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The Prosecutor's Obligation to Investigate Incriminating and Exonerating Circumstances Equally: Illusion or Reality?

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Abstract

This article examines whether the ICC Prosecutor has complied with its statutory obligation under Article 54(1)(a) of the Rome Statute to investigate incriminating and exonerating circumstances equally. By way of a number of striking examples of deficient investigations, it demonstrates that the ICC Prosecutor has so far failed to comply with this obligation. As a matter of competence and diligence, the Prosecutor is expected to conduct thorough investigations: this requires a critical assessment of each case and the supporting evidential material. An examination of the pending ICC cases shows that the Prosecutor has not met this expectation. The investigations conducted in all of these cases have been incomplete as far as both incriminating and exonerating circumstances are concerned. This article, however, also suggests that the defence is in a better position to search for exonerating evidence than the Prosecutor, and questions whether Article 54(1)(a) can be applied effectively under any conditions.

Key words

Article 54(1)(a); ICC investigations; confirmation hearing; exonerating and incriminating circumstances; competent and diligent Prosecutor

1. Origins of Article 54(1)(a) of the Rome Statute

The Rome Statute puts high demands on the Prosecutor. Not only does it require that the prosecution disclose all exculpatory evidence within its possession, it also mandates the prosecution to 'investigate incriminating and exonerating circumstances equally'. This obligation is set out in Article 54(1)(a) of the Rome Statute, which ascribes the role of an independent and neutral truth-finder to the Prosecutor.[1]

The ICC proceedings are adversarial with an important role and a budget for both parties to conduct their own independent investigations. They are, therefore, more akin to common-law than to civil-law criminal proceedings, but have incorporated a number of important civil-law principles. Article 54(1)(a) embodies one such

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1 Article 54(1)(a) provides: 'In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally'.

principle, and is based on the rationale that the Prosecutor should not merely act as a party to the proceedings 'whose exclusive interest is to present the facts and evidence as seen by him or her in order to accuse and to secure the indictee's conviction', but also as 'an impartial truth-seeker or organ of justice'.[2]

Article 54(1)(a) attempts to strike the balance between common-law and civil-law traditions, and 'to build a bridge between the adversarial common law approach to the role of the Prosecutor and the role of the investigating judge in certain civil law systems'.[3] It finds its origin in a German proposal that was widely supported by civil-law jurisdictions where a prosecutor has a similar explicit obligation.[4]

In common-law jurisdictions, on the other hand, the prosecutor's obligation is in principle limited to the disclosure of exculpatory material in his or her possession without the additional requirement to search actively for it. The active search is left to the accused through counsel who, at least in theory, is provided with adequate resources to conduct defence investigations.[5] However, in some circumstances, ethical obligations of diligence and competence may require common-law prosecutors to seek exonerating information not yet within their knowledge and possession.[6] And in any event, prosecutors cannot 'ignore the obvious',[7] even if 'it will damage the prosecution's case or aid the accused'.[8] Thus, even though the obligation described in Article 54(1)(a) finds its origin in civil law, common-law principles of ethics may

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2 Antonio Cassese,'The Statute of the International Criminal Court: Some Preliminary Reflections', (1999) 10 *European Journal of International Law*, 168.

3 M. Bergsmo and P. Krueger, 'Article 54', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (2008), 1077.

4 Vol. 1 of the Report of the Preparatory Commission on the Establishment of an International Criminal Court, UN Doc. A/51/22, Proposal II.B.5 and 6, 113–14. For a similar explicit legal obligation on the prosecution to search for incriminating and exonerating evidence equally, see, for instance, Germany: § 160(2) Strafprozeßordnung (StPO). See M. Bohlander, 'Basic Concepts of German Criminal Procedure: An Introduction' (2011) 26 *Durham Law Review* 1, at 9. See also the Netherlands: A. Beijer, '34 Bewijs', in J. Boksem (ed.), *Handboek Strafzaken* (2006), 34.1.4 Strategy of the Accused and Counsel. See also Arts. 50–4 *quater* of the Italian Criminal Code of Procedure.

5 J. Sprack, *A Practical Approach to Criminal Procedure* (2008), paras. 9.13–15.

6 ABA Formal Opinion 09–454 'Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense', July 8, 2009, fn. 27:

> Rules 1.1 and 1.3 require prosecutors to exercise competence and diligence, which would encompass complying with discovery obligations established by constitutional law, statutes, and court rules, and may require prosecutors to seek evidence and information not then within their knowledge and possession.

7 See comment [3] to Rule 1.13 ('Client–Lawyer Relationship') of the Model Rules, ibid. Available at: http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_13_organization_as_client/comment_on_rule_1_13.html. See also ABA Formal Opinion 95–396, July 1995: '[A]ctual knowledge may be inferred from the circumstances. It follows, therefore, that a lawyer may not avoid [knowledge of a fact] simply by closing her eyes to the obvious'. And ABA Formal Opinion 09–454 'Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense', July 8, 2009, at 6: 'Rule 3.8(d) ordinarily would not require the prosecutor to conduct further inquiry or investigation to discover other evidence or information favourable to the defence unless he was closing his eyes to the existence of such evidence or information.'

8 ABA Standards for Criminal Justice, Prosecution Function, Standard 3–3.11(c) (1993): 'A prosecutor should not intentionally avoid pursuit of evidence because he or she believes it will damage the prosecution's case or aid the accused'.

also require prosecutors to be on the lookout for exonerating evidence, at least to some extent.[9]

2. Article 54(1)(a): a needed improvement to rectify an imbalance?

The adoption of Article 54(1)(a) appears to strengthen the position of the defence in comparison to its position at the ad hoc tribunals. In the ICTR, the ICTY, and the SCSL, the Prosecutor is under the sole duty to disclose exonerating evidence if it happens to come into his or her possession,[10] but the burden of collecting exonerating evidence is left to the defence. To be able to search effectively for exonerating evidence, the defence must be afforded adequate time and resources. What that means in reality is in dispute and subject to continuous debates.[11] But it is undeniable that, unless the defence is privately funded, there is an imbalance in power and resources between the defence and prosecution. This imbalance exists in both domestic and international criminal-justice systems but is arguably greater in the latter.

The prosecution has a much greater budget and manpower to conduct investigations than does the defence.[12] The prosecution also has significantly more time to investigate than the defence. In international justice, investigations have often gone on for years before suspects are identified and charges are brought. In the ad hoc tribunals, defence counsel is appointed after an indictment is issued. In the ICC, the defence is already involved before the charges are confirmed. Nonetheless, in most ICC cases a significant time passes between the Prosecutor's opening of an

9 In the absence of an explicit legal obligation on prosecutors in common-law jurisdictions to search for exonerating information, let alone to equally incriminating information, defendants, however, are in a much weaker position to seek an effective remedy in respect of a prosecutor's failure to produce such evidence if undiscovered. Indeed, not only is the ethical obligation not firm but it rather depends on the circumstances of the case; ethical rules are 'disciplinary rules, not statutes', and as such, do not have the force of law and do not bind the courts 'to implement the will of the Legislature' (*Mena v. Key Food Stores Co-Op Inc.*, 195 Misc.2d 402, 404 (2003)). Accordingly, ethical obligations are generally not treated in the same way as legal obligations. For instance, the collection of evidence in violation of a statutory obligation much likelier leads to the exclusion of the evidence than the collection of evidence in violation of an ethical obligation. See, e.g., *Gidatex v. Campaniello Imports Ltd,* 82 F.Supp.2d 119, 126 (S.D. NY District Court 1999).

10 Rule 68 of the ICTR/ICTY/SCSL Rules of Procedure and Evidence places a burden on the prosecution to disclose to the defence, as soon as practicable, 'any material, which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence'.

11 In each international criminal tribunal and court, there have been multiple debates between defence counsel and the Registry concerning the adequacy of the defence budget. In the ICTR, in November 2003, financial disagreements have even led to strikes of the accused as well as their lawyers (the author of this article was part of a defence team at the ICTR when this occurred). Recently, multiple rounds of discussions took place between ICC state parties, the ICC Registry and defence counsel about necessary cuts in the legal aid budget. These discussions resulted in a significant decrease of the ICC legal aid budget in March 2012. See internal ICC documents, on file with the author.

12 As stated in ibid., the already limited legal aid budget was cut drastically in March 2012. This decrease principally resulted in a cut in the salaries of members of defence teams and victim representatives. After heavy negotiations with defence counsel, the defence investigation budget has remained untouched. However, until now, there was significant leeway to request additional funds in conducting investigations, provided such request was justified. The defence in *Lubanga* and *Katanga and Ngudjolo* sought and received further funds on at least two occasions. With the budget limitations, it is questionable whether such requests will be approved in the future. See internal ICC documents, on file with the author.

investigation and the appointment of counsel for a particular defendant, before which point counsel cannot conduct investigations on behalf of his client.[13]

In addition, the prosecution, being an official organ of the Court, has greater powers than the defence to enforce unwilling governments to co-operate unless it is investigating the conduct of members or allies of the government.[14] The prosecution also significantly benefits from the assistance of the UN and NGOs,[15] which are generally more reluctant to co-operate with the defence.[16] Thus, the prosecution may also have greater access to information and be in a better position to collect

13 For instance, in the Democratic Republic of Congo (DRC), the Prosecutor opened an investigation on 23 June 2004 – http://www.icccpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/the%20office%20of%20the%20prosecutor%20of%20the%20international%20criminal%20court%20opens%20its%20first%20investigation.aspx). The Prosecutor's initial focus was on Ituri, a region in East Congo. Nearly two years had passed before Lubanga, the first suspect from that part of DRC, was transferred to The Hague. He arrived on 16 March 2006 and was assigned duty counsel (who then became his permanent counsel for over a year) on 20 March 2006 (Registrar's Appointment of Mr Jean Flamme as duty counsel for Mr Thomas Lubanga Dyilo, ICC-01/04-01/06-40). The second suspect from Ituri, Katanga, was transferred to The Hague on 17 October 2007 and assigned permanent counsel on 23 November 2007 (Enregistrement de la designation de Maître David Hooper par M. Germain Katanga comme son conseil et des declarations relatives à cette designation, ICC-01/04-01/06-40), more than three years after the Prosecutor opened an investigation. For Ngudjolo, this was even longer. He was transferred on 7 February 2008 and assigned permanent counsel on 11 February 2008 (Enregistrement de la prorogation du mandat de Maître Jean-Pierre Kilenda Kakengi Basila en qualité de conseil de permanence de M. Mathieu Ngudjolo Chui, ICC-01/04-01/07-277).

14 Governments are often reluctant to offer the same services to the defence as to the prosecution. For instance, members of the Katanga defence team, including this author, were refused access to potential defence witnesses detained in the Kinshasa central prison. This refusal lasted two weeks and was repeated on a subsequent mission. The defence raised this before the Trial Chamber: *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Transcript, ICC-01/04-01/07-T-56-ENG, 3 February 2009, at 49–51. See also: Katanga Defence Request for Leave to Meet Four Defence Witnesses in The Hague Prior to Their Testimony, ICC-01/04-01/07-2709-Red, 17 February 2001; and ICC-01/04-01/07-2755-Red, Décision sur la requête de la Défense de Germain Katanga aux fins d'être autorisée à rencontrer des témoins à La Haye (article 64–6-f du Statut), 4 March 2011. In Kenya, on the other hand, the prosecution alleges that the government does not provide adequate co-operation, in particular since the defendants have been elected president and vice president of the country. See, e.g., Statement by ICC Prosecutor on the Notice to Withdraw Charges against Mr Muthaura, 11 March 2013, available at: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/OTP-statement-11–03–2013-aspx.aspx; and ICC-01/09-01/11-730-Red, Prosecution Response to the 'Government of Kenya's Submissions on the Status of Cooperation with the International Criminal Court, or, in the alternative, Application for Leave to File Observations Pursuant to Rule 103(1) of the Rules of Procedure and Evidence' (ICC-01/09-01/11-670), 10 May 2013. Whatever is true of that allegation, it is noteworthy that, at the time of the confirmation and a significant period of time thereafter, it was the Prosecutor's expressed view that the government of Kenya was fully co-operating. See ICC, Prosecutor Fatou Bensouda, Statement at the Press Conference at the Conclusion of Nairobi Segment of ICC Prosecutor's Visit to Kenya, Nairobi, available at http://www2.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/otpstatement251012. See also Luis Moreno-Ocampo, Address to the Assembly of States Parties, Ninth Session of the Assembly of States Parties, Speech, New York, 4 (6 December 2010).

15 For instance, in Kenya, the Prosecutor received a 518-page report, as well as thousands of pages of supporting materials collected over the course of nearly a year and a half by the Kenyan Commission of Inquiry into the Post-Election Violence (also known as the 'Waki Commission') (see http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/press%20releases/pr439). In addition, the OTP benefited from detailed reports compiled by the Kenyan National Commission on Human Rights ('KNCHR') (KNCHR, *On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence* (15 August 2008) (EVD-PT-OTP-00001_KEN-OTP-0001–0002), available at: http://www.knchr.org/Portals/0/Reports/KNCHR_REPORT_REPORT_ON_THE_BRINK_OF_THE_PRECIPE.pdf.), as well as by other human rights organizations such as Human Rights Watch ('HRW') (see for instance ICC-01/09-01/11-355 (24 October 2011)).

16 The author has personally experienced difficulties in securing co-operation from the UN or NGOs. See also C. Buisman, 'The Ascertainment of the Truth in International Criminal Justice' (PhD, 2012), 186–206, available online at: http://bura.brunel.ac.uk/bitstream/2438/6555/1/FulltextThesis.pdf. See also C Buisman, 'Defence

evidence than the defence. Article 54(1)(a) intends to redress this imbalance between the parties.[17]

In light of these realities of international justice, not only the defence, but also the judges, in carrying out their task to ascertain the truth, as well as the victims of the conflict, could potentially benefit from a Prosecutor who is actively and equally investigating incriminating and exonerating circumstances, provided she does so adequately.

3. Scope of the Prosecutor's obligation under Article 54(1)(a)

The next question, then, is how wide the scope is and should be of the Prosecutor's obligation under Article 54(1)(a). Should the Prosecutor pursue every potentially exonerating 'clue' that presents itself, or is she sometimes justified in determining beforehand that the clue is not worth pursuing or is not likely to result in credible and relevant evidence? This author is of the view that the Prosecutor should pursue any lead that may reasonably lead to the discovery of exonerating evidence. At all times should the prosecution investigators keep an open mind about results that are unanticipated or inconsistent with the prosecution theory of the case. Only then is the Prosecutor in a position to satisfy her obligation to investigate incriminating and exonerating circumstances equally.

In theory, the prosecution appears to share the author's view, as staff members have expressed on multiple occasions. In the ICC case of *Katanga and Ngudjolo*,[18] the Chamber called the chief of investigations as a witness of the Court and asked her multiple questions on the prosecution's methodology applied in its search for exonerating evidence. The witness explained that the ICC prosecution considers that, under Article 54(1)(a), it has a continuous obligation 'to investigate potentially exonerating evidence' and 'to critically look at the evidence that we collect'.[19]

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and Fair Trial', in R. Haveman, O. Kavran, and J. Nicholls (eds.), *Supranational Criminal Law: A System Sui Generis* (2003), 198.

17 M. Bergsmo and P. Krueger, 'Duties and Powers of the Prosecutor', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), 715 at 716.

18 On 21 November 2012, the Chamber severed the cases of Ngudjolo and Katanga and notified Katanga of a possible change of modes of liability. See *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-3319, Décision relative à la mise en oeuvre de la Norme 55 du Règlement de la cour et prononçant la disjonction des charges portées contre les accusés, 21 November 2012. A translation into English was issued on 17 December 2012. See ICC-01/04-01/07-3319-tENG/FRA, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges against the Accused Persons, 17 December 2012 (Regulation 55 Decision). Within a month of this severance, the Chamber acquitted Ngudjolo on all charges. See *Prosecutor v. Mathieu Ngudjolo*, ICC-01/04-02/12-3, Jugement rendu en application de l'article 74 du Statut, 18 December 2012 (*Ngudjolo* Judgment).

19 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Transcript, ICC-01/04-01/07-T-81-Red-ENG, 25 November 2009 (Testimony of Katanga chief of investigations), at 16–17. This is in line with the interpretation given by the ICTR Appeals Chamber to the Prosecutor's duty to disclose exculpatory evidence, requiring him to disclose any document that is 'potentially' exculpatory even if questionable whether it is actually exculpatory (*Prosecutor v. Kalimanzira*, Appeal Judgment, Case No. ICTR-05-88, AC, 20 October 2010, para. 20). The jurisprudence of the ad hoc tribunals has further determined that potentially exculpatory material includes material which may suggest the innocence or mitigate the guilt of the accused, or affect the credibility of prosecution witnesses (*Prosecutor v. Casimir Bizimungu* et al., Trial Judgment and Sentence, Case No. ICTR-99–50-T, TC, 30 September 2011, para. 145).

The chief of investigations also testified that the prosecution identifies and investigates exonerating themes, as well as locates any new witnesses or sources who could provide new information or evidence on such themes.[20]

In addition, the witness stated:[21]

> We question the credibility of information that we receive and we try and corroborate it with multiple sources. We test the reliability of the sources that we use, and we don't take information for granted. We check the origin to the extent possible we can to make sure we understand the nature of it.

She further said that the prosecution investigators refrain from asking leading questions and are open to any answers, incriminating or exonerating alike. According to her testimony, they seek to duly report the witness's account as he or she has experienced the events and take good care not to manipulate the answers. Investigators, she insisted, have no preconceived notion as to what they want, or expect, to hear.[22]

Accordingly, it appears that there is no dispute as to the scope of the prosecution's obligation to search for exonerating evidence. Indeed, if what the chief of investigations in the *Katanga and Ngudjolo* case said were actually done in reality, the prosecution would be fully compliant with its obligation to search for incriminating and exonerating evidence equally.

4. Research questions

The central question in this paper is whether this stated position, as shared by the author, is reflective of the prosecution's actual practice. In order to answer this question, this paper will address the following four sub-questions, all of them narrowly intertwined:

1. Does the prosecution make sufficient attempts to look for potentially exonerating witnesses or documents?
2. Does the prosecution search adequately for information potentially undermining the credibility of its incriminating witnesses?
3. Does the prosecution follow up any investigative clues that could reasonably lead to the discovery of potentially exonerating evidence?
4. Does the prosecution seek to obtain both incriminating and exonerating information from any witness it questions?

These questions are examined on the basis of an assessment of the Prosecutor's investigative practice in the ICC cases which so far have proceeded to the

20 Testimony of Katanga chief of investigations, with at 34.
21 Ibid., at 17.
22 Ibid., at 11–20, 26.

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confirmation stage or further:[23] *Lubanga*, *Katanga and Ngudjolo*, *Bemba*,[24] *Abu Garda*, *Banda and Jerbo*,[25] *Kenya I (Ruto, Sang, Kosgey), Kenya II (Kenyatta, Muthaura, Ali)*, *Mbarushimana*, and *Gbagbo*. This assessment is made by scrutinizing the issues raised by the defence with respect to the Prosecutor's obligation to search for incriminating and exonerating evidence equally, as well as the Chamber's reaction to those submissions, if any.

4.1. Does the prosecution make sufficient attempts to look for potentially exonerating witnesses or documents?

As aforementioned, the prosecution's office claims that it makes sufficient attempts to look for potentially exonerating witnesses or documents. The defence has, however, challenged this claim in most cases. For instance, the defence for *Katanga* noted in its written and oral closing submissions that, apart from the judicial site visit, which took place in January 2012, together with the judges, parties, and participants,[26] and an outreach visit from the former chief prosecutor to Zumbe,[27] the prosecution never visited the localities where the accused Katanga and Ngudjolo lived and had their base.[28]

This is a significant omission in searching for exonerating evidence. The starting point of such a search is the locality of the accused where the prosecution may discover many things about the accused, both incriminating and exonerating. The prosecution also failed to visit neighbouring villages, central to their case theory.[29] Even Bogoro, the crime scene, was visited only very sporadically by members of the prosecution office. During these sporadic visits, no proper exhumation was conducted to identify the number and causes of deaths and the status (civilian or military) of the victims.[30] There may therefore be a range of exonerating evidence

23 At the time of this writing, a confirmation hearing has been scheduled in the case of *Ntaganda*. This case is not subject to review in this paper because the confirmation hearing has not taken place yet even if the proceedings have started.

24 The author has been unable to identify many debates on Article 54(1)(a) from the *Bemba* trial. More issues may have been raised, but this is difficult to verify in light of the fact that a large part of the *Bemba* proceedings is held in closed session.

25 It is noteworthy that, on 21 April 2013, the defence notified the Chamber of the death of Mr Saleh Mohammed Jerbo Jamus (see Public Redacted Version of 'Defence Notification of the Death of Mr Saleh Mohammed Jerbo Jamus', ICC-02/05-03/09-466-Red). On 6 May 2013, the Prosecutor responded that, until Mr Jerbo's death is confirmed, the case against him should remain open (see Public Redacted Version of the Confidential Prosecution's Observations Regarding the 'Defence Notification of the Death of Mr. Saleh Mohammed Jerbo Jamus', ICC-02/05-03/09-471-Red). At the time of this writing, no public decision has been issued on the matter yet. Thus, the case is still pending against both defendants.

26 Press release: 'ICC Judges in Case against Katanga and Ngudjolo Chui Visit Ituri', ICC-CPI-20120127-PR765. The author participated personally in this judicial site visit.

27 This visit included Luis Moreno-Ocampo and a few others but nobody from the actual prosecution team in the case of *Katanga and Ngudjolo*. See DRC-OTP-1063-0002, EVD-D03–00101, EVD-D03–00102 (Prosecution Video about Ocampo visit to Zumbe, 10 July, 2009, exhibited in the Ngudjolo and Katanga trial).

28 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Second Corrigendum to the Defence Closing Brief, 23 April 2012 (Katanga Closing Brief), paras. 450–2; Transcript (Katanga Final Oral Submissions), ICC-01/04-01/07-T-338-CONF-ENG, 21 May 2012, at 75–6; as confirmed by the testimony of Katanga chief of investigations, *supra* note 19, at 65–6.

29 Katanga Closing Brief, para. 453; as confirmed by the testimony of Katanga chief of investigations, *supra* note 19, at 68.

30 Katanga Closing Brief, paras. 454–458; as confirmed by the Testimony of Katanga chief of investigations, *supra* note 19, at 21, 40, 57, and 64.

which the prosecution has failed to discover and disclose as a result of their deficient investigations. In its judgment of *Ngudjolo*, the Chamber expressed its regret that the prosecution had failed to visit the villages of the accused and to conduct a timely forensic inquiry in Bogoro.[31]

In addition, the prosecution failed to interview numerous persons with key, and potentially exonerating, information on the case. Remarkably, no contacts were undertaken with the Kinshasa government or any government body like the Maison Militaire or EMOI,[32] its army (FAC), the regional political party that was chased out of the region (RCD-K/ML), its army (APC), or any Ugandan officers notwithstanding the defence allegations of their involvement in the attack on Bogoro with which Katanga and Ngudjolo were charged.[33] The issue of the involvement of the DRC government and the role of the RCD-K/ML are both crucial and potentially fatal to the prosecution's theory of common plan and have been a principal defence theme from the beginning.[34] In Ngudjolo's judgment, the Chamber noted the prosecution's failure to interview a number of seemingly important APC and EMOI witnesses.[35]

The prosecution further considered it unnecessary to speak to any of the *féticheurs* (traditional doctors), despite many witnesses having ascribed a significant role to them in leading the war operations carried out by the militia of which the accused were allegedly chiefs. Throughout the proceedings, the judges showed a clear interest in their precise role in the conflict and asked the chief of investigations why the prosecution had not sought to contact them.[36] Again, the Chamber recognized this as a gap in the Prosecutor's investigations.[37]

The prosecution also failed to search for potentially exonerating documentary evidence. Presumably, there are volumes of intelligence documents in the possession of the DRC government. The government has refused to disclose any such documents, relying on the protection of state security. The prosecution has never made a serious effort to persuade it to disclose at least some of these documents. The defence sought to receive intelligence documents, as well as documents concerning the demobilization and reintegration programmes. When the DRC government was non-responsive to its requests, the defence requested the Chamber's intervention in obtaining them. The Chamber rejected this request to the extent that it concerned intelligence documents, since the actual existence of these documents was based on speculation. As for the demobilization documents, the Chamber directed the

31 *Ngudjolo* Judgment, *supra* note 18, paras. 117, 118.
32 EMOI stands for Etat-major opérationnel intégré, which was a military structure based in Beni, set up by the Kinshasa government. For further details, see Katanga Closing Brief, paras. 602–639.
33 Katanga Closing Brief, para. 459; Testimony of Katanga chief of investigations, *supra* note 19, at 70, 73. It is noteworthy that the two defence teams took a different position as to whether Uganda was involved in the Bogoro attack. Only the Ngudjolo defence takes the view that the Ugandans were directly involved; all the more reason for the prosecution to interview Ugandan officers about the allegations against them.
34 Katanga Closing Brief, paras. 602–639.
35 *Ngudjolo* Judgment, *supra* note 18, para. 119, mentioning amongst others Colonel Aguru, who was part of EMOI, and Blaise Koka, who was an APC captain.
36 Testimony of Katanga chief of investigations, *supra* note 19, at 20–1.
37 *Ngudjolo* Judgment, *supra* note 18, paras. 122, 123.

Registrar to liaise with the DRC government with a view to receive the documents requested.[38] No response from the government has, however, ever been forthcoming.

Potentially exonerating documents were also largely untouched in the Kenya cases. It is presumably not difficult to at least make a cursory effort to obtain tangible and documentary evidence in Kenya. 'Kenya is not Somalia', as counsel for Mr. Ruto, one of the suspects in *Kenya I*, affirmed during the confirmation hearing.[39] Kenya is a well-structured society with much traceable paperwork. Among the six Kenyan suspects (three of whom are to stand trial) were very senior politicians, including two (Mr. Kenyatta and Mr. Ruto) who won the presidential elections in March 2013 and are currently the president and vice president respectively of Kenya. Their paths are permanently followed by the active Kenyan media. Contemporaneous videos, press clips, radio broadcasts, and newspaper articles exist which can show a pattern of their conduct and the public statements they made during the relevant period.[40]

In *Kenya II*, similar complaints were made. The defence for Muthaura submitted that the prosecution did not even make an attempt to conduct 'the necessary and most basic investigations' and never interviewed anyone from the inner circles of the suspect.[41] General Ali's defence complained that the prosecution had completely failed to exploit Ali's efforts to combat the Mungiki because these efforts undermined the prosecution's 'theory of "inaction" designed to create a "free zone" for violence'.[42] The defence also claimed that the prosecution 'consistently downplays evidence that many Kenya Police officers regularly received actionable intelligence from General Ali'.[43] The defence referred to the police raid on the Stem Hotel in Nakuru on 10 January 2008 to illustrate that General Ali had conveyed vital intelligence to his officers, which made this raid possible.[44] According to the defence, police orders were issued and patrols intensified in the affected areas in an attempt to get the security situation under control. Notwithstanding that this information is well documented and known to the prosecution, it failed to incorporate it in the story it presented to the Pre-Trial Chamber.[45]

Also in *Gbagbo*, the defence complained that the Prosecutor had failed to satisfy her obligations under Article 54(1) and failed to visit the significant sites, but instead relied on the reports of human rights organizations without even cross-checking

38 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Order on the 'Urgent Defence Motion for Cooperation of the DRC', ICC-01/04-01/07-2019-Conf-Exp-Red, 23 April 2010; and Décision relative à la seconde requête de la Défense de Germain Katanga visant à obtenir la coopération de la République démocratique du Congo, ICC-01/04-01/07- 2619-Red 17 August 2011.

39 *Prosecutor v. William Samoei Ruto et al.*, Transcript, ICC-01/09-01/11-T-6-Red-ENG, 02 September 2011, at 116.

40 This point was made by the Ruto defence: *Prosecutor v. William Samoei Ruto et al.*, Transcript, ICC-01/09-01/11-T-5-ENG, 01 September 2011, at 91.

41 *Prosecutor v. Francis Kirimi Muthaura et al.*, Muthaura Confirmation Brief, ICC-01/09-02/11-374-Red, 2 December 2011 (Muthaura Confirmation Brief), paras. 71–72. The defence submitted evidence in support of this allegation: EVD-PT-D12-00063 at para. 2; EVD-PT-D12–00062 at para. 13; EVD-PT-D12–00088 at para. 2; EVD-PT-D12–00054 at para. 6; EVD-PT-D12-00053 at para. 5.

42 *Prosecutor v. Francis Kirimi Muthaura et al.*, Ali Confirmation Brief, ICC-01/09-02/11-373-Red, 2 December 2011 (Ali Confirmation Brief), para. 23 citing: ICC-01/09-02/11-T-5-CONF-ENG, at 41, 42 (all three NSIS reports referenced had corresponding Situation Reports sent from General Ali to his PPOs).

43 Ibid., para. 27.

44 Ibid., para. 27.

45 Ibid., paras. 27–30, 46.

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the information.[46] In failing to visit sites where, for instance, shelling allegedly occurred, the Prosecutor missed an opportunity to conduct ballistic tests and have military and/or ballistic experts verify the plausibility of the circumstances in which the alleged shelling took place.[47] The Pre-Trial Chamber agreed with this defence observation and requested specific additional evidence of a forensic nature.[48]

The *Gbagbo* defence also pointed at multiple missing documents: official army and security forces documents, orders or other communications from military superiors to their subordinates, documents relating to the activities of Ouattara's rebel movement, and military intelligence documents which were available to the United Nations and France during their intervention in the post-election crisis.[49] The defence further pointed at missing interviews with several persons, including police officers present at the academy during alleged rapes. The Prosecutor based these and other allegations of rape and murder solely on media and human rights reports without identifying the victims and perpetrators by name or interviewing any eyewitnesses, family members, or sources relied upon in these reports.[50] The Pre-Trial Chamber was unimpressed and required additional evidence in support of these allegations.[51]

In addition, the defence claimed that the prosecution investigations had been carried out in a biased fashion. The prosecution largely relied on information received from the current Ivorian regime under President Ouattara, who himself was a significant player in the post-election crisis in the Ivory Coast. This, the defence suggested, resulted in a distorted prosecution narrative, placing the responsibility for atrocities 'firmly and exclusively on the doorstep of President Gbagbo'[52] while turning a blind eye to any wrongdoing on the part of the rebels loyal to Ouattara. According to defence submissions, the Prosecutor accepted this 'black and white picture of one camp representing evil and another camp representing good' as the 'gospel truth', and based her findings on erroneous assumptions rather than on thorough, impartial investigations.[53]

In the case of *Bemba*, the defence noted that approximately 30 military officers from the DRC and Central African Republic who were essential to the case and who could offer potentially exculpatory evidence were not called notwithstanding the Prosecutor's obligation to help the court establish the truth.[54]

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46 *Prosecutor v. Laurent Gbagbo*, Transcript, ICC-02/11-01/11-T-19-Red-ENG, 26 February 2013, at 22–3.
47 Ibid., at 22–3.
48 *Prosecutor v. Laurent Gbagbo*, Public Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, 03 June 2013, para. 44(6).
49 *Prosecutor v. Laurent Gbagbo*, Transcript, ICC-02/11-01/11-T-18-Red-ENG, 25 February 2013, at 27–8.
50 *Prosecutor v. Laurent Gbagbo*, Transcript, ICC-02/11-01/11-T-16-Red-ENG, 21 February 2013, at 43–4; ICC-02/11-01/11-T-18-Red-ENG, 25 February 2013, at 49–50; ICC-02/11-01/11-T-19-Red-ENG, 26 February 2013, at 29–30; ICC-02/11-01/11-T-20-Red-ENG, 27 February 2013, at 59.
51 *Prosecutor v. Laurent Gbagbo*, Public Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, 3 June 2013, para. 44(5).
52 *Prosecutor v. Laurent Gbagbo*, Transcript, ICC-02/11-01/11-T-15-Red-ENG, 20 February 2013, at 16–17.
53 *Prosecutor v. Laurent Gbagbo*, Transcript, ICC-02/11-01/11-T-15-Red-ENG, 20 February 2013, at 16–21; ICC-02/11-01/11-T-18-Red-ENG, 25 February 2013, at 28–9; ICC-02/11-01/11-T-19-Red-ENG, 26 February 2013, at 10–12.
54 *Prosecutor v. Charles Pierre Bemba*, Transcript, ICC-01/05-01/08-T-98-Red-ENG, 11 April 2011, at 31–5, 66–8.

In the case of *Banda and Jerbo*, both parties are unable to enter Sudan to conduct onsite investigations. The government of Sudan not only refuses to co-operate, but has also made any co-operation with the ICC a criminal offense.[55] Consequently, the prosecution is not able to investigate exonerating circumstances in the crime-base region. In seeking for a stay as long as the parties cannot enter the country, the defence presented its most significant examples of failures to investigate exonerating circumstances relating to the conduct of the government in the relevant temporal and geographical area. Through no fault of its own, the prosecution failed to interview relevant potentially exonerating witnesses residing in Sudan and obtain essential contemporaneous documents.[56]

The Chamber dismissed the motion for a stay on the ground that 'the investigation and prosecution of the most serious crimes of international concern should not become contingent upon a state's choice to co-operate or not co-operate with the court'.[57] Accordingly, the Chamber held that it 'should not automatically conclude that a trial is unfair, and stay proceedings as a matter of law, in circumstances where States would not allow defence (or prosecution) investigations in the field even if, as a result, some potentially relevant evidence were to become unavailable'.[58] Therefore, rather than staying the proceedings, the Chamber decided that the defence complaints would be dealt with, if need be, during or after the presentation of the evidence.[59] The Chamber's approach is questionable, given the impossibility of conducting complete and thorough investigations into both incriminating and exonerating circumstances without the ability to visit the crime scenes.[60] The importance of on-site investigations in Sudan was firmly acknowledged by Antonio Cassese and Louise Arbour, who also expressed the view that the prosecution could have carried out such investigations before Sudan closed its borders.[61]

4.2. Does the prosecution search adequately for information potentially undermining the credibility of its incriminating witnesses?

In order to assess the credibility of its own witnesses, the prosecution would be expected to verify their stories with any person they refer to, other witnesses to the events they describe, and their family members or close allies, as well as contemporaneous documents. None of that has been done in any of the cases so far brought before the ICC. For instance, both in *Lubanga* and in *Katanga and Ngudjolo*, the age of witnesses who claimed to be child soldiers at the time relevant to the

55 *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Defence Request for a Temporary Stay of Proceedings, ICC-02/05-03/09-274, 06 January 2012, para. 2.
56 Ibid., paras. 37–39.
57 Ibid., para. 100.
58 Ibid., para. 100.
59 Ibid., paras. 155, 156, and 159.
60 Indeed, without visiting the crime scenes, the parties miss the opportunity to meet with the witnesses closest to the events.
61 See Observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence, ICC-02/05-19, 10 October 2006; 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, 1 September 2006. See also Antonio Cassese, '*Is the ICC Still Having Teething Problems*?', (2006) 4 JICJ 434.

charges became a contentious issue. The prosecution had failed to interview family members, or collect the birth certificates, school bulletins, or identity cards of these witnesses to corroborate their ages.[62] The prosecution claims it omitted to take any of these basic steps because it did not want to put the witnesses at risk by showing up in their neighbourhoods, thereby making it obvious that these persons were in contact with the ICC.[63] It therefore relied heavily on intermediaries for any local investigations and for the identification of witnesses.[64] In both cases, the defence produced documentary evidence and witnesses demonstrating that the alleged child soldiers were in fact older than they claimed.[65] Both in *Lubanga* and in *Ngudjolo*, this led the Chamber to disregard the testimonies of all alleged child soldiers.[66] The case of Katanga is still pending, but many of the witnesses are the same as in Ngudjolo's case. The Chamber already noted that it would not rely on these and a number of other unreliable witnesses in assessing Katanga's criminal liability.[67]

In *Kenya I* and *II* the prosecution did not seek to corroborate with contemporaneous documents the allegations from witnesses that the suspects were present at specific meetings. The defence claimed that numerous publicly available contemporaneous documents, including videos and press clips, demonstrated that the suspects were occupied elsewhere at the specific dates of these alleged meetings.[68]

In addition, when the prosecution alleged that the suspects purchased weapons, it relied solely on anonymous witnesses. It had not made any discernible efforts to verify whether purchase receipts, bank transfers, or other tangible evidence exist. In a society like Kenya, if it exists, it should presumably have been possible for the prosecution to obtain it. This should particularly have been possible at the time of the confirmation hearing when the Prosecutor clearly expressed the view that the Kenyan government was co-operating and before two of the three remaining Kenyan defendants were governing the country.[69]

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62 *Prosecutor v. Thomas Lubanga*, No. ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute, 14 March, 2012 (*Lubanga* Judgment), paras. 160–161, 172–174, 480, 482; ICC-01/04-01/06-Rule68Deposition-Red2-ENG, 18 November, 2010, 17–20, 32–4; Katanga Closing Brief, *supra* note 28, paras. 27, 32–36, 60–68, 156, 166–171.

63 Ibid.

64 ICC-01/04-01/06-2690-Red2, paras. 124, 128, 8 March, 2011; citing prosecution confidential filing ICC-01/04-01/06-2678, paras. 14, 18. See also ICC-01/04-01/06-Rule68Deposition-Red2-ENG, 16 November 2010, 48–52.

65 In the *Ngudjolo* Judgment, the Chamber duly noted that it was the defence, rather than the prosecution, which produced documentary evidence relating to the correct age and military status of the prosecution witnesses. See *Ngudjolo* Judgment, *supra* note 18, para. 121.

66 *Lubanga* Judgment, *supra* note 62, paras. 478–484; *Ngudjolo* Judgment, *supra* note 18, para. 203 (P-280), paras. 177–180 (P-279), paras. 234–237 (P-28).

67 See Regulation 55 Decision, *supra* note 18, para. 39: where the Chamber gave the Katanga advance notice that it intends not to rely on witnesses P-219 and P-250, which it subsequently confirmed in the *Ngudjolo* Judgment, *supra* note 18, paras. 157–159 (P-250), 281–283 (P-219). This judgment also identifies P-279 and P-280 as unreliable witnesses common to both defendants (paras. 189–190, 281–283), and P-28 as a witness whose credibility is diminished (paras. 251–254).

68 For instance, the Ruto defence argued that evidence of Ruto's absence at alleged meetings because he was elsewhere was readily available. See: *Prosecutor v. William Samoei Ruto et al.*, William Samoei Ruto Defence Brief Following the Confirmation of the Charges Hearing, ICC-01/09-01/11-355, 24 October 2011 (Ruto Defence Brief), para. 7; and oral submissions, Transcript, ICC-01/09-01/11-T-6-Red-ENG, 2 September 2011, 62–72.

69 See *supra* note 14. This was one of the arguments of the defence in support of its claim that the prosecution failed to investigate properly. See, for instance, Transcript, ICC-01/09-01/11-T-12-ENG, 8 September 2011, 41–5. See also Muthaura Confirmation Brief, *supra* note 41, paras 71–72. The Kenyan government insists that,

In *Abu Garda*, the prosecution failed to provide existing previous statements of witnesses relied on for the confirmation hearing. As the defence pointed out, a previous statement is a critical device to test the credibility and consistency of a witness and 'could show a huge change in a witness' account, so much so that it may render the second statement completely incredible'.[70]

4.3. Does the prosecution follow up any investigative clues that could reasonably lead to the discovery of potentially exonerating evidence?

In *Abu Garda*, the defence also complained that, contrary to its investigative duties under Article 54, the prosecution never requested the exonerating evidence mentioned by one prosecution witness despite his expressed willingness to provide it.[71] The defence even asked that the chief of investigations of that case be called at the confirmation hearing to explain why certain steps were not taken. Unfortunately the entire testimony is in closed session and thus the explanations remain unknown to the public.[72]

Similar complaints were made in *Kenya I*, where the prosecution failed to follow up the issue of 'coaching witnesses, being paid 60,000 and being ... rented mansions' mentioned by one of its witnesses. During his interview, prosecution investigators told this witness that, for now, all they were interested in was the facts, and they would come back to this issue on another occasion. They did not, however, follow it up before the confirmation hearing.[73]

In the same case, the prosecution disclosed a handful of newspaper articles and video clips of two persons, who said 'they were coached and induced to implicate Ruto and recruited others to do the same'.[74] According to the defence, they 'were allegedly asked to co-operate and change their statements, so they could be systematic and consistent, in exchange for upkeep, paid apartments, and relocation outside of Africa'.[75] These persons worked for organizations on whose reports the prosecution relied. Yet it had not investigated the allegations of impropriety. The prosecution did not even ask any of the witnesses about these inducements.[76]

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even today, it fully co-operates with the ICC, a position shared by the defence. See, e.g., ICC-01/09-01/11-670, 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, 8 April 2013; ICC-01/09-01/11-727-Red, Public Redacted Version of 'Defence Response to the Government of Kenya's Observations Pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the Status of Cooperation with the International Criminal Court', 8 May 2013; and ICC-01/09-01/11-729, Sang Defence Response to Submissions by the Government of the Republic of Kenya, 8 May 2013.

70 Defence oral submissions, transcript, ICC-02/05-02/09, 30 October 2009, 70–1.

71 ICC-02/05-02/09-243-Red, 8 February 2010, paras. 46–47.

72 *Prosecutor v. Bahar Idriss Abu Garda*, Decision on Witness to be Called by the Defence at the Confirmation Hearing, ICC-02/05-02/09-186, 19 October 2009.

73 Ruto Defence Brief, *supra* note 68, para. 20.

74 Ibid., para. 19; relying on EVD-PT-OTP-00464; -00433; -00434; -00463; -00464.

75 Ibid., para. 19; relying on EVD-PT-D09–00048.

76 Ibid., paras. 19–21; Joshua Arap Sang Defence Brief Following the Confirmation of Charges Hearing, ICC-01/09-01/11-354, 24 October 2011, paras. 34–35.

In addition, one witness told the prosecution that Citizen TV had recorded a rally at which Ruto allegedly 'addressed a crowd of youths and told them to prepare to barricade roads, destroy property and kill the Kikuyus'.[77]

Another witness stated that he had read in the newspaper that grenades were found at the house of Ruto's accomplice Cherambos.[78] The prosecution failed to search for these recordings and newspaper articles and thus missed an opportunity to verify the accuracy of the stories of witnesses it relied on as witnesses of truth.

In *Gbagbo*, the defence provided multiple examples of prosecution failures to follow up investigations. For instance, the defence stated that, despite her awareness of investigations being carried out by a military tribunal in Abidjan in respect of the shelling incident at Abobo, blamed on Gbagbo, the Prosecutor failed to monitor, and elicit, information from those investigations.[79] Nor did the Prosecutor ever seek to find out at what time the alleged shelling took place, how many shells were fired and from which direction, notwithstanding drastic inconsistencies between witness accounts on these matters.[80] At no time did the Prosecutor consult a military expert on these matters. The Prosecutor also failed to verify the assertion by one of their key witnesses that 18 members of the Invisible Commando had infiltrated the population, but simply concluded that the Abobo shelling area was exclusively populated by civilians.[81] The Pre-Trial Chamber acknowledged these failures and was unwilling to confirm the charges without '"forensic or other evidence" indicating who fired the ammunitions and what their alleged target was'.[82]

4.4. Does the prosecution seek to obtain both incriminating and exonerating evidence from any witness it questions?

In *Mbarushimana*, the Pre-Trial Chamber raised concern about the prosecution's investigation technique of putting leading questions to witnesses during interviews and being impatient with their answers if incompatible with their theory of the case. The Pre-Trial Chamber qualified this technique as 'utterly inappropriate' and contrary to the prosecution's duty under Article 54(1) to establish the truth by investigating incriminating and exonerating evidence equally. In the *Mbarushimana* confirmation decision numerous examples are cited of the prosecuting investigators 'showing resentment, impatience or disappointment whenever the witness replies in terms which are not entirely in line with his or her expectations'.[83]

The Pre-Trial Chamber referred specifically to suggestions made by the prosecution investigators to a witness that he may not be 'really remembering exactly what

77 Ruto Defence Brief, *supra* note 68, para. 22.
78 Ibid., para. 23.
79 *Prosecutor v.. Laurent Gbagbo*, Transcript, ICC-02/11-01/11-T-19-Red-ENG, 26 February 2013, at 12.
80 Ibid., at 19.
81 Ibid., at 30.
82 *Prosecutor v. Laurent Gbagbo*, Public Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, 03 June 2013, para. 44(6).
83 *Prosecutor v. Mbarushimana*, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, 16 December 2011, para. 51.

was said', that he does not 'really understand what is important' to the investigators of the case, or that he may be 'trying to cover' for the suspect.[84]

By majority, the Pre-Trial Chamber observed that 'none of the FDLR insider witnesses directly and spontaneously confirm the existence of an order emanating from the FDLR leadership' to launch attacks against the civilian population and to create a 'humanitarian catastrophe' in the manner alleged by the prosecution.[85] Some witnesses deny having heard of such an order. Others state the opposite, which is that there were specific instructions to protect the civilians from the consequences of the fighting.[86] Many of those who remember that such an order was issued by the FDLR leadership remember it only after the investigator persistently spelt out the existence of the order, its timing, and its specific content.[87]

The Pre-Trial Chamber, left with the impression that the prosecution investigators were so attached to their case theory that they lost their impartiality, attached significantly less weight to answers prompted in such a manner.[88] In part this led to the non-confirmation of the charges, a decision upheld by the Appeals Chamber.[89]

5. Reaction from the chambers

The *Lubanga* Trial Chamber devoted 157 pages of its judgment to discussing the deficiencies of the prosecution investigations.[90] Throughout the trial the Chamber made critical remarks with respect to the prosecution's investigative techniques, particularly its use of unaccountable intermediaries.[91] Consequently, none of the nine alleged child soldiers who testified were relied upon as a child soldier. That constitutes a striking condemnation of the investigative methods.

In its judgment of Ngudjolo, Trial Chamber II also expressed criticism regarding the Prosecutor's investigative failures.[92] Most notably, the Chamber dismissed the testimonies of all alleged insider witnesses and acquitted Ngudjolo.[93] Ngudjolo being the second defendant who has received judgment by the ICC, this might be considered a major blow to the Prosecutor's office.[94]

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84 Ibid.
85 Ibid., para. 255.
86 Ibid., para. 255.
87 Ibid., paras. 248 and 257.
88 Ibid., para. 51.
89 *Prosecutor v. Callixte Mbarushimana*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges', ICC-01/04-01/10-514, AC 30 May 2012 (*Mbarushimana* Appeal Judgment).
90 *Lubanga* Judgment, *supra* note 62, 63–220.
91 Ibid., 101–220; also Redacted Decision on the 'Defence Application Seeking a Permanent Stay of the Proceedings', ICC-01/04-01/06-2690-Red2, 8 March 2011; Redacted Decision on Intermediaries, ICC-01/04-01/06-2434-Red2, 31 May 2010.
92 *Ngudjolo* Judgment, *supra* note 18, 117–23.
93 Ibid., paras. 157–159 (P-250), 189–190 (P-279), 218–219 (P-280), 254 (P-28), 281–283 (P-219).
94 See, for instance, J. Easterday, 'Ngudjolo Acquitted by ICC', 18 December 2012:

> Trial Chamber I in the trial of Thomas Lubanga, the first ICC judgment, harshly criticized the prosecution for the quality of its evidence and its charging strategy. Although the judges in this case did not make any overt criticisms of the prosecution, this decision is a blow to the legacy of the first ten years of the ICC's Office of the Prosecutor (OTP). It suggests that the new prosecutor,

In *Mbarushimana*, the Pre-Trial Chamber examined the witness statements in great detail before concluding that the prosecution had not sought to obtain exonerating information. The prosecution argued that in doing so the Pre-Trial Chamber exceeded its role as a confirmation chamber.[95] However, the Appeals Chamber found no error on the part of the Pre-Trial Chamber.[96]

The Pre-Trial Chamber in both *Abu Garda* and *Kenya I* and *II* was more reluctant to take alleged investigative failures into account. They took the position that the alleged prosecution failure to comply with its Article 54 obligations 'does not fall within the scope of the Chamber's determination pursuant to Article 61(7) of the Statute'.[97] Accordingly, defence arguments to this effect can only be viewed in the context of the purpose of the confirmation hearing, and should thus be regarded as a means of seeking a decision declining to confirm the charges. It follows, therefore, that the defence's objection raised, in this instance, cannot in itself cause the Chamber to decline to confirm the charges on the basis of an alleged investigative failure on the part of the prosecution. Rather, this objection may have an impact on the Chamber's assessment of whether the Prosecutor's evidence as a whole has met the threshold of 'substantial grounds to believe'.[98]

Thus, the Prosecutor's duty to search for incriminating and exonerating evidence equally was not looked at as a distinct issue at the confirmation stage. In *Kenya I* and *II* Judge Kaul, dissenting, expressed his disagreement with the majority ruling that this issue does not fall within the scope of the confirmation hearing. He pointed out that Article 54 required the prosecution investigations to cover all incriminating and exonerating facts and evidence. In his view, these requirements are fundamental and must be respected at the confirmation stage. He acknowledged that the Appeals Chamber authorized the prosecution to continue its investigations after confirmation. However, he pointed out that this is only permitted 'in certain circumstances,' and in particular 'in situations where the ongoing nature of the conflict results in more compelling evidence becoming available for the first time after the confirmation hearing'.[99] Thus, the bulk of the investigations must be carried out

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Fatou Bensouda, will need to make significant changes to the OTP's prosecution and investigation procedures in order to preserve the integrity of the court.

Available at: http://www.katangatrial.org/2012/12/ngudjolo-acquitted-by-icc.

95 *Prosecutor v. Callixte Mbarushimana*, Prosecution's Document in Support of Appeal against the 'Decision on the Confirmation of Charges' (ICC-01/04-01/10-465-Red, ICC-01/04-01/10-499-Corr, 12 March 2012).

96 *Mbarushimana* Appeal Judgment, *supra* note 89.

97 *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-01/09-02/11-373-Red, 23 January 2012 (*Ruto* Confirmation Decision), para. 51; *Prosecutor v. Francis Kirimi Muthaura et al.*, Decision on the Confirmation of Charges Pursuant to Article 67(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, 23 January 2012 (*Muthaura* Confirmation Decision), para. 63.

98 *Prosecutor v. Bahar Idriss Abu Garda*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 February 2010, para. 48; *Ruto* Confirmation Decision, paras. 51–52; *Muthaura* Confirmation Decision, ibid., paras. 63–64.

99 Judge Kaul Dissenting Opinion to: *Ruto* Confirmation Decision, ibid., *supra* note 97, 50–51, citing: *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure Pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence', ICC-01/04-01/06-568, AC, 13 October 2006 (*Lubanga* Disclosure Appeal Judgment), para. 54.

in advance of the confirmation hearing. Given this situation, Judge Kaul stated the following:[100]

> I underline once again 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, such as those mentioned above in paragraph 50. 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.

Accordingly, in the opinion of Judge Kaul:[101]

> [T]he Chamber cannot satisfy itself solely with the evidence, which the Prosecutor claims to be relevant and reliable, in order to effectively and genuinely exercise its filtering function. Such a general approach would have, in my view, the untenable consequence that Prosecution evidence would be considered as credible almost by default through the formal act of its presentation. Likewise, it would have the equally untenable consequence that the role and rights of the Defence would be dramatically and unfairly curtailed.

Is not the view expressed by Judge Kaul on this issue correct? The prosecution has a duty to investigate incriminating and exonerating circumstances equally from the outset of its investigations, the major part of which must be conducted prior to the confirmation. If the full picture is not presented to the Pre-Trial Chamber, the latter risks confirming charges that should not have been confirmed. It is precisely the task of the Pre-Trial Chamber to ensure that only those cases are confirmed that should proceed to trial. This also corresponds with the Appeals Chamber's view that the investigation should largely be completed at the stage of the confirmation-of-charges hearing.[102]

Trial Chamber V expressed a similar view in the case of Kenyatta, emphasizing that the Prosecutor 'is not responsible for establishing the truth only at the trial stage by presenting a complete evidentiary record, but is also expected to present a reliable version of events at the confirmation hearing'.[103] Indeed, the Chamber stated that '[t]he Prosecutor should not seek to have the charges against a suspect confirmed before having conducted a full and thorough investigation in order to have a sufficient overview of the evidence available and the theory of the case'.[104] In the event that, after the confirmation, the Prosecutor continues to investigate 'for the purpose of collecting evidence which it could reasonably have been expected to

100 Judge Kaul Dissenting Opinion to: *Ruto* Confirmation Decision, *supra* note 97, para. 52.
101 Judge Kaul Dissenting Opinion to: *Muthaura* Confirmation Decision, *supra* note 97, para. 62.
102 *Lubanga* Disclosure Appeal Judgment, *supra* note 92, para. 54 (acknowledging that the Prosecutor may continue his investigation beyond the confirmation hearing, but stating that 'ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing'). See also *Mbarushimana* Appeal Judgment, *supra* note 89, para. 44.
103 *Prosecutor v. Uhuru Muigai Kenyatta*, Trial Chamber, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, ICC-01/09-02/11-728, 26 April 2013, paras. 118–125, at 119.
104 Ibid., at para. 119.

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have collected prior to confirmation',[105] it is within the Trial Chamber's discretion to determine the appropriate remedy, which 'could include the exclusion of all or part of the evidence so obtained'.[106] In this case, the Chamber granted additional time to the defence to investigate and prepare for trial in light of the new evidence.[107]

In *Gbagbo*, the Pre-Trial Chamber criticized the prosecution for relying heavily, if not solely, on anonymous hearsay from NGO, UN, and media reports and describing many of the incidents in summary fashion. The Chamber further observed that it is also presented with an incomplete picture as to: (i) the structural connections between the so-called 'pro-Gbagbo forces' acting across the incidents, and (ii) the presence and activities of the armed forces opposing them. Ultimately, the Chamber is asked by the Prosecutor to draw numerous inferences from actions or conduct of Mr Gbagbo, his inner circle, and the 'pro-Gbagbo forces', but the Chamber does not have enough information to determine whether these inferences are sufficiently supported by the evidence in order to meet the required threshold for confirmation.[108]

However, instead of declining to confirm the charges, the Pre-Trial Chamber granted the Prosecution additional time to present additional, more specific information in support of its allegations.[109]

Thus, the Prosecutor's investigative failures were seemingly important factors in finding that the Prosecutor had failed to prove to the requisite confirmation standard of 'sufficient grounds to believe' that Abu Garda, Mbarushimana, and Gbagbo, as well as two out of the six Kenyan suspects, were guilty as charged. In addition, the charges against Francis Kirimi Muthaura were withdrawn after confirmation, essentially because the key witness against him had recanted a crucial part of his evidence. The prosecution was already in possession of this witness's recanting statement at the time of the confirmation hearing, but had failed to make timely disclosure thereof to the defence.[110] Had the Pre-Trial Chamber been able to review this

105 Ibid., at para. 121.

106 Ibid., at para. 121.

107 Ibid., at para. 125. See also the Concurring Opinion of Judge Christine Van Den Wyngaert where she states that she

> would have gone further in that I am of the view that there 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.

(ICC-01/09-02/11-728-Anx2, 26 April 2013, para. 1).

108 *Prosecutor v. Laurent Gbagbo*, Public Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11-432, 3 June 2013, para. 36.

109 Ibid., paras. 15, 37, 42–44. One judge, however, dissented on the ground that the adjournment in the particular circumstances of the case and the instructions by the majority exceeded the role of the Pre-Trial Chamber. He stated that 'it is for the Prosecutor and not for the Chamber to select her case and its factual parameters' (Dissenting Opinion of Judge Silvia Fernandez de Gurmendi, ICC-02/11-01/11-432-Anx, 3 June 2013, para. 51).

110 The defence has alleged bad faith on the part of the prosecution, but the prosecution maintains the non-disclosure was in error but not in bad faith. The prosecution asserts it was the result of a failure 'to appreciate that the affidavit contained an inconsistent statement and was thus disclosable as impeachment material'. See, e.g., ICC, *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-664-Red2, Public Redacted Version of the 25 February 2013 Consolidated Prosecution Response to the Defence

recanting statement, it would most probably not have confirmed the charges against Muthaura.

5. Role of the Prosecutor redefined

These examples, though incomplete, clearly demonstrate that the prosecution has largely ignored its obligation under Article 54(1)(a) to investigate incriminating and exonerating circumstances equally in any of the pending or completed cases. There is no sign that the Prosecutor made a genuine effort to comply with this obligation. The Prosecutor's principal response to the defence complaints in the Kenya cases was that

> [t]he purpose of the confirmation of charges hearing is not to assess whether the Prosecution has fulfilled its duty under Article 54(1) nor is it to evaluate the sufficiency of the evidence presented against hypothetical evidence which may or may not exist and which the Defence loosely contends could have been collected.[111]

However, its efforts to comply with Article 54(1) were no better in the course of the trial proceedings in the *Lubanga* and *Katanga and Ngudjolo* cases. And the whole point of Article 54(1) is to conduct complete investigations in order to determine whether hypothetical evidence exists. The outcome of investigations cannot, nor should it, be known in advance; and the mere collection of evidence which the Prosecutor knows exists is simply not good enough to comply with Article 54(1).

But is it realistic to expect a Prosecutor in international justice to investigate incriminating and exonerating circumstances with an equal level of commitment?

Applications under Article 64 of the Statue to Refer the Confirmation Decision back to the Pre-Trial Chamber, 7–9, 41, 44–6 (26 February 26 2013). Mr Kenyatta was also affected by this witness and asked that his case be referred back to the Pre-Trial Chamber for a new confirmation hearing, given that the evidentiary basis for confirming the charges had significantly changed now that the recanting witness could no longer be relied upon. See, e.g., ICC, *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-622, 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 (5 February 2013). The Chamber did not find that the prosecution acted with bad faith, but instead found that the failure to disclose this crucial information was the result of 'a grave mistake' and a deficient internal review system within the prosecution (*Prosecutor v. Uhuru Muigai Kenyatta*, Trial Chamber, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, ICC-01/09-02/11-728, 26 April 2013, paras. 93–94). Instead of granting Mr Kenyatta's request to refer the case back to the Pre-Trial Chamber, the Chamber reprimanded the Prosecutor and required her to conduct a complete review of the case file and certify before the Chamber that she had done so, as well as to make appropriate changes to the internal review process (ibid., paras. 97–104). Judge Van Den Wyngaert made even stronger criticism against the 'Prosecution's negligent attitude towards verifying the trustworthiness of its evidence', stating that '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)' (ICC-01/09-02/11-728-Anx2, paras. 1, 4). In an earlier decision, the Trial Chamber confirmed the Prosecution's subsequent notification of withdrawal of the charges against Mr Muthaura. See ICC, *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-687, Prosecution Notification of Withdrawal of the Charges against Francis Kirimi Muthaura (11 March 2013); ICC, Press Release, Statement by ICC Prosecutor on the Notice to Withdraw Charges against Mr. Muthaura (11 March 2013), http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/OTP-statement-11–03–2013.aspx; ICC, *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-696, Decision on the Withdrawal of Charges against Mr Muthaura (18 March 2013).

111 *Prosecutor v. William Samoei Ruto et al.*, Prosecution's Written Submissions Following the Hearing on the Confirmation of Charges, ICC-01/09-01/11-345, 30 September 2011, para. 67. See also para. 69.

And is the Prosecutor best placed to do so? Or is Article 54(1)(a), imposing a schizophrenic role on the Prosecutor, a graft that will not take?

Some, mostly common-law, practitioners before the ICC are sceptical about the compatibility of neutrality and the task of prosecuting in an adversarial procedure.[112] They also doubt that the notion of a truly independent Prosecutor searching for evidence that undermines his or her own case is a workable concept in an essentially adversarial international criminal-justice system, as the ICC is. Most prosecutors in international justice are not trained as magistrates or the like. In addition, unlike most civil-law procedures, the ICC procedure does not constitute a joint search for the truth, duly reported in a dossier, in which the defence is an active participant and engages with the prosecution to suggest certain investigative steps. Rather, it is an evidence-gathering exercise carried out by two autonomous parties.

In this context, it is perhaps over-idealistic to expect a prosecutor to search purposefully for information that is contrary to his or her perception of the facts and his or her case. It is not in the nature of the beast to investigate, with a high level of diligence and persistence, those elements that undermine one's own case. The defence, on the other hand, has the task of advancing the interests and case of the accused and to challenge those aspects of the case against him or her which are in dispute. In doing so it is more likely that the defence will take the extra step often required to find exonerating evidence. To conduct such an investigation adequately requires significant time, patience, and effort. It may be necessary to open doors that appear firmly closed. The defence is clearly the most suitable party to do so.[113]

It is also more difficult for the Prosecutor to do so without the advantage of viewing events through the eyes of the accused. As the Prosecutor does not, as a rule, question the accused or otherwise have his or her account of events, it is questionable whether she can have a realistic basis for such an enquiry. In addition, while the prosecution may be better equipped to deal with reluctant states and international entities, this is not true of the community, family, and friends of the accused who may not be as open to a prosecution investigator as they would be to someone representing the interests of the individual accused.[114]

Accordingly, it may be in the interests of both parties if the role of the Prosecutor and the scope of her duty to investigate incriminating and exonerating circumstances equally were to be reconsidered. There are, however, problems with this proposition, most notably that exonerating evidence obtained by the defence may be looked at with more scepticism than if it had been obtained by the prosecution. In addition, the defence's access to potentially exonerating evidence can be limited if, for instance, it comes from state authorities.

Any inequality of investigative means of the two parties must then be remedied through the channels of the Court's assistance and disclosure obligations on the prosecution, as it is done in adversarial common-law systems as well as the ICTR,

112 See, for instance, the observations made by David Hooper QC, defence counsel at the ICC, at the SCL lecture on 14 December 2001, held at T. M. C. Asser Institute, The Hague.

113 This corresponds with the author's own experience in conducting investigations.

114 This corresponds with the author's own experience in conducting investigations. Among the communities loyal to the defendants, there can be distrust towards the prosecution and reluctance to co-operate with it.

ICTY, and SCSL. In the ad hoc tribunals, the duty to disclose exonerating evidence has been rated as important as the duty to prosecute.[115] It is then also of the utmost importance that the defence is given an adequate investigation budget. This budget does not need to equal the prosecution budget but must be sufficient to allow the defence to conduct a thorough investigation into the exonerating circumstances of the case, which can be a costly and time-consuming exercise. Regrettably, the defence budget was recently decreased considerably.[116]

6. Duty to conduct effective investigations

Irrespective of the scope of the Prosecutor's obligation to search for exonerating evidence, she must conduct a thorough and complete investigation into her case. This not only stems from the obligation to search for incriminating and exonerating evidence equally, it also falls under the obligation to '[t]ake appropriate measures to ensure the *effective* investigation and prosecution of crimes within the jurisdiction of the Court' under Article 54(1)(b) of the ICC Statute.[117] In any jurisdiction, common-law and civil-law alike, the prosecution is expected to examine its case from all angles and to consider alternative case theories. It is a question of both ethics and competence that the prosecution critically reviews the reliability and credibility of the evidence on which its case relies.[118] No prosecutor who prides himself on being diligent and competent would deliberately present a weak case and have it publicly destroyed.

Also in this respect, the Prosecutor has so far clearly failed. In the pending cases, the prosecution has been insufficiently thorough in conducting investigations, and uncritical with respect to the veracity of its own evidence. The above examples clearly demonstrate that important basic steps were not taken and relevant evidence was left alone. The investigations were thus incomplete, missing potentially both exonerating and incriminating material. The main reason for these deficiencies is that the prosecution rarely conducts on-site investigations but relies on intermediaries instead. This practice has been severely criticized by the *Lubanga* Trial Chamber.[119] It has resulted in the dismissal of nine 'child soldier' witnesses in the case of *Lubanga* and, at least in part, in the dismissal of four out of 15 cases at the confirmation stage, and one adjournment of the confirmation decision. With the withdrawal of

115 *Prosecutor v. Kordić and Čerkez*, Decision on Motions to Extend for Filing Appelant's Briefs, TC, 11 May, 2001, para. 14; *Prosecutor v. Kordić and Čerkez*, Appeals Chamber Judgement, 17 December, 2004, paras. 183, 242; *Prosecutor v. Blaskć*, Decision on Production of Discovery Materials, TC, 27 January 1997, para. 50.1; *Prosecutor v. Blaskć*, Appeals Chamber Judgement, 29 July 2004, para. 264; *Prosecutor v. Karemera et al.*, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, AC, 30 June 2006; *Prosecutor v. Théoneste Bagosora et al.*, Decision on Interlocutory Appeals on Witness Protection Orders, Case No. ICTR-98–41-A, AC, 6 October 2005.

116 See *supra* notes 11, 12.

117 Emphasis added by the author.

118 See, for instance, the American Bar Association's Prosecution Ethics Guidelines, Advocates Rule 3.8(a) 'Special Responsibilities of a Prosecutor' requiring a prosecutor in a criminal case 'to refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause'.

119 *Lubanga* Judgment, *supra* note 62, 90–220.

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the case against Muthaura and Ngudjolo's acquittal, it is time for a drastic change in the Prosecutor's investigation policy.[120]

7. Conclusion

In conclusion, the above examples demonstrate that, whether from a standpoint of competency or stemming from its Article 54 obligations, the prosecution failed to investigate any of its cases with the thoroughness expected from a diligent prosecu tor. Whilst the prosecution can never have the advantage of knowing the accused's case on which to base any parallel investigation, especially where an affirmative defence is proffered, it could and should do more in terms of addressing weaknesses in its own case and proceed or not proceed accordingly. Given the record thus far, it is overdue for the Prosecutor's office to critically review and alter its investigation policy with a view to guaranteeing more thorough and complete investigations in future cases. More rigorous internal scrutiny would serve to both meet the objectives of Article 54 and result in early exoneration or mitigation where appropriate and stronger evidence against those who are rightfully charged.

120 For detailed criticism relating to the ICC Prosecutor's investigations carried out so far, see Caroline Buisman, 'Delegating Investigations: Lessons to Be Learned from the Lubanga Judgment', (2013) 11 Nw. J. Int'l Hum. Rts. 30. http://scholarlycommons.law.northwestern.edu/njihr/vol11/iss3/3.