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Investigating from Afar: The ICC's Evidence Problem

CHRISTIAN M. DE VOS*

Abstract
The ICC's early history indicates that more attention must be paid to the investigative practices of the Office of the Prosecutor. The judicial record to date, and the increasing dissatisfaction amongst affected communities with the Court's work, belies the desirability of the 'light-touch,' low-cost approach to investigations that has hitherto been championed. Rather than positioning the ICC as a remote site of justice, the Office must locate its investigative work more thoroughly on the territories in which it is engaged. The composition of its staff has also been insufficiently reflective of the countries under investigation and its relationships with individuals and institutions on the ground poorly managed. Despite relying heavily on the knowledge that these local actors can bring, the OTP has too often employed a unilateral approach to evidence gathering, failing to integrate their concerns and priorities into the investigative process.

Key words
International Criminal Court; Office of the Prosecutor; investigations; intermediaries; local context

1. INTRODUCTION

The investigation of atrocity crimes by international courts makes evidence gathering a difficult enterprise, often limiting the reliability of witness testimony,[1] the quality of available evidence, the security of international personnel, and even access to territories themselves.[2] Yet while the space between where crimes are committed and where they are judged complicates investigations it is also, in part, what makes international adjudication desirable. Spatial distance – away from the site of

* JD (American University); MSc (LSE); PhD Researcher at the Grotius Centre for International Legal Studies, Leiden University [christian.m.devos@gmail.com]. This article is part of a larger research project on Post-Conflict Justice and 'Local Ownership', supported by the Netherlands Organisation for Scientific Research. The author thanks Abigail Baim-Lance, Caroline Buisman, John Jackson, Sara Kendall, Susana SáCouto, Carsten Stahn, Larissa van den Herik, Marnie Whelan-De Vos, and two anonymous reviewers for helpful comments, corrections, and conversation. The insights and experiences of former and current ICC personnel who granted interviews with the author, as well as those of interlocutors in Kenya, Uganda, and the Democratic Republic of Congo, are also gratefully acknowledged.

1 See, e.g., N. Armoury Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (2010).

2 See, e.g., C. Del Ponte, 'Investigation and Prosecution of Large-Scale Crimes at the International Level', (2006) 4 *Journal of International Criminal Justice* 552; R. Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (2000).

conflict – offers the possibility for institutions like the International Criminal Court (ICC) to 'deliver impartial, majestic justice on behalf of the international community', while an elite corps of investigators, prosecutors, and judges are those thought best placed to deliver it.[3] In Gerry Simpson's words, 'The ICC is imagined as a way of removing from the field the local particularities and prejudices of national criminal justice systems, and putting in their place a unified system of transnational justice'.[4] An attendant presumption is that the ICC should remain, or be perceived to remain, at a distance from the social and political lives of the conflicts in which it intervenes. In the words of a recent Human Rights Watch report, the Court must 'act impartially and be seen to be doing so'.[5] Yet this quest for impartiality, or at least its appearance, is precisely what can leave international courts poorly equipped to deal with the 'peculiarities and prejudices' of local context, making evidence gathering one of the great (if often overlooked) challenges for the international criminal justice project.

It is becoming increasingly clear that the ICC has an evidence problem. Of the 14 individuals who have undergone the confirmation-of-charges process before the Court to date, charges against five suspects, more than a third of those accused, have been dismissed or withdrawn in their entirety.[6] More recently, the confirmation decision against former Côte D'Ivoire president Laurent Gbagbo was 'postponed' by the Pre-Trial Chambers, also due to insufficient evidence.[7] One report notes that this is 'a substantially higher rate of dismissal than the acquittal rate seen at other international criminal bodies following a full trial, even though the standard at trial

3 G. Simpson, *Law, War & Crime* (2007), 30.
4 Ibid., at 35.
5 Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Cases* (2011), 5.
6 See *The Prosecutor v. Bahr Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, P.T.Ch. I., 8 February 2010; *The Prosecutor v. Callixte Mbarushimana*, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, P.T.Ch. I, 16 December 2011; *The Prosecutor v. William Samoei Ruto et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, P.T.Ch. II, 23 January 2012 (confirming charges against William Ruto and Joshua Sang, but declining to confirm charges against Henry Kosgey); *The Prosecutor v. Francis Kirimi Muthaura et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, P.T.Ch. II, 23 January 2012 (confirming charges against Francis Muthaura and Uhuru Kenyatta, but declining to confirm charges against Mohammed Hussein Ali). In March 2013 the Prosecutor sought, and was granted, permission to withdraw charges against Muthaura as well, on the basis that 'serious investigative challenges, including a limited pool of potential witnesses', led her to the conclusion that there was no longer a reasonable prospect of conviction. See *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Prosecution Notification of Withdrawal of the Charges against Francis Kirimi Muthaura, ICC-01/09-02/11, T.Ch. V, 11 March 2013, para. 11.
7 See *The Prosecutor v. Laurent Gbabgo*, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11, P.T.Ch. I, 3 June 2013. By majority, the Chamber considered that the evidence, 'although apparently insufficient, does not appear to be so lacking in relevance and probative value' as to leave it no choice but to decline confirmation. The Chamber adjourned the hearing and asked the Prosecutor to 'consider providing, to the extent possible, further evidence or conducting further investigations'; see paras. 15, 44. The Ggabgo case is not the only instance in which judges have split on the proper role of the Pre-Trial Chamber during the confirmation of charges, or the appropriate standard of proof to be applied. See, e.g., *Mbarushimana* Decision, *supra* note 6, where the Chamber, also by majority, declined to confirm charges. In dissent, Judge Monageng stated: '[W]hat the majority sees as "insufficient evidence" I see as "triable issues" deserving of the more rigorous fact finding that only a Trial Chamber can provide.' Ibid., para. 134.

– beyond a reasonable doubt – is higher than the burden at the confirmation stage'.[8] Furthermore, in December 2012, Trial Chamber II acquitted Mathieu Ngudjolo Chui, the ICC's second defendant, of all crimes, due to the absence of sufficient evidence; it also dedicated a portion of the judgement to criticizing the OTP's investigatory methods and the credibility of its witnesses.[9] Similar criticisms were raised in the judgement against Thomas Lubanga,[10] the first defendant to be convicted by the Court, and in the Kenya case, where the number of individuals facing trial has now been reduced by half. Indeed, in April 2013, Judge Christine Van den Wyngaert chastised the Office of the Prosecutor (OTP) for its 'failure to investigate properly' prior to confirming charges against the now president of Kenya, Uhuru Kenyatta, revealing, in her words, 'grave problems in the Prosecution's system of evidence review, as well as a serious lack of proper oversight by senior Prosecution staff'.[11]

The limited scope of charges in some cases has also raised doubts about the Prosecution's investigative strategy, creating the perception that proceedings might fail to reflect the true scale or gravity of a conflict. Pascal Kambale, a human rights advocate who was closely engaged with the ICC's intervention in the Democratic Republic of Congo (DRC), has noted in the context of the Lubanga trial that, 'Many in the DRC found it deeply disturbing that, after two years of investigations, conscription of child soldiers was all that the ICC prosecutor was able to point to as being among "the worst crimes" committed in Ituri'.[12] Similar concerns have been raised over sexual and gender-based crimes, which the OTP has identified as a priority but are also those most vulnerable to failing judicial scrutiny.[13]

The ICC presently has eight situation-countries on its docket, with the Prosecution's diminishing confirmation and conviction record tracking its expanded jurisdiction. In light of that record, this article considers ICC investigations as a site where the internationalizing impulse of impartial justice has too often overlooked the importance of a place-based approach to evidence gathering. The OTP has instead pursued a strategy of short, 'focused' investigations, choosing not to base any of its investigators in situation-countries or to develop a sustained field-based presence. Early intentions to recruit nationals of ICC situation-countries appear to have

8 War Crimes Research Office, *Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor* (2012), 9. The burden of proof during the ICC confirmation of charges stage is 'substantial grounds to believe'. See Rome Statute of the International Criminal Court, UN Doc.A/CONF.183/9 (1998), Art. 61(7).

9 *The Prosecutor v. Mathieu Ngudjolo*, Judgement Pursuant to Article 74 of the Statute, ICC-01/04-02/12, T.Ch. II, 18 December 2012, para. 516.

10 *The Prosecutor v. Thomas Lubanga Dyilo*, Judgement Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T.Ch. I, 14 March 2010, paras. 482–483.

11 *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, ICC-01/09-02/11, T.Ch. V, 26 April 2013, Concurring Opinion of Judge Christine Van den Wyngaert, paras. 1, 4–5.

12 Pascal Kambale, 'The ICC and Lubanga: Missed Opportunities', *SSRC Forums: African Futures*, 16 March 2012, available online at www.forums.ssrc.org/african-futures/2012/03/16/african-futures-icc-missed-opportunities.

13 The Women's Initiatives for Gender Justice notes that gender-based crimes are the 'most vulnerable category' of crime at the ICC, with more than 50 per cent of such charges being dismissed before trial, attributable, in part, to 'the Prosecution's use of open-source information and failure to investigate thoroughly'. See *Legal Eye on the ICC* (March 2012), available online at www.iccwomen.org/news/docs/WI-LegalEye3-12-FULL/LegalEye3-12.html.

been abandoned as well. Rather, the OTP has increasingly relied on its relationships with local information providers, known as 'intermediaries'. These individuals and organizations, while not 'core' ICC staff, nevertheless perform a variety of essential functions, including assistance with investigations. Unfortunately, rather than seeking to develop a more partner-based relationship with these actors, the OTP has too often failed to integrate their concerns and priorities into the investigative process and, in certain cases, to properly oversee their work in the field.

Relatively little has been written about ICC investigations to date, as they touch upon some of the Court's most sensitive practices and depend, in part, on confidentiality. Nevertheless, particularly in the wake of the departure of the Court's first Prosecutor, Luis Moreno Ocampo, the OTP's approach to investigations is in urgent need of reflection. In first providing a broad outline of how ICC investigations have been structured within the overall architecture of the OTP, this article contends that, at an institutional level, investigative practices have not been sufficiently prioritized. This lack of prioritization appears to be premised, in part, on a presumption that keeping the Court at a distance best preserves its impartiality and efficiency, particularly in the face of insistent demands by states parties to maintain a 'zero-growth' budget. The second part of the article therefore considers how the OTP's evidence-gathering practices have in fact been designed to minimize the time investigators spend in affected communities, and their degree of engagement with local actors. Drawing on the comments and reflections of former ICC staff, as well as an emerging jurisprudence critical of the Prosecution's investigative techniques, this article argues that the OTP should develop a more field-based orientation to its investigations, while also developing better relationships with the variety of local actors – individuals as well as non-governmental organizations (NGOs) – that it engages.

2. Investigating at the ICC

2.1. Structure of the Office of the Prosecutor

Investigations comprise one of three divisions within the OTP; the other two are the Prosecutions Division and the Jurisdiction, Complementarity, and Cooperation Division (JCCD).[14] Following the ICC's establishment in 2002, the Assembly of States Parties (ASP) elected Moreno Ocampo as its first Prosecutor, as well as two Deputy Prosecutors: Fatou Bensouda, the ICC's new Prosecutor as of June 2012, and Serge Brammertz, currently the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY). Bensouda was appointed Deputy Prosecutor for Prosecutions while Brammertz served as the Deputy Prosecutor for Investigations; notably, however, since Brammertz's departure from the Court in 2007, that position has been left empty.[15] Thus, whereas the Deputy Prosecutor leads the Prosecution

14 See ICC, Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, 23 April 2009, Regs. 7–9. The OTP also has an Executive Committee, which is responsible for strategic, policy, and budgetary decisions. Ibid., Reg. 4(1).

15 Although his resignation was submitted in June 2007, Brammertz had, in fact, been on leave from his position since early 2006. See 'The Office of the Prosecutor of the ICC – 9 Years On', FIDH, No. 579 (December 2011), 7, n. 8. Moreno Ocampo later sought to abolish the position of Deputy Prosecutor for Investigations entirely.

Division, the Investigations Division (ID), like the JCCD, is led by a 'head of division' that the Prosecutor selects.[16] The current head of investigations, Michel De Smedt, has served in this position since January 2006.

Following a decision to proceed with an investigation, a 'joint team' consisting of staff from the OTP's three divisions is formed; one former investigator has referred to these teams as the 'core operational units' of the Office.[17] With respect to the composition of the investigative teams, it appears that the ICC has sought to employ investigators from various backgrounds, a decision that some have criticized as contributing to the evidence problem because of their lack of law-enforcement training. For instance, Bernard Lavigne, who oversaw the ICC's early investigations in the DRC, testified during the Lubanga proceedings that his team included 'former members of [NGOs] who could provide better open-mindedness to enable the other team members not to limit themselves to their police backgrounds'. In his view, such limits 'may have had a negative impact on the quality of their work'.[18]

Regulation 32 provides that each team 'shall regularly report its progress and activities' to an Executive Committee composed of the Prosecutor, Deputy Prosecutor, and the heads of the ID and JCCD.[19] One former ICC investigator who led investigations against Germain Katanga and Ngudjolo Chui described the concept of the joint-team approach as one in which 'investigators, prosecutors and cooperation staff ... all work together from the very beginning of an investigation. ... Decisions in the joint team are taken jointly'.[20] Notably, this tripartite approach distinguishes the ICC from its ad hoc predecessors, both of which followed a more 'linear' model in which 'an entire investigation team ... reports directly to the Chief Prosecutor or to his executive office'.[21] While this model aims at 'adopting a more holistic and balanced investigative approach',[22] Gregory Townsend cites several anonymous OTP staff members who likened the interdivisional concept to a 'three-headed dragon', insofar as it 'divides authority, requires consensus throughout, and can subject all decisions to a difficult interpersonal dynamic'.[23] Townsend also notes that 'the

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The ASP rejected his effort to do so, however, on the basis that his successor 'should have [the] same flexibility to decide on the composition of the Office of the Prosecutor'. See 'Official Records of the Ninth Session of the ICC Assembly of States Parties', ICC-ASP/9/20, Vol. 1, Part II, para. 23.

16 The ASP elected James Stewart as the Court's second Deputy Prosecutor in November 2011; Phakiso Mochochoko has led the JCCD since February 2011.

17 D. Luping, 'Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court', (2009) 17 *American University Journal of Gender Social Policy and the Law* 438, n. 7.

18 *The Prosecutor v. Thomas Lubanga Dyilo*, Deposition of Witness DRC-OTP-WWWW-0582, ICC-01/04-01/06-Rule68Deposition-Red2-ENG, T.Ch. I, 16 November 2010, at 16–17; see also ICC-OTP, 'Paper on Some Policy Issues before the Office of the Prosecutor', September 2003, at 8. At the same time, it should be noted that tribunals like the ICTY have also championed a multidisciplinary approach to investigations with considerable success. See, e.g., *ICTY Manual on Developed Practices* (2009), at 12; see also War Crimes Research Office, *supra* note 8, at 33–4.

19 Regulations of the Office of the Prosecutor, Reg. 32.

20 *The Prosecutor v. Germain Katanga and Mathieu Ngudjulo Chui*, Transcript, ICC-01/04-01/07-T-81-Red-ENG, 25 November 2009, at 7:4–9; see also 29:17–19.

21 H. Fujiwara and S. Parmentier, 'Investigations', in L. Reydams, J. Wouteres, and C. Ryngaert (eds.), *International Prosecutors* (2012), 590.

22 Ibid., at 593.

23 G. Townsend, 'Structure and Management', in G. Townsend, *International Prosecutors* (2012), 590.

OTP's management and management culture is lacking', with 'poor results obtained in internal surveys'.[24]

2.2. The OTP's approach to investigations

While the Rome Statute is silent as to how evidence collection is to be carried out, the OTP adopted early on a policy of 'focused investigations'.[25] As articulated by the former head of the JCCD, 'The ICC prosecutor's policy is to carry out investigations in a few months, involving as few witnesses and incidents as possible'.[26] Related to this policy is the Office's use of small teams of rotating investigators to carry out its investigations.[27] Lavigne testified that his investigation teams in the DRC never consisted of more than 12 people for the entire country, a number that he considered to be 'insufficient'.[28] Similarly, in the case against Laurent Gbagbo eight investigators reportedly work on the ground 'in rotating teams of two'.[29] And, in Libya, the investigative team consisted of ten professional-level staff members and one general services assistant.[30] According to the OTP's proposed 2012 budget, only 44 professional staff were requested for the 'Investigations Teams' section of the ID, to be dispersed among the eight situation-countries.[31]

This strategy has meant that ICC investigators spend relatively little time in the field. Although Moreno Ocampo remarked in 2004 that some investigators 'will be based in headquarters and others will be deployed in the field',[32] in practice all ICC investigators are Hague-based and travel 'on mission', undertaking repeated, short-term trips. In the DRC, the OTP reported that, as of 2006, investigators had 'conducted more than 70 missions inside and outside the DRC, interviewing almost 200 persons'.[33] The same report noted that since opening its investigation in July 2004, the Ugandan joint team had conducted '[i]n just ten months … over 50 missions to the field'. Darfur investigators have 'conducted more than 50 missions in 15 countries', though, significantly, not in Darfur itself.[34]

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24 Ibid., at 293.

25 See ICC-OTP, 'Report on Prosecutorial Strategy', 14 September 2006, 5, para. 2(b); ICC-OTP, 'Prosecutorial Strategy 2009–2012', 1 February 2011, 5, para. 20. The Office has also developed an Operational Manual as a framework for its investigations; however, it is not available to the public.

26 K. Glassborow, 'ICC Investigative Strategy on Sexual Violence Crimes under Fire,' *Institute for War & Peace Reporting*, 27 October 2008, available online at http://iwpr.net/report-news/icc-investigative-strategy-under-fire. Glassborow's article quotes Beatrice Le Fraper du Hellen, who headed the JCCD from 2006 to 2010.

27 An early OTP policy paper noted that its 'operations are informed by three basic principles', one being that 'it functions with a variable number of investigation teams'. See ICC Paper on Policy Issues, *supra* note 18, at 8.

28 *Lubanga* Deposition, *supra* note 18, at 16:11–16.

29 J. James, 'Ivory Coast: Who's Next after Laurent Gbagbo?', 146 *International Justice Tribune*, 29 February 2012.

30 War Crimes Research Office, *supra* note 8, at 24, n. 45.

31 Ibid. The report further notes that the number of professional staff employed in the investigations division 'has *decreased* since 2007, despite the increase in the number of situations in which the Court is active'. Ibid., at 30–1 (emphasis in original); see also 'Proposed Programme Budget for 2012 of the International Criminal Court', ICC-ASP/10/10, 21 July 2011, at 47.

32 Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps, 12 February 2004, at 2, available online at www.iccnow.org/documents/OTPStatementDiploBriefing12Febo4.pdf.

33 ICC-OTP, 'Report on the Activities Performed during the First Three Years (June 2003–June 2006),' 12 September 2006, at 11.

34 Ibid., at 15, 19.

2.3. Budgeting for investigations

The OTP's approach to investigations is closely linked to austerity measures that have been imposed on the Court. Indeed, the number of small missions conducted in a relatively short period was extolled in a 2009 document on 'efficiency measures' as part of the 'Court-wide efficiency drive'.[35] The report noted that the OTP's strategy 'of having a small, flexible office', as well as 'lean and flexible' investigation teams, had 'enabled [it] to perform more investigations and prosecutions simultaneously, with the same number of staff'.[36] These 'achievements', it noted, 'are also reflected in the OTP's proposed budget for 2010, where no increase in resources is requested'.[37] These figures are consistent with a financial picture in which, since 2009, the Court's budget has increased just over 4 per cent even as the situations under investigation have increased by 75 per cent.[38]

Yet while the commitment to small investigation teams has been praised for its cost efficiency, the Office's 'lean and flexible' approach has been criticized for its effectiveness and the strain it places on Court staff. In a private 2008 letter that Human Rights Watch sent to the OTP Executive Committee (later made public), the organization expressed concern with the high attrition rate of ICC investigators and noted that there were 'simply not enough of them to handle the rigorous demands for conducting investigations'.[39] One former senior ICC investigator similarly notes that, by the mid-point of the Lubanga trial, the OTP had 'lost much of its experienced staff and was relying upon increasingly young personnel, whose considerable intellect and enthusiasm was matched only by their collective ignorance of sound investigative methodology in high-threat environments'.[40]

An overburdened (and underexperienced) investigations unit also raises the question whether investigations have been sufficiently prioritized by the OTP. One former official who led the Court's investigations in Uganda made clear that the former Prosecutor routinely undervalued the investigations unit, with too little time given to conduct thorough investigations;[41] another lamented the 'long history of investigative mismanagement'.[42] It would also appear that financial constraints have altered the OTP's ability to structure its investigations as originally envisaged. An early policy document noted, for instance, that 'to the extent possible, individuals would 'remain part [of investigation teams] until the end of the trial, in order to ensure that the knowledge of the situation acquired during the different phases remains

35 'Second Status Report on the Court's Investigations in to Efficiency Measures', ICC-ASP/8/30, 4 November 2009, para. 4.
36 Ibid.
37 Ibid.
38 R. Hamilton, Closing ICC Investigations: A Second Bite at the Cherry for Complementarity?, HRP Research Working Paper Series (2012), at 6.
39 Human Rights Watch, Letter to the Executive Committee of the Prosecutor, 15 September 2008, available online at www.article42-3.org/Secret%20Human%20Rights%20Watch%20Letter.pdf.
40 W. Wiley, 'The Difficulties Inherent in the Investigation of Allegations of Rape before International Courts and Tribunals', in M. Bergsmo, A.B. Skre, and E. Wood (eds.), *Understanding and Proving International Sex Crimes* (2012), 375–6.
41 Personal interview with former ICC investigator, October 2011.
42 Wiley, *supra* note 40, at 384.

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accessible to the team'.[43] Yet, in her inaugural address to the ASP, Prosecutor Bensouda explained that – with financial cuts having now 'reached the bones' – a 'rotation model' was in effect, wherein 'staff move between teams depending on the phases, workload and case priorities'.[44] Bensouda noted that this approach has provided the Office with 'significant savings, in comparison with what would normally be the ideal situation of having full teams moving at maximum pace on all the cases simultaneously'.[45]

3. Three critiques

3.1. Limited field presence

The most notable aspect of the Prosecution's approach to evidence gathering has been its failure to locate any investigators in country on a permanent (or semi-permanent) basis. In this respect the ICC departs from the practice of predecessor tribunals like the International Criminal Tribunal for Rwanda, which had several investigators based in-country.[46] Moreover, while tribunals like the ICTY have also adopted a mission-based approach to investigations, unlike the ICC's small-team arrangement, investigation teams at the ICTY 'consisted of up to twenty members', with 'up to ten separate teams operational at a given time, even though the geographic jurisdiction of the Tribunal was limited to the territories of the former Yugoslavia'.[47] OTP leadership also prioritized field investigations. Louise Arbour, the tribunal's former Prosecutor, 'made it an organizational priority during the Kosovo period to get as many OTP employees into the field "on mission" as possible'.[48] Another ICTY investigator recalled fieldwork being an 'all-consuming' enterprise, where it was 'common to work through ten at night, every day, for three, four weeks'.[49]

By contrast, ICC investigators working in the DRC spent only an average of ten days in the field,[50] making it difficult for them to even interview witnesses, much less to develop the sort of long-term connections that a more sustained field presence would enable. As a 2008 report by Human Rights Watch noted:

> The opportunities for Hague-based investigators to interact and develop strong contacts with witnesses are limited in number and timeframe … [E]ven when key witnesses agree to a specified time to meet with investigators, circumstances may change,

43 ICC Paper on Policy Issues, *supra* note 18, at 9.
44 F. Bensouda, Address to the Assembly of States Parties, Eleventh Session of the Assembly of States Parties, 14 November 2012, paras. 7, 19.
45 Ibid.
46 G. Boas and G. Oosthuizen, Suggestions for Future Lessons-Learned Studies: The Experience of Other International and Hybrid Criminal Courts of Relevance to the International Criminal Court (January 2010), para. 47.
47 War Crimes Research Office, *supra* note 8, at 29–30; see also *ICTY Manual on Developed Practices*, *supra* note 18, at 16.
48 J. Hagan, *Justice in the Balkans: Prosecuting War Crimes in The Hague Tribunal* (2003), 137.
49 Ibid., at 154.
50 *Lubanga* Judgement, *supra* note 10, para. 165; *Lubanga* Deposition, *supra* note 18, at 75:7–8.

> rendering them unavailable by the time that the Hague-based members of the investigative teams travel to the field.[51]

The small-team approach also made the possibility of a permanent presence in the field impossible. As summarized by the Lubanga Trial Chamber, 'because there were only a few investigators it was not possible to have someone in the field permanently', even though, according to Lavigne, 'This would have been the correct approach'.[52]

In his assessment of the trial, Kambale has argued that the OTP's failure to bring charges against other, higher-ranking commanders was 'a direct result of the prosecutor's strategy of conducting quick investigations with the lowest cost possible'.[53] In his view, the investigative teams assigned to Ituri 'were too undersized and too short-term to generate good analysis of the intricately entangled criminal activities' taking place in the region.[54] Kambale further recalls a meeting in December 2003, at which Moreno Ocampo reportedly told a group of international NGOs that the investigative teams deployed to the field 'would be composed almost entirely of temporary staff'.[55] Although this plan was later reconsidered, the 'cost-efficient' approach still meant that investigators were 'sent to the field for short periods of time'. The Prosecution's minimal field presence in the Kivus region of eastern DRC – which has been even more limited than its presence in Ituri – has led to similar results: in December 2011, the Court declined to confirm any of the charges against Callixte Mbarushimana (a Rwandan national residing in France) for crimes committed by FDLR troops in the DRC.[56]

In its judgement acquitting Ngudjolo Chui, Trial Chamber II also drew attention to the Prosecution's lack of field presence in assessing deficiencies in the evidence presented. While acknowledging the difficulty of conducting investigations in a 'region still plagued by high levels of insecurity', the chamber emphasized the importance of 'mak[ing] as many factual findings as possible, in particular forensic findings … in *loci in quo*'.[57] The chamber noted that it would have been 'beneficial for the Prosecution to visit the localities where the Accused lived and where the preparations of the attack in Bogoro allegedly took place, prior to the substantive hearings'.[58] The chamber had itself travelled to these localities – Bogoro, Aveba, Zumbe, Kambutso – in early January 2012 as part of a judicial site visit, the first (and

51 Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years* (2008), 55.
52 *Lubanga* Judgement, *supra* note 10, para. 166; *Lubanga* Deposition, *supra* note 18, at 75:16–18.
53 Kambale, *supra* note 12.
54 Ibid.
55 Ibid. According to local NGOs and UN staff in Bunia, 'Investigators never spent more than a few days', n. 21.
56 *Mbarushimana* Decision, *supra* note 6. The Chamber, by majority, expressed 'concern' over the OTP's apparent attempt to 'keep the parameters of its case as broad and general as possible', pleading certain charges with insufficient specificity and 'in such vague terms,' seemingly 'in order to allow it to incorporate new evidence relating to other factual allegations at a later date without following the procedure [governing amendments to the charges]', paras. 82, 110. In the case against FDLR commander Sylvestre Mudacumura, a separate Pre-Trial Chamber denied the OTP's first request for an arrest warrant for a similar 'lack of specificity'. It later granted the warrant but excluded all of the requested counts of crimes against humanity, while noting that the application bore 'some similarities' to the case brought against Mbarushimana. See *The Prosecutor v. Sylvestre Mudacumura*, Decision on the Prosecutor's Application under Article 58, ICC-01/04-01/12, P.T.Ch. II, 13 July 2012, paras. 20, 22–29.
57 *Ngudjolo* Judgement, *supra* note 9, paras. 115–117.
58 Ibid., para. 118.

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only) time an ICC chamber has done so.[59] Its visit was described as enabling the Chamber to 'gain a better understanding of the context of the events', as well as to 'conduct the requisite verifications *in situ* of certain specific points and to evaluate the environment and geography of locations'.[60] The judgement refers repeatedly to the Chamber's visit, providing examples of how such knowledge would have provided it with a clearer appreciation of the evidence.[61]

The security question raised by the Trial Chamber one that has understandably informed the OTP's 'light-touch' approach: most ICC investigations are conducted in situations of ongoing conflict, or where conflict has only recently ended. As a result, ensuring the security of both ICC personnel and witnesses is a constant source of concern. Lavigne, for instance, testified that the security situation in the DRC had 'a marked impact on the [OTP's] ability to undertake its work because it was impossible for the team to go to the villages and meet with potential witnesses, and there were limited meeting places'.[62]

Yet there has also been public criticism that the OTP has been too risk-averse in assessing its ability to operate on the territory of situation-countries. For instance, although Moreno Ocampo defended his decision not to investigate in Darfur on security grounds, he was sharply criticized by Professor Antonio Cassese, chair of the United Nations Commission of Inquiry on Darfur, whose report helped, in part, spur the referral of the situation to the Court. Cassese criticized the '[e]xceedingly prudent attitude of the ICC Prosecutor'[63] and, in an invited amicus curiae brief, the failure to pursue even 'targeted and brief interviews' in Darfur, noting that the UN Commission had successfully insisted upon such access during the course of its investigations.[64]

Andrew Cayley, the ICC's first senior trial attorney for Darfur, concurs with Cassese's assessment. Reflecting on the Darfur investigation, Cayley notes:

> It was a mistake that the court did not establish a presence on the ground in Darfur. ... It is not to say that establishing an office in Darfur would have been easy but it should be emphasized that the OTP was extremely risk averse when I worked there. By encouraging some risks I am not proposing recklessness. The reality, as we all know, is that you have to take risks and you have to have courage to do this work. Professor Cassese ... personally went to Khoba prison in Khartoum and interviewed very sensitive witnesses. He demanded access with nothing more than a Security

59 Ibid., paras. 22, 68–69.
60 Ibid., para. 70.
61 Ibid., para. 118.
62 *Lubanga* Judgement, *supra* note 10, para. 153.
63 A. Cassese, 'Is the ICC Still Having Teething Problems?', (2006) 4 *Journal of International Criminal Justice* 438.
64 Situation in Darfur, Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC, ICC-02/05-14, P.T.Ch. I, 25 August 2006, at 5. Louise Arbour, then the UN's High Commissioner for Human Rights, was also invited to submit a brief to the Court, in which she similarly called for 'an increased visible presence of the ICC in Sudan', insisting that it 'is possible to conduct serious investigations of human rights during an armed conflict in general, and Darfur in particular, without putting victims at unreasonable risk'. See Situation in Darfur, Observations of the United Nations High Commissioner for Human Rights Invited in Application of Rule 103 of the Rules of Procedure and Evidence, ICC-02/05, P.T.Ch. I, 10 October 2006, para. 64.

> Council resolution in his hand. The OTP ICC got no further than the Hilton Hotel in Khartoum.[65]

More recent cases conducted by the Court suggest that little has changed with respect to the OTP's strategy. During the confirmation-of-charges proceedings against the suspects in Kenya – where security risks were considerably less than in DRC or Darfur – submissions by both defence and victims' counsel raised questions about the OTP's lack of in-country investigations.[66] Similarly, while arrest warrants were issued against three Libyan indictees in May 2011 (just three months after the Security Council's referral), it appears that the OTP only began conducting *in loci* investigations there in November 2011.[67]

To be sure, security is a legitimate concern, and one that poses crucial ethical responsibilities for all ICC staff. At the same time, however, there is a legitimate concern that security, and the attendant obligations of confidentiality, have been used to deflect much of the critique directed at investigations. As one ICC defence counsel (who has herself conducted extensive investigations in the DRC), noted, '[I]nvestigations in war-torn … societies will always involve some level of risk no matter how much one seeks to reduce it: this cannot be allowed to reduce the quality of the investigations to the extent the OTP has done so far'.[68] Similarly, in her concurring opinion, Judge Van den Wyngaert rejected the Prosecution's 'mere invocation … of generic problems with the security situation in Kenya', which did not 'adequately justify the extent and tardiness' of the OTP's post-confirmation investigation there.[69]

3.2. Absence of national investigators

In addition to its minimal field presence, none of the OTP's investigators to date have been nationals of countries where cases are under investigation; indeed, only a small number are African.[70] While other OTP staff members have supported such a proposal – which was identified as an early goal of the Office's plan for investigations[71] – it was never implemented during Moreno Ocampo's tenure. Kambale's notes from a 2004 meeting with OTP staff indicate that the choice not to seek out experienced

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65 A. Cayley, 'Witness Proofing: The Experience of a Prosecutor', (2008) 6 *Journal of International Criminal Justice* 763, at 779–80. In 2010, all of the OTP charges against Bahr Idriss Abu Garda – one of only three accused in the Darfur situation to have actually appeared before the ICC – were dismissed. The Pre-Trial Chamber unanimously found that the evidence presented was 'so scant and unreliable' that it could not find substantial grounds to confirm the allegations. *Abu Garda* Decision, *supra* note 6.

66 See, e.g., *The Prosecutor v. William Samoei Ruto et al.*, Request by the Victims' Representatives for Authorisation to Make a Further Written Submission on the Views and Concerns of the Victims, ICC-01/09-01/11, P.T.Ch. II, 9 November 2011, paras. 10–12; *The Prosecutor v. William Samoei Ruto et al.*, William Samoei Ruto Defence Brief Following the Confirmation of Charges Hearing, ICC-01/09-01/11-355, P.T.Ch. II, 24 October 2011, paras. 24–29.

67 See 'Third Report of ICC Prosecutor to UN Security Council Pursuant to UNSCR 1970', 16 May 2012, para. 11.

68 C. Buisman, 'Delegating Investigations: Lessons to Be Learned from the Lubanga Judgment', (2013) 11 *Northwestern Journal of Human Rights* 30, at 71; personal interview with Caroline Buisman, July 2012.

69 Van den Wyngaert Concurring Opinion, *supra* note 11, para. 2.

70 Personal interview with member of ICC Investigations Division, July 2012.

71 The OTP's 2003 policy paper states that 'Investigation teams will include staff members who are nationals of the countries targeted by the investigations'. This 'inclusive strategy' would 'help the OTP have a better understanding of the society on which its work has the most direct impact, and will allow the team to interpret social behavior and cultural norms as the investigation unfolds'. See *supra* note 18, at 9.

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national investigators was deliberate. Part of the 'short and focused' investigative strategy, as articulated by the then Prosecutor, was 'the fact that it would minimize the need for having local people in the investigative teams, thus helping avoid situations where impartiality is questionable'.[72] Unlike predecessor tribunals the OTP has also hired no country experts as either permanent or temporary staff.[73] In the DRC, it appears that there was only one Congolese national who served for a brief period of time, in a formal capacity, as a country expert and adviser to investigators.[74]

The price of this interest in impartiality, or at least its appearance, has undoubtedly compromised the quality of OTP investigations. As articulated by one intermediary from Ituri:

> The Court faces difficulties in assessing places and [it] was unfamiliar with the socio-political context [in the DRC.] It did not understand the complicated war-time alliances, and did not grasp the subtleties of 'who was close to who' in a toxic environment nor 'who could do what'.[75]

Similarly, a study conducted by the International Refugee Rights Initiative (IRRI), in consultation with the Congolese NGO Aprodivi, notes that:

> [T]he fact that Court staff was … dominated by internationals did little to diminish the sense that the Court could have done more to understand the local context. … Failure to ['verify the information that they got'], and to engage the 'real community leaders', left the ICC 'looking ridiculous a large percentage of the time'.[76]

The Ngudjolo Chui judgement suggests that the chamber would have similarly appreciated attention to local context: the judges expressed interest, for instance, in questions of 'socio-cultural framework', so as to 'prompt a more informed debate from the outset'.[77]

The OTP's decision not to locate any of its investigators in the field, or to hire nationals of the country being investigated, stands in contrast with other organs of the Court. The Registry, for instance, while admittedly performing a different function than the OTP, has hired Congolese and Ugandan nationals to conduct outreach on behalf of the Court in situation-countries.[78] The role and participation of victims in ICC proceedings further provides an interesting counterexample to the Prosecution's approach. During the pre-trial stage of the Kenya cases, the two counsels who were assigned to represent victims each had a staff of three country-based field assistants. Kenyan nationals all, these individuals had long associations

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72 Kambale, *supra* note 12, n. 22.

73 In contrast, both Louise Arbour and Carla del Ponte, former Prosecutors of the ICTY, hired specialists to act as political advisers in dealing with governments and key figures within the former Yugoslavia. See V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (2008).

74 Personal interview with member of ICC Investigations Division, The Hague, July 2012.

75 G. Carayon, 'Increased Use of Intermediaries: Increased Discontent', *ACCESS: Victims' Rights Working Group Bulletin* (Spring 2012), available at www.vrwg.org/ACCESS/ENG20Rev.pdf, at 4.

76 IRRI and Aprodivi-ASBL, Steps towards Justice, Frustrated Hopes: Some Reflections on the Experience of the International Criminal Court in Ituri (January 2012), 20.

77 *Ngudjolo* Judgement, *supra* note 9, para. 123. The Chamber expressed particular interest in testimonies that allowed it 'to appreciate the special significance of the local customs and the function of family relationships in Ituri', as 'notions of hierarchy and obedience were likely to be interpreted very differently'. Ibid., para. 122.

78 Personal interviews with ICC Field Office Staff in Kampala, Uganda, and Kinshasa, DRC, June 2011.

with Kenyan civil society and human rights organizations in the country. Based in Nairobi, they travelled regularly to other conflict-affected regions of the country, while another was based in the Rift Valley Province, a key site of the post-election violence.[79]

While the model adopted in Kenya represented a more directed, streamlined approach to the ICC's victim participation regime that has drawn criticism,[80] the victims' counsels and their assistants played an active role in exposing early gaps in the OTP's case and pushing it (if unsuccessfully) to investigate further. One filing from the victims' representative in the case against William Ruto and Joseph Sang, in particular, sought to make further submissions to the Court about its views and concerns with respect to the Prosecution's case. The motion stated that the OTP had not conducted a 'meaningful investigation into eyewitness experiences' and that the victims – who numbered nearly 300 at the time – had reportedly not been interviewed by the OTP, were not aware of anyone in their locality having been interviewed, and were not aware of the Prosecution having ever come to their localities to conduct on-site investigations.[81] The victims' counsel further observed that some victims 'felt that the failure of the OTP to conduct on-site investigations or to interview victims could explain why the case as presented … did not fully accord with [their] own personal experiences'.[82]

3.3. Intermediaries: quasi-investigators?

While country nationals have not been formally a part of OTP investigations teams, the Office has nevertheless made extensive use of intermediaries. Intermediaries are not ICC employees as such, but may assist the Office (and other organs of the Court) in a volunteer capacity; in certain cases, intermediaries have also been hired on a short-term, contract basis.[83] No definition of 'intermediary' is found in the Rome Statute or the Rules of Procedure and Evidence; however, the Court currently defines an intermediary as:

> [S]omeone who comes between one person and another; who facilitates contact or provides a link between one of the organs or unit of the Court or Counsel on the one hand, and victims, witnesses, beneficiaries of reparations and/or affected communities more broadly on the other.[84]

In short, intermediaries are locally based actors who, '[b]ecause of their long-term presence',[85] carry out important functions for the Court. As summarized by the Lubanga chamber, they 'undertake tasks in the field that staff members cannot fulfil

79 Personal interview with legal assistants to victims' representatives, Nairobi, January 2012.
80 See, e.g., M. Kiai, 'Despised and Neglected, PEV Victims Are Now Being Abandoned by ICC', *Daily Nation*, 8 June 2012, available at www.nation.co.ke/oped/Opinion/-/440808/1423430/-/lroavoz/-/index.html.
81 Victims' Representatives Request, *supra* note 66, paras. 10–11.
82 Ibid., para. 10.
83 Testimony from the Lubanga proceedings indicates that the term 'intermediary' 'began to be used in the summer of 2004, but intermediaries only received contracts much later'. See *Lubanga* Judgement, *supra* note 10, para. 194. Furthermore, while travel expenses for intermediaries were generally reimbursed, 'the majority of the intermediaries were not paid and did not request payment'; ibid., para. 198.
84 Draft Guidelines Governing the Relations between the Court and Intermediaries (August 2011), at 5.
85 *Lubanga* Judgement, *supra* note 10, para. 167.

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without creating suspicion; they know members of the community, and they have access to information and places that are otherwise unavailable to the prosecution'.[86]

Although intermediaries were also a feature of the ad hoc tribunals (albeit far more limited), the ICC's scant resources, combined with the multiple countries in which it must carry out its operations, ensure that they will be a permanent part of the Court's landscape. They have attracted particular attention in the wake of the Lubanga trial, where the Chamber determined early on that the role of a small number of key intermediaries, together with the manner in which they discharged their functions, had become 'an issue of major importance'.[87] Ultimately, in its judgement, the Chamber found that the 'essentially unsupervised actions of three of the principal [Prosecution] intermediaries [could not] safely be relied upon',[88] a determination that, in turn, led to the exclusion of the testimony of witnesses who claimed to have served as child soldiers in Lubanga's rebel army.

The uncertain relationship of intermediaries to the OTP (and to the Court at large) underscores the crucial, but potentially destabilizing, role that they can play in investigations. On the one hand, as the Trial Chamber concluded, the OTP inappropriately 'delegated' its investigative responsibilities to intermediaries, relying on them, in some cases, not only to contact but also to propose potential witnesses. At the same time, the role of intermediaries overall was apparently 'limited, in the sense that [they] were excluded from the decision-making process'.[89] As it was explained to the Court, intermediaries 'were not supposed to know the objectives of the investigation team', nor were they 'given any substantive information about the case', as it would have been 'too complicated to enable discussions with anyone who was not a member of the investigation division'.[90]

Thus, despite recognizing that intermediaries are often better placed to gather evidence than many Hague-based investigators, it would appear that, as a matter of policy, they remain at the margins of the OTP's decision-making process. Kambale notes that local Congolese NGOs and activists 'had more raw intelligence on the crimes than any other entity, [but] were deliberately sidelined and their invaluable expertise not fully integrated into the investigative process'.[91] Phil Clark makes a similar point, arguing based on his extensive ethnographic research in the DRC that:

> the Court has generally failed to foster meaningful relations with … ground-level institutions that are vital to its cause. … [T]he ICC has not always sought this collaboration and often perceived itself as the lead organisation to which all others are answerable.[92]

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86 *The Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, ICC-01/04-01/06, T.Ch. I, 31 May 2010, para. 88.

87 Ibid., paras. 135–138; see also C. M. De Vos, '"Someone Who Comes between One Person and Another": Lubanga, Local Cooperation and the Right to a Fair Trial', (2011) 12 *Melbourne Journal of International Law* ??

88 *Lubanga* Judgement, *supra* note 10, para. 482.

89 Ibid., para. 181.

90 Ibid., para. 183.

91 Kambale, *supra* note 12.

92 P. Clark, 'If Ocampo Indicts Bashir, Nothing May Happen', 13 July 2008, available at www.csls.ox.ac.uk/documents/Clark_Final.pdf.

Protection for intermediaries has been another point of contention. Chidi Odinkalu of the Open Society Justice Initiative notes that a number of intermediaries – a 'community of refugees' – had become early targets for persecution in their countries as a result of their co-operation with the Court, yet 'neither support nor recognition was available from the ICC or most of its supporters'.[93]

Greater support and recognition for intermediaries is not only ethically responsible, it is practical as well. IIRI, which has worked extensively with intermediaries in the DRC, Uganda, and Sudan, notes that, in the context of the DRC, the prosecution did not know enough about who was giving it information and why. This 'lack of expertise … was viewed as reducing the capacity of the office [in The Hague] to navigate the complex local politics and *resulting* in the office relying blindly on some actors'. In the words of one interlocutor, 'They trusted anyone who called themselves civil society'.[94] The Lubanga Trial Chamber drew a similar conclusion, finding that 'There was no formal recruitment procedure for selecting intermediaries. An intermediary was simply someone who could perform this role; there was no process of candidacy or application and instead it was a matter of circumstance'.[95]

Some strides have been made in this area. Draft Guidelines – described as an attempt to 'provide a framework with common standards and procedures in areas where it is possible to standardize the Court's relationship with intermediaries'[96] – were first circulated in 2010 and later revised. Importantly, they address the existing legal and policy framework governing the ICC's relationship with intermediaries and seek to provide greater clarity as to the rights intermediaries may expect from the ICC, including their selection, payment (where appropriate) of their expenses, and their protection when placed at risk. Unfortunately, the ASP has failed to adopt the Guidelines as yet, and it remains unclear when it might do so.

The Guidelines should be adopted as a matter of priority; however, they alone will not overcome the more fundamental question of the ICC's orientation to the field. Rather than assets to be 'managed', the OTP must take greater care in cultivating more partner-based relationships with those individuals and organizations that know best the complex terrains in which the Court operates.[97] Indeed, while the Prosecution's

93 C. Odinkalu, 'Concerning the Criminal Jurisdiction of the African Court: A Response to Stephen Lamony', *African Arguments*, 19 December 2012, available at www.africanarguments.org/2012/12/19/concerning-the-criminal-jurisdiction-of-the-african-court-a-response-to-stephen-lamony-by-chidi-anselm-odinkalu; see also K. Glassborow, 'Intermediaries in Peril', *Institute for War & Peace Reporting*, 28 July 2008, available at www.iwpr.net/report-news/intermediaries-peril.

94 IRRI and Aprodivi-ASBL, *supra* note 76, at 20.

95 *Lubanga* Judgement, *supra* note 10, para. 195. The Prosecutor also drew heavily on evidence gathered from confidential agreements with intermediaries in its cases against Katanga and Ngudjulo Chui, leading the Pre-Trial Chamber to similarly lament 'the reckless investigative techniques during the first two years of the investigation into DRC'. *Prosecutor v. Katanga*, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, ICC-01/04-01/07, P.T.Ch. I, 20 June 2008, para. 123.

96 Draft Guidelines, *supra* note 84, at 3. It should be noted that while many organizations (for instance, local NGOs) can also serve as intermediaries, the Guidelines only govern the ICC's relationships with individuals. In addition to the Guidelines, a draft 'Code of Conduct for Intermediaries' and a 'Model Contract for Intermediaries' have also been created (draft of April 2012; on file with author).

97 On this point, see, e.g., E. Baylis, 'Outsourcing Investigations', (2009) 14 *UCLA Journal of International Law and Foreign Affairs* 121; see also E. Haslam and R. Edmunds, 'Managing a New "Partnership": "Professionalization", Intermediaries and the International Criminal Court', (2013) 24 *Criminal Law Forum* 49.

missteps with respect to a small number of ill-intentioned intermediaries have largely dominated discussions to date, it should not be forgotten that most of them are committed advocates who have sought to help the ICC, often at great personal risk.[98] Without them, the Court simply could not function.

4. Conclusion

The ICC's early history indicates that greater capital must be invested in the OTP's investigative practices. The judicial record to date, and the increasing dissatisfaction amongst affected communities with the Court's work, belies the desirability of the 'light-touch' approach to investigations that the OTP, at least under Moreno Ocampo's tenure, has championed. While deliberate, this approach has also elided larger constraints confronting the ICC, ranging from an ever-dwindling appetite to appropriately resource the Court, to an institutional reluctance to assume the greater risks that a long-term ground presence might present.

Such reluctance is perhaps more understandable in the context of coercive interventions – for instance, those where Security Council referrals led to the ICC's engagement. Yet even in states that have invited the Court in, the OTP's field presence has been minimal, the composition of its staff predominantly (if not exclusively) international, and its relationships with local actors damaged by a Hague-centric approach to evidence gathering. Presently, it is unclear the extent to which these policies may change under Bensouda's leadership. She promisingly noted in her inaugural speech to the ASP that the OTP is 'sending longer investigative missions with less frequent travel'; however, she also made clear that 'there shall be no structural changes in the Office, neither shall there be a departure from established policies and methods of operation'.[99]

Rather than positioning the ICC at a distance from the countries and regions in which it intervenes, this article has argued that the OTP must locate its investigative work more thoroughly on those territories. Furthermore, the Prosecutor needs to more effectively integrate individuals and NGOs based in ICC situation-countries into its investigations from the outset, not merely to better manage them but to more fully recognize the expertise and local knowledge they bring as well. As one ICC senior analyst has noted, 'Local expertise is indispensable to interpret the relevant information in its authentic social context, including aspects of culture, politics, economy and linguistics.'[100] Distance may have its virtues but it would seem that, for the ICC, the space between successful prosecutions in The Hague and responsible investigations in the field has grown unsustainably wide.

98 See, e.g., *Lubanga* Judgement, *supra* note 10, para. 184, where the Court notes that most intermediaries are 'activists, most of whom [are] fully aware of developments within the sphere of international criminal justice and the objectives of the investigators'.

99 Bensouda ASP Address, *supra* note 44, paras. 3, 6.

100 X. A. Aranburu, 'Methodology for the Criminal Investigation of International Crimes', in A. Smeulers (ed.), *Collective Violence and International Criminal Justice* (2010), 359.