; see also Prosecutor v. Abu Garda, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, ¶ 48 (Feb. 8, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc819602.pdf>.

132. *Kenya II*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Dissenting Opinion by Judge Hans-Peter Kaul, ¶ 57 (Jan. 23, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>.

regard, I stress the concerns expressed in the Decision about the overwhelming number of post-confirmation witnesses and the quantity of post-confirmation documentary evidence, as well as the very late disclosure of the latter. . . . In addition to insufficiently justifying the exceptional circumstances that meant it could not have taken these particular investigative steps prior to confirmation without unduly endangering the security of particular individuals, the Prosecution also did not offer cogent reasons for what led it to believe, prior to confirmation, that the situation of each of these persons would significantly change after confirmation or indeed that such a change actually occurred. . . . Based on the foregoing considerations, I find that the Prosecution failed to properly investigate the case against the accused prior to confirmation in accordance with its statutory obligations under article 54(1)(a) of the Statute. In so doing, the Prosecution has also violated its obligation under article 54(1)(c) of the Statute to fully respect the rights of persons arising under the Statute.¹³³

A defense counsel planning his or her client's strategy for the confirmation-of-charges hearing should therefore consider the value of examining in detail the prosecution's investigations from the vantage point of article 54(1)(a) of the Rome Statute. Even if charges against the client are confirmed for trial, as detailed above, the prosecution's obligations pursuant to article 54(1)(a) of the Rome Statute remain a live issue with respect to the continuation of the prosecution's investigations and the legitimacy of the use of the fruits of such investigations as evidence at trial or as the basis to request an amendment of the confirmed charges.¹³⁴

Coming back to the broader strategic issue of how counsel should approach the confirmation-of-charges hearing, counsel will need to weigh a number of factors in advising the client on the most appropriate path. These factors will include, first and foremost, the goals and wishes of the client. In *Prosecutor v. Banda*, the joint defense of the accused agreed with the prosecution to a "short-form" confirmation hearing in which the defense pledged not to call evidence or contest, solely for the purposes of the confirmation hearing, the charges alleged, with a view to moving proceedings forward in as expeditious a manner as possible to the trial stage.¹³⁵

In view of the above-mentioned risk of revealing the core of the defense case to the prosecution at the confirmation stage, a defense counsel might—after evaluating the strength of the prosecution's case based on the evidence

133. *Kenya II*, Case No. ICC-01/09-02/11, Concurring Opinion of Judge Christine Van den Wyngaert to the Decision on Defence Application Pursuant to Article 64(4) and Related Requests, ¶¶ 1, 3, 5 (Apr. 26, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1585626.pdf>.

134. *See 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,'" ¶ 36 (Mar. 21, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1571050.pdf> ("[I]n principle, the Prosecutor's investigation 'should largely be completed at the stage of the confirmation hearing' . . . The underlying rationale is that the continued investigation 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.") (internal citation omitted).

135. Case No. ICC-02/05-03/09, Joint Submission by the Office of the Prosecutor and the Defence as to Agreed Facts and Submissions Regarding Modalities for the Conduct of the Confirmation Hearing, ¶¶ 5-7 (Oct. 19, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc955335.pdf>.

disclosed and the DCC—choose to challenge only specific aspects of the prosecution’s case as opposed to undertaking a fuller defense. Additionally, factors such as limited time and defense investigative difficulties, as in the case of *Prosecutor v. Abu Garda*,¹³⁶ may limit the extent to which the defense can call its own evidence, effectively limiting the defense to focusing the core of its case on challenging the sufficiency and probative value of the prosecution’s evidence.

V

CONDUCTING DEFENSE INVESTIGATIONS

Conducting investigations for the purposes of proceedings before any of the ad hoc and hybrid international tribunals and courts as well as the ICC is a challenging endeavor. Locating witnesses on the ground in an ongoing or postconflict context who are willing and able to cooperate with an international judicial entity or the defense is a time- and resource-intensive undertaking. Interacting with potential witnesses who have experienced trauma or believe they or their families may be put at risk by participating in international proceedings requires careful planning and caution with respect to witness contact and communication, as well as relationship and expectation management and regular reassurances.

Additionally, the international members of a defense team may not speak the language of the client or of potential witnesses, and differences between defense-team personnel and witnesses with respect to cultural norms and educational backgrounds may result in further obstacles to efficient and clear communications.¹³⁷ If the case is a document-heavy one, as has often been the situation before the ICTY, or one involving large amounts of electronic media, as occurred in *Prosecutor v. Mbarushimana* before the ICC, significant defense resources must be dedicated to the organization and review of such items.

What differentiates the conduct of investigations in cases before the ICC from those before the ad hoc and hybrid international tribunals and courts is the scope and nature of the ICC’s jurisdiction and the impact of the above-discussed disclosure regime. The ad hoc and hybrid international tribunals and courts focus all of their human and physical resources on limited geographic areas. The ICC, by contrast, is a reactive institution that does not know where its next situation may arise or what the relevant avenue of jurisdiction—referral

136. See *supra* Part III.A.1.

137. Professor Nancy Combs of William and Mary Law School, in a study of the judgments of the trial chambers of the ICTR, SCSL and SPSC, has proposed that the testimony of witnesses relied upon by these trial chambers may be of questionable value because, among other reasons, many witnesses lack the life experience and education needed to use maps or understand and answer basic questions regarding times, dates, and distances, and that further, the impact of “[c]ultural norms and taboos” may result in less than clear and accurate information being obtained from witnesses. NANCY COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS 4–5 (2010).

by a State Party or the UN Security Council, *proprio motu* action by the prosecutor, or acceptance of the court's jurisdiction by a state that is not party to the Rome Statute—will be.

A. The Impact of the ICC's Globalized Jurisdiction on Defense Investigative Practices

The ad hoc and hybrid international tribunals and courts have steadily built up their institutional knowledge and resources with respect to the history (including, importantly, the history of the conflict(s) in question), politics, culture, and languages of the discrete areas over which they exercise jurisdiction, as well as on-the-ground capacities and professional connections with civil-society members, government officials, and other local contacts.

At present, the ICC has eight active situations that arose via four different avenues of jurisdiction: the Democratic Republic of the Congo, the Central African Republic, Uganda and Mali (all via referral by a State Party); the Republic of Kenya (via prosecutorial *proprio motu* jurisdiction in a State Party); Darfur, Sudan, and Libya (via UN Security Council referral); and Côte d'Ivoire (via prosecutorial *proprio motu* jurisdiction in a non-State Party that has accepted the jurisdiction of the court).¹³⁸ The ICC must therefore allocate its limited resources among its many situations, and with each new situation start anew in building up the necessary human and physical infrastructure to carry out investigations and prosecutions, conduct outreach to victims and support the work of the defense.

The impact of this reality on an ICC defense team is perhaps less obvious because the defense is not a part of the ICC but instead an independent and ad hoc entity. However, an ICC defense team, unlike its counterparts at the ad hoc and hybrid courts and tribunals, will not have the benefit of a large and experienced defense bar with extensive and broad substantive knowledge of the conflict in question and practical advice on planning and conducting investigations on the ground. The wealth of factual knowledge of the history and politics of a region, including a detailed accounting of the conflict in question, available, among other places, in judgments of trial chambers and through expert reports submitted by parties, are likewise in short supply at the ICC with its eight disparate situations and the comparatively limited number of active cases. Hiring qualified and knowledgeable investigators, resource persons, and language assistants will similarly be a much more involved undertaking than at the ad hoc and hybrid institutions, where the class of such individuals grows and becomes even more experienced and specialized as the years pass.

138. See *Situations and Cases*, INT'L CRIM. CT, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.

In short, a defense counsel representing a client before the ICC should be prepared to build his defense team from the ground up in every respect. The learning curve will be a steep one and take place in the absence of a large number of colleagues who understand and can provide advice regarding the specific state and conflict in question.

Therefore, arguably, the defense's need for assistance from the court (particularly the court's Registry) in supporting defense investigative activities is also much greater at the ICC than at the ad hoc and hybrid institutions. However, as alluded to above, the court is least able to provide such assistance due to the spreading of limited resources across multiple situations. For example, the Registrar of the ICC must make annual decisions with respect to the staffing levels or closure of field offices, which may have significant implications on the defense's ability to conduct effective investigations in the field for the case in question.¹³⁹ In our experience, even relatively mundane—but critical—issues such as the issuance of travel visas for defense-team members and the transmission of defense requests for cooperation to states and international organizations through the assistance of the Registry are impacted by the court's necessarily broad but sometimes shallow interactions and relationships with key personnel in States Parties, not to mention interactions with states not party to the Rome Statute. For example, in the case of *Prosecutor v. Banda*, the defense submitted an application requesting that the trial chamber order the issuance of an official request for cooperation to the government of Nigeria following the defense's inability to obtain, even with the Registry's assistance, a substantive response to a request for assistance submitted more than eighteen months earlier to the Nigerian government.¹⁴⁰

This being said, we must underline that in our interactions with the Registry, Registry officials and staff members have always acted as consummate professionals who have demonstrated a genuine willingness to constructively and, wherever possible, effectively assist and advise the defense.

139. See, e.g., Int'l Criminal Court, Assembly of States Parties, 10th Sess., Dec. 12-21, 2011, *Proposed Programme Budget for 2012 of the International Criminal Court*, ¶ 194, 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 (discussing the closure of various field offices).

140. Case No. ICC-02/05-03/09, Public Redacted Version of "Defence Application Pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute for an Order for the Preparation and Transmission of a Cooperation Request to the Government of Nigeria" Filed on 3 July 2013, ¶ 8 (Jul. 3, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1613082.pdf>. Trial Chamber IV granted the defense application on September 12, 2013. Case No. ICC-02/05-03/09, Public Redacted Version of the Decision on the third defence application pursuant to Articles 57(3)(b) and 64(6)(a) of the Statute, <http://www.icc-cpi.int/iccdocs/doc/doc1644021.pdf>. On October 23, 2013, the ICC Registry informed Trial Chamber IV that the Nigerian government had submitted a response to the ICC's cooperation request the preceding day, October 22. Case No. ICC-02/05-03/09, Second Report of the Registry concerning the "Decision on the third defence application pursuant to Article 57(3)(b) and 64(6)(a) of the Statute," ¶ 1, <http://www.icc-cpi.int/iccdocs/doc/doc1669325.pdf>.

Although any one issue arising out of the context of the ICC's globalized jurisdiction is not likely to significantly impact the manner in which a defense counsel conducts investigations, the cumulative impact of this reality is certainly one that counsel must recognize, understand, and seek to work within in endeavoring to achieve the ultimate goal of providing a suspect or accused person with full and effective representation in line with the client's instructions.

B. The Impact of the Type of Jurisdiction Exercised on Defense Investigative Practices

As mentioned above, the ICC has now exercised jurisdiction under the four avenues available to it under articles 12 and 13 of the Rome Statute: (1) referral by a State Party to the Rome Statute,¹⁴¹ (2) the prosecutor's initiation of an investigation with respect to a State Party in accordance with article 15 of the Rome Statute, (3) referral of a situation by the UN Security Council acting pursuant to chapter VII of the UN Charter, and (4) the prosecutor's initiation of an investigation pursuant to article 15 of the Rome Statute with respect to a non-State Party that has accepted the jurisdiction of the court pursuant to article 12(3) of the Rome Statute.

Although the particular manner under which the ICC exercises jurisdiction in a situation does not mathematically equate to the level of difficulty the defense will encounter when attempting to carry out investigations in a case, the exercise of a particular type of jurisdiction may reflect and reveal certain fundamental realities that a defense team will face, and that therefore impact the modalities of how a defense team conducts its investigations.

Given that the ICC exercises complementary jurisdiction,¹⁴² a state must be either unable or unwilling to carry out genuine investigations or prosecutions of crimes falling within the subject matter jurisdiction of the court as set out in the Rome Statute. From the perspective of the defense, when the ICC decides to exercise jurisdiction on the basis of a self-referral, this suggests the logistical and security difficulties a defense team could face in attempting to conduct investigations given that the authorities of the state have been deemed unwilling or incapable of carrying out effective policing or prosecutorial actions with respect to the crimes in question.

In the one instance that the ICC prosecutor has sought and been authorized to exercise *proprio motu* jurisdiction on the territory of a party to the Rome Statute—the situation in Kenya¹⁴³—the court's "self-invitation" into a state with

141. These referrals have all been self-referrals of a state to the ICC as opposed to one State Party referring a situation in another State Party to the ICC. *See Situations and Cases, supra* note 138 (noting that Uganda, the Democratic Republic of the Congo, the Central African Republic, and Mali have referred situations occurring in their territory to the ICC).

142. Rome Statute, *supra* note 11, at art. 17.

143. The prosecutor also sought permission and was authorized to open an investigation in Côte

a dynamic and contentious political process and a large and active media sector has fostered a climate in which the challenges facing defense teams involve intense media scrutiny and political maneuverings in addition to witness security concerns. Additionally, tensions between the government of Kenya and the ICC Office of the Prosecutor resulted in the Kenyan government filing in April of 2013 submissions challenging the prosecution's public statements and court filings, which had alleged a lack of cooperation on the part of the Kenyan government with the court.¹⁴⁴

The court's exercise of jurisdiction pursuant to a referral from the UN Security Council (as has been utilized in the situations in Darfur, Sudan, and Libya) has thus far presented the defense with the most challenging of scenarios in seeking to provide effective representation to a client facing charges before the ICC. As recently noted by Justice Richard Goldstone, former prosecutor of the ICTY and ICTR,

[I]n the Sudan, in the Banda Jerbo case, the parties have had marginal access to witnesses, which has negatively impacted the defence's ability to investigate through no fault of its own. This raises questions around the accused's capacity to exercise the right to prepare his or her defence, and could result in an unfair trial.¹⁴⁵

In such a circumstance, and when applications to stay¹⁴⁶ such proceedings have failed,¹⁴⁷ defense counsel are faced with the very difficult, if not unprecedented,¹⁴⁸ task of conducting investigations without a single member of the defense being able to legally and safely enter the area that is the subject of the ICC situation to conduct the most basic of investigative steps. The defense may be reduced to relying on other means of communication—primarily

d'Ivoire, which accepted the ICC's jurisdiction pursuant to the procedure set out under article 12(3) of the Rome Statute. 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>.

144. *Kenya I*, Case No. ICC-01/09-01/11, 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, ¶¶ 12, 24 (Apr. 9, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1577521.pdf> ("The Government of Kenya asserts that it has complied with its obligations under the Rome Statute in good faith and in a practical and effective manner [T]he Prosecution's approach is that of a halfway house - alleging non-cooperation and delaying tactics by the Kenyan Government in support of its legal submissions and requested relief, without affording the Government of Kenya the opportunity to comment on and respond to these claims so as to expose or explain such assertions as false, incomplete, inaccurate or otherwise misleading.") (internal citations omitted).

145. *ICC's Reliance on Live Witness Testimony at a Crossroads States New IBA Report*, INT'L B. ASS'N (July 11, 2013), <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=4470A96B-C4FA-457F-9854-CE8F6DA005ED>.

146. See *Prosecutor v. Banda*, Case No. ICC-02/05-03/09, Defence Request for a Temporary Stay of Proceedings (Jan. 6, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1296602.pdf>.

147. *Banda*, Case No. ICC-02/05-03/09, Decision on the Defence Request for a Temporary Stay of Proceedings, ¶ 160 (Oct. 26, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1498141.pdf>.

148. *Banda*, Case No. ICC-02/05-03/09, Defence Request for a Temporary Stay of Proceedings, ¶ 2 (Jan. 6, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1296602.pdf>.

telephone—in order to locate and conduct initial interviews with witnesses. When the communication infrastructure in the area in question is of limited availability and reliability, a counsel’s already-limited investigative tools are curtailed even further, and countless defense man-hours may need to be spent regularly calling phone numbers over periods of days and weeks, if not months, in the hope that a potential witness may eventually be reached and be willing and able to speak to the defense.

In considering whether to ask willing potential witnesses located in a state hostile to the court to travel to a third-party state to meet with the defense,¹⁴⁹ defense counsel must take the most careful, considered, and difficult of decisions in determining the acceptable level of risk to a witness. When meeting with such a witness the defense must undertake all reasonable precautions to protect the anonymity and physical security of the individual and also be prepared to refer the witness to the Victims and Witnesses Unit of the court in the event an unanticipated security situation arises. Additionally, documentary evidence may take on more significance than it otherwise would,¹⁵⁰ though it cannot counterbalance the significant difficulties arising out of an inability to locate and interview key witnesses.

C. The Impact of the ICC Disclosure Regime on Defense Investigative Practices

The ICC’s disclosure regime as it relates to the defense was examined at length in part III. The prosecution’s practice of delayed disclosure to the defense, the application of wide-ranging and significant redactions to disclosed items, and the piecemeal manner in which redactions are lifted over the course of months and years all result in defense investigative activities being unduly hampered and, potentially, investigative opportunities being lost in the event information is disclosed too late for the defense to take advantage of said information.¹⁵¹

Delayed disclosure limits the time available to the defense to review and act upon the material received. When critical information remains redacted from the defense—such as the identity of a witness or the time and place of an alleged meeting—the defense can hardly be expected to conduct full and effective investigations on this basis. Indeed, late disclosure or the eventual lifting of a redaction to a crucial piece of information may necessitate the defense reinterviewing witnesses at the cost of limited defense resources. In circumstances such as those in the *Banda* case, where a witness may have travelled out of the situation area (in that case Darfur) to meet with the defense

149. *Id.* ¶ 13–14.

150. *Id.* ¶ 17.

151. For example, as would be the case with disclosure of a phone number that no longer functions or disclosure of the identity of a potential witness only after the individual has died.

in a third state,¹⁵² the eventual lifting of redactions to photographs disclosed to the defense will be of little value if witnesses who may have been able to shed light on such items are no longer available to the defense.

Given this state of affairs, defense counsel practicing before the ICC must structure their investigative activities and undertake their preparatory work in a manner that minimizes the impact, where possible, of the present ICC disclosure regime. For example, a well-organized and regularly updated record of prosecution disclosure will be crucial for a defense counsel to be able to readily identify and understand the significance of recently disclosed items of evidence or information that has been unredacted. This will allow the defense team to quickly incorporate said information into its ongoing investigations.

Similarly, the defense cannot simply wait for the lifting of redactions to crucial passages of information that may come months or even years down the line. The defense must be proactive in seeking out this information itself—for example, the identities of persons whom the prosecution does not intend to call as witnesses who may have been present at pertinent events and locations. Suffice it to say, the ICC disclosure regime encourages a defense team to be flexible, organized, and efficient to effectively conduct investigations in defense of the client.

VI

CONCLUSION

The popular image of a criminal defense attorney is that of an individual operator, whether brilliant and flamboyant, unswervingly resolute and passionate in defense of his or her client in the face of overwhelming odds (the fictional Atticus Finch of Harper Lee's *To Kill a Mockingbird* comes to mind¹⁵³), or perhaps—unfortunately—a figure viewed with some amount of scorn or wariness because he or she represents individuals accused of criminal offenses.¹⁵⁴ As submitted in the introduction to this article, the work of a criminal defense attorney is not for the fainthearted. This is even truer in the context of international criminal cases—with the average defense team working against not only a better resourced prosecution but often in an environment of great prejudice due to the sometimes concerted negative public statements from third parties regarding the client and the crimes the client is alleged to have committed.

152. *Banda*, Case No. ICC-02/05-03/09, Defence Request for a Temporary Stay of Proceedings, ¶¶ 13-14 (Jan. 6, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1296602.pdf>

153. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

154. See, for example, a 2002 report prepared for the American Bar Association that reveals that seventy-three percent of respondents to a survey agreed with the statement that “lawyers spend too much time finding technicalities to get criminals released.” LEO J. SHAPIRO & ASSOCIATES, AM. BAR ASSOC., SECTION OF LITIG., PUBLIC PERCEPTIONS OF LAWYERS CONSUMER RESEARCH FINDINGS 8 (2002), available at <http://www.cliffordlaw.com/abaillinoisstatedelegate/publicperceptions1.pdf>.

From this vantage point, the actions of the defense would seem to be driven primarily by individual initiative, in which the personal attributes and experiences of particular defense counsel have a direct effect on the practices and decision making of defense teams. Practice theory reverses this popular looking glass and examines “practices not practitioners.”¹⁵⁵ As we have explored in this article, practice theory provides a more analytical view and better understanding of the work of the defense before the ICC. The personal and professional attributes and experiences of individual defense counsel undoubtedly remain important factors in the decision-making and practices of the defense before the ICC. However, practice theory reveals that the scope of action available to defense counsel before the ICC is very much an incident of both macro and micro factors over which a defense counsel has little control.

From a macroperspective, the Rome Statute and RPE set the substantive and procedural legal framework within which a defense counsel will operate when representing a client before the ICC. As noted in the introduction to this article, this framework is itself the result of a long and intensive process of discussion and negotiation involving a diverse array of actors seeking to address in a permanent fashion fundamental issues of criminal accountability for crimes that are of the greatest concern to the international community. Applicable codes of ethics and the integrity of individual defense counsel in steadfastly applying these fundamental principles provide the overarching framework within which counsel must operate.

From a microperspective, the actions of the organs of the court—including the decisions of the pre-trial, trial and appeals chambers, the type of ICC jurisdiction exercised in a particular situation and the practical precedents set by other defense counsel—all influence the practices and decision-making of the defense on both a strategic level and on a day-to-day basis. In part III of this article we examined how the manner and timing of prosecution disclosure to the defense and the legal regime for disclosure at the ICC shape the manner in which a defense team deploys its resources and structures its evidence analysis and investigations. In particular, the prosecution’s practice of disclosing to the defense significant and substantial amounts of material at or close to disclosure deadlines at both the confirmation and trial stages, coupled with an overbroad and cumbersome redaction regime, results in defense teams having to backload and amend their strategic planning and ongoing investigations in the months, weeks, and even days prior to the commencement of the confirmation hearing or trial proceedings. Additionally, a significant proportion of precious defense resources and attention must be deployed toward *inter partes* communications regarding and the litigation of disclosure issues. The requirements of the e-court protocol, especially in the context of the disclosure process at the confirmation stage, add a very specific, but not insignificant, constraint on the manner in

155. See NICOLINI, *supra* note 18, at 7.

which a defense team must prepare for the confirmation hearing and the defense case at trial. In short, an understanding of the disclosure framework at the ICC and the actions of other actors in this process as they impact defense teams are crucial to understanding how a defense counsel approaches the representation of a client before the ICC.

In part IV practice theory was applied to the unique confirmation-of-charges process at the ICC. Here, the decision-making of a defense counsel is shaped by the Rome Statute and RPE, the goals and instructions of the client, and strategic considerations in view of the possible outcomes of the confirmation process, with this last factor influenced by the results of past confirmation hearings before the ICC.

In Part V we focused on the conduct of defense investigations before the ICC, examining how factors such as the ICC's status as an institution of global reach and activity, the four bases upon which the court may exercise jurisdiction, and, as explored earlier, the process of disclosure at the ICC, influence a defense counsel's approach to planning and conducting investigations. The spreading of the ICC's resources across its various distinct situations, and a similar diversity in experience of defense-team personnel practicing within these situations, results in defense counsel and their teams having less in the way of institutional and defense-bar support and knowledge to rely upon in comparison to the ad hoc and hybrid courts and tribunals. Although no general rule applies as to how the particular type of ICC jurisdiction exercised in a situation may impact defense investigations, the jurisdiction exercised is part and parcel of the overall context pertaining to that situation (which includes the security situation on the ground, communication and transport infrastructure in the area in question, the history of the conflict, and the languages and cultural and social norms of the peoples involved in or otherwise touched by the conflict). Darfur, Sudan, a situation referred to the ICC by the UN Security Council over the objections of the government of Sudan, provides perhaps the starkest example of how the type of ICC jurisdiction exercised may impact the process of defense investigations. Because neither the defense nor the organs of the court can legally and safely enter and conduct investigations on the territory of Sudan, the defense is limited to conducting investigations by phone and otherwise expending significant resources in attempting to arrange for the safe round-trip travel of willing witnesses to third states in order to meet with the defense.

The security situation of witnesses in this context takes on an even greater import given that the court is unable to provide any measure of protection or assistance to witnesses located in Sudan, as does the collection of documentary evidence including information provided by states and international organizations. As discussed earlier, the process of disclosure at the ICC also impacts the conduct of defense investigations. The prosecution's practice of late disclosure of significant amounts of critical incriminatory, exonerating and otherwise relevant items, as well as the heavy and broad regime of redactions

applied at the ICC, require the defense to structure their evidence analysis and investigation strategy to take into account this reality.

An examination of these three defense phenomena—approaches to disclosure, the confirmation-of-charges process and investigations—through the lens of practice theory reveals that the considerations and actions of ICC defense counsel, and the issues a defense counsel will face in practicing before the ICC may be understood, and perhaps even predicted in a general sense, from the very start of a counsel's engagement in a case. Disclosure issues will pervade throughout an ICC case and greatly influence a defense counsel's actions and decisions with respect to resource allocation, litigation priorities, formation of case strategy, and conduct of investigations. A counsel's approach to the confirmation-of-charges hearing will depend on, among other things, the client's goals and instructions and strategic considerations unique to the ICC process. The conduct of defense investigations at the ICC, as revisited immediately above, is likewise a phenomenon that arises from the particular context of the ICC as a global institution with different avenues of jurisdiction and a disclosure process that requires significant defense resources and careful attention.

Of course, the effective representation of a client, in the end, will always fall upon the individual shoulders of a defense counsel. This is how it should be. Whilst the practices described above set the framework within which the ICC defense operates, a defense counsel's individual skill and experience, as well as his or her determination to adhere to the best standards of deontology will ultimately determine the quality and effectiveness of representation that a suspect or accused person will receive before the ICC.