“SHORTCOMINGS” IN PROSECUTION INVESTIGATIVE PRACTICES: A RESPONSE TO RECENT ICC JUDGMENTS AND DECISIONS

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Introduction

Judges at the International Criminal Court (“ICC” or “the Court”) have recently criticized the investigative practices of the Office of the Prosecutor (“OTP”). For example, in its December 2012 judgment acquitting Mathieu Ngudjolo Chui of all charges (“Ngudjolo judgment”), Trial Chamber II (TC II) complained that the Prosecution did not call key insider witnesses, did not interview the accused during the investigation, and did not investigate its witnesses’ backgrounds more thoroughly.

Trial Chamber V (TC V) also found fault with the OTP’s investigative practices in an April 2013 decision in the case Prosecutor v. Uhuru Muigai Kenyatta (“Kenyatta decision”). TC V was particularly displeased that the OTP appeared to have performed the majority of its investigation after the hearing on the confirmation of charges. Judge Christine Van den Wyngaert issued a harsh concurring opinion in which she asserted that the OTP had not complied with its investigative obligations under the ICC’s Rome Statute by the confirmation hearing (“Kenyatta concurrence”).

Though recently raised, most of these criticisms relate to investigations that the OTP performed under its first chief Prosecutor, Luis Moreno Ocampo. The task of addressing these criticisms falls to the OTP’s new Prosecutor, Fatou Bensouda, who took office in June 2012. While it is true that the OTP needs to improve its investigations, a close look at the criticisms lodged against it suggests that some are not accurate or fair. In fact, some criticisms suggest that the ICC’s judges have unrealistic expectations for investigations and adversarial trials at the ICC.

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2 Prosecutor v. Ngudjolo, “Judgment pursuant to article 74 of the Statute” (“Ngudjolo judgment”), ICC-01/04-02/12-3-tENG, 18 December 2013.

3 Prosecutor v. Kenyatta, “Decision on defence application pursuant to Article 64(4) and related requests” (“Kenyatta decision”), ICC-01/09-02/11-728, 26 April 2013.

This paper reviews some of the criticisms lodged against the OTP in the *Ngudjolo* judgment and the *Kenyatta* decision and concurrence. It seeks to separate the criticisms that show room for constructive improvement from those that demonstrate unrealistic expectations for the OTP, or any criminal investigation.

**Judges found key Prosecution witnesses unreliable**

In the *Ngudjolo* judgment, TC II found that the Prosecution’s evidence linking Ngudjolo to the crimes charged came primarily from three witnesses “whose credibility is vigorously impugned”.⁵ TC II found that these witnesses were not credible.⁶ The Chamber highlighted several concerns with the witnesses’ evidence, including: that evidence that the accused was the leader of a militia that led the attack at issue in the case was almost all hearsay (i.e. evidence that a witness heard from someone else, not based on personal knowledge);⁷ and that the witnesses gave evidence that was imprecise, internally inconsistent, and/or inconsistent with the evidence of others in such a way as to cast doubt on their evidence, while the accused presented evidence that reinforced these doubts.⁸

On the one hand, this finding indicates that the OTP needs to improve some of its investigative techniques. For example, some investigators may need to enhance their questioning techniques, or learn more about the key questions to ask as part of a criminal investigation (e.g. about a witness’ basis of knowledge of his evidence).

Moreover, the OTP may need to find better ways to corroborate witnesses’ evidence. This problem was highlighted by Judge Van den Wyngaert in her *Kenyatta* concurrence, where she stated that the Prosecution had a “negligent attitude towards verifying the trustworthiness of its evidence” and criticized what she called “grave problems in the Prosecution’s system of evidence review, as well as a serious lack of proper oversight by senior Prosecution staff.”⁹

On the other hand, it must be recognized that problems with witness credibility and reliability are not unique to the ICC. Domestic prosecutors regularly face difficulty with witness credibility and reliability, and with judges’ and jurors’ perceptions of the same. Even honest, well-intentioned witnesses’ memories may fade over time; when they testify they may recall details differently from when they initially spoke to investigators and prosecutors; they may become nervous and confused when testifying in a crowded, unfamiliar, and possibly hostile courtroom, even if they are clear and coherent during an interview with a small number of people; or one witness may remember events differently from another. Other witnesses may change their testimony depending on who is present when they speak (e.g. if the defendant is present), or falsify evidence when they believe they will benefit from doing so. These problems are par for the course of adversarial criminal trials.

But the ICC is at a disadvantage for dealing with this problem in comparison with some domestic systems. For example, in the US, prosecutors can relieve some of these potential problems because they can repeatedly speak to their witnesses about their evidence and help them prepare to testify at trial.

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⁵ *Ngudjolo* judgment, para. 124.
⁶ *Id.*
⁷ *Id.* para. 496.
⁸ *Id.* paras. 152-159, 189, 218, 251-254, 281-282.
⁹ *Kenyatta* concurrence, para. 4.
The prosecutor can go through the questions she intends to ask the witness, so the witness understands what the questions mean and what he will be asked to talk about. The prosecutor can also suggest lines of questioning that the defense may ask, so the witness is not caught off guard by questions that may be sensitive, harsh or accusatory. The prosecutor builds rapport with the witness, so the witness feels comfortable being questioned by the prosecutor and may be more comfortable answering sensitive questions in court. This can include showing the witness the courtroom, so the witness is more familiar with the setting and speaking to the prosecutor in it.

An important aspect of this trial-prep process is that the prosecutor may discover that the witness has changed his evidence. The witness may recant; the prosecutor may realize that the witness does not recount his evidence consistently; the witness may change or reveal key details; or – through the comfort of repeated interaction – the witness may reveal a side of his personality that suggests a lack of credibility. Repeated interaction, re-interview, and preparation for trial can save a prosecutor from presenting unreliable witnesses at trial – and can even lead to dismissal of cases before trial.

In most cases, the OTP does not have the benefit of this practice because ICC judges have typically refused to allow prosecutors to “prep” their witnesses – what is called “witness proofing” at the ICC. In many cases, the OTP is only able to speak to witnesses about their evidence a small number of times before the trial, and more often than not this takes place long before the trial begins. The OTP cannot review with its witnesses the questions the OTP intends to ask at trial. Staff from the Registry’s Victims and Witnesses Unit, and not staff from the OTP, show the courtrooms to the witnesses.

The Court has justified the ban on witness proofing on the grounds that it will avoid allegations that witness proofing was “used to influence the testimony of the witnesses in some way.”10 This prohibition began in the Lubanga Pre-Trial Chamber, which found in particular that the practice of witness proofing was “unethical or unlawful” in some national jurisdictions.11 However, other jurisdictions, such as the US, allow “witness proofing,” seeing it as a valuable tool to prepare witnesses to give focused and cogent evidence at trial. Ultimately, because witness proofing is not allowed at the ICC, the OTP loses the ability to test and confirm its witnesses’ evidence through repeated interaction and examination, and to build the trust of its witnesses over time.

Thus, though there is surely room for the OTP to improve its investigative practices and witness questioning techniques, the ICC should also reconsider its prohibition of witness proofing, as this inhibits the OTP from presenting its best case, and from realizing and addressing (where appropriate) some of its witnesses’ problems before trial.

Lack of sufficient background information on witnesses

In the Ngudjolo judgment, TC II also found that the Prosecution should have made more effort to corroborate background evidence about its witnesses that affected their “ability to testify and reliability”, noting that such evidence came from the defense instead.12 Indeed, in both domestic and international criminal cases it is preferable to corroborate important information about witnesses.

\[11\] Id. para. 41.
\[12\] Ngudjolo judgment, para. 121.
Background information can be used during an interview with a witness to determine his credibility; for example, US prosecutors may get a copy of a witness’ criminal record before an interview and then ask the witness about his criminal record to see if he will tell the truth about it, and, if not, how he appears when he lies. Background evidence can also be used to evaluate witnesses’ statements after their interview, and can be presented at trial to corroborate the witness testimony.

However, collection of evidence on witnesses’ backgrounds presents concerns and difficulties for the OTP that are not always present in domestic cases. At a very basic level, background information is much easier to get for many domestic prosecutors than it is at the ICC. This is because domestic prosecutors are part of the government and benefit from access to government resources and records. In the example above of obtaining a witness’ criminal record prior to an interview, this is very easy for a domestic prosecutor: she may be able to access the information by running a short search from her computer. The OTP does not have similar access to government resources, and instead must ask for such information from governments – not all of which are cooperative or produce information quickly.

Moreover, for security reasons, the OTP is reluctant to ask for witness background information because this may reveal its witnesses’ identities. Where the OTP’s investigations involve small close-knit communities, acquiring information about a witness’ background may reveal that he is cooperating with the OTP and place him and/or his family in danger. Worse, where the OTP would have to ask for key background information from the very government it is investigating, the OTP would reveal witnesses’ identities to the suspects. The OTP must balance these risks with the value of the information.

The OTP may also face practical obstacles to obtaining background information. Because it operates in countries that are often just coming out of or are still engaged in armed conflict, background information may be lost, destroyed, or very difficult to access. TC II recognized this, noting that conflict in the region where the OTP investigated the Ngudjolo case could cause the OTP “difficulties ... in the collection of reliable documentary evidence necessary for determining the truth in the absence of infrastructure, archives and publicly available information.” Moreover, the OTP has no power to order countries to produce certain information – it can only ask for these materials. In cases where the Court has criticized the OTP for not collecting evidence, it is possible the OTP tried unsuccessfully, and simply did not explain this to the Court.

Absence of testimony from certain “insider” witnesses

In the Ngudjolo judgment, the judges stated that it would have been “worthwhile for the Chamber to hear the testimonies of certain of the commanders who played a key role before the attack, during the fighting and afterwards.” The Chamber seemed to blame the Prosecution for this, noting that the discretion to call various witnesses “rested above all with the Office of the Prosecutor.”

While it would be good to hear evidence from such witnesses, it is unrealistic to expect that the Prosecution will always be able to call them to testify. First, the OTP would have to be able to locate and contact these commanders. However, prosecutors and investigators in any criminal system often have

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13 Id. para. 115.
14 Id. para. 119
15 Id.
difficulty simply finding witnesses. For example, investigators may not know a witness’ real name, where he is currently located, or any contact information for him such as a telephone number or address.

Second, the judges assume that these commanders would agree to speak to the OTP. In any criminal system, witnesses are often reluctant to speak to prosecutors and investigators. This could be because of their relationship with suspects, fear of reprisals, distrust of law enforcement, or a simple desire not to get involved. However, in this case the OTP finds itself at a disadvantage over domestic criminal systems because the OTP has no authority to compel people to speak with its staff. Whereas domestic prosecutors in the US, for example, have the power to subpoena people and evidence, the OTP does not. Witnesses speak to the OTP voluntarily, and can refuse to speak with staff or terminate interaction at any time. The OTP is also at a disadvantage because of the circumstances under which it often investigates, including in areas suffering on-going armed conflicts and in countries where the heads of state are themselves the target of the investigation. These circumstances significantly increase the difficulty of locating witnesses and decrease the chances that witnesses will be willing to cooperate if found. TC II recognized this, stating that the instability plaguing the region in which the OTP investigated the Ngudjolo case caused the OTP “difficulties in locating witnesses with sufficiently accurate recollections of the facts and able to testify without fear”.16

Third, even if the OTP was able to interview any of these commanders, this does not guarantee their availability or willingness to testify at trial, for many of the same reasons discussed above. Moreover, witnesses’ willingness to testify may change over time. This certainly happens in domestic criminal systems. For example, witnesses may be happy to talk in private but are unwilling to give evidence publicly or in front of the defendant. They may become uncooperative because they have been bribed or threatened. Over time, they may simply lose interest.

The OTP will need to determine how to handle judges’ desire for important but unavailable evidence. The OTP can evaluate its evidence by asking – if I were a judge, what would I expect to see as the best evidence in this case? If the OTP is not able to present that evidence at trial, perhaps the OTP should consider ways of explaining its absence. For example, the OTP could explain the steps it took to contact important witnesses it could not find or who refused to speak with the OTP. However, the OTP may have limited ability to do this because the OTP might have to present evidence about its investigative practices in front of the accused or defense counsel, and reveal the identities of any investigators who would have to testify about it. This could damage the confidentiality and integrity of ongoing and future OTP investigations. The OTP will have to weigh these issues against the value of explaining the missing evidence.

At the same time, the ICC’s judges should be careful not to place too much value on evidence they “wish” they had. Because the reasons for “missing” evidence can be so varied, the Chamber should not necessarily “blame” the Prosecution for any “failure” to present evidence.

TC II may have expressed a desire for more evidence because the presiding judge comes from a civil law background.17 In civil law traditions, judges do not merely conduct the proceedings, as they primarily do

16 Id. para. 115.
17 Judge Bruno Cotte was the presiding judge of TC II. He is from France, a civil law country, where he served as a senior judge prior to joining the ICC. For more, see http://www.icc-
in common law systems such as the US. Rather, the role of judges is to establish the facts of the case, which includes investigating it, and interviewing witnesses.

At the ICC, judges are somewhere in between common and civil law traditions: they decide on guilt or innocence and conduct the trial. Moreover, as TC II recognized, the ICC’s Chambers have the ability to request the submission of evidence they consider necessary for the determination of the truth and to order the production of evidence in addition to that presented during the trial by the parties. If ICC judges do this, they may learn why the witnesses or evidence are in fact not available. Nevertheless, judges who come to the ICC from civil law systems may be unprepared for the limitations that the ICC imposes on their ability to investigate.

No interview of the accused

In the Ngudjolo judgment, TC II also complained that the OTP did not interview the accused, Mathieu Ngudjolo, saying that it would have been “expedient […] for a statement to be taken from the Accused during the investigation stage.” Again, the Chamber’s expectations may have been unrealistic here. In an adversarial criminal investigation, there are at least two important factors that can affect a prosecutor’s decision to interview an accused person during an investigation. First, the investigators/prosecutors may choose not to try to interview a suspect – and possibly those in his or her immediate circle as well – because they do not want to alert the suspect to the investigation at all. Doing so could give that person an opportunity to tamper with witnesses or other evidence, or to flee.

Second, even if the prosecution might like to interview a suspect or accused person, he or she is free to refuse to do so. Indeed, defense counsel will often advise a suspect/accused not to speak with the prosecution for strategic reasons: the earlier the prosecution learns the accused’s defense, the earlier the prosecution can begin to investigate it to disprove it at trial. And, should the accused testify at trial, the prosecution may be able to examine the accused concerning inconsistencies between the trial testimony and the earlier interview. Therefore, the fact that the OTP did not interview Ngudjolo before his trial is not unusual, and the OTP should not necessarily be criticized for it.

Delay in starting on-sight investigations

TC II also criticized the OTP’s investigation in the Ngudjolo case on the grounds that the OTP did not start on-site investigations as soon as possible after the crime occurred. According to TC II, the OTP only started collecting evidence in the case in 2006 and did not collect forensic evidence until 2009, even though the crimes occurred in 2003. While it is preferable for the OTP to begin its investigations as close in time to the commission of crimes as possible, the judges’ criticism does not mention a number of practical realities that delay ICC investigations so that they appear untimely.

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18 Except for bench trials, where the judge also determines the guilt or innocence of the defendant.
19 Rome Statute, art. 69(3).
20 Id. art. 64(6)(d).
21 Ngudjolo judgment, para. 120.
22 Id. para. 117.
First, the judges mistook the date when the OTP collected a piece of evidence for the date when the OTP began investigating. In fact, a significant amount of work is required before the OTP can actually collect evidence. This includes learning that the evidence exists, ensuring safe access to the country where the evidence is located, preparing the security of staff traveling to get the evidence and for any witnesses interviewed, and confirming dates for interviews and evidence collection. The Court’s physical distance from crime scenes lengthens these processes, because it requires more planning for the OTP and coordination with the country where the evidence is located.

As a result of these factors, the process leading up to collection of evidence can take several months. Thus, while it may appear that the investigation began when the first piece of evidence was collected, the investigation had to have begun months before in order to collect it.23

Second, the OTP does not have the discretion to open investigations whenever it wants. The OTP must wait for a State Party to the Rome Statute or the UN Security Council to refer a situation to the OTP for investigation, or the OTP can ask permission to initiate an investigation itself from a Pre-Trial Chamber (proprio motu).24 When the OTP begins its investigation on the basis of a referral, that referral happens after the crimes occurred – often long after. For example, in the Ngudjolo case, the Democratic Republic of Congo (DRC) did not refer the situation to the OTP until April 200425 – already more than a year after the crimes at issue in the case.26 In another example, in the situation in the Central African Republic (CAR), the CAR did not refer the situation to the OTP until 2005, but the OTP’s case against Jean-Pierre Bemba Gombo concerns events that occurred in late 2002 to early 2003.27

Similar delays are inevitable when the OTP initiates an investigation itself. In such cases, the OTP must conduct a preliminary examination of the situation country before requesting permission to initiate an investigation. This includes determining whether crimes within the jurisdiction of the Court occurred, whether they are sufficiently “grave” to justify action by the Court, and whether any country with jurisdiction is investigating or prosecuting the crimes in good faith or has already done so.28 During a preliminary examination, the OTP has no legal authority to collect evidence.

After conducting the preliminary examination, the OTP can only begin an investigation itself (proprio motu) with permission from a Pre-Trial Chamber. The OTP has done so in two instances: in the Kenya situation, and in the Côte d’Ivoire situation. In both situations, it took the relevant Chamber around four months to grant the OTP permission to initiate its investigation.29 Thus, even the process of opening an investigation proprio motu delays the start of evidence collection.

23 E.g. Prosecutor v. Kenyatta, “Public readacted version of the Additional Prosecution observations on the Defence’s Article 64 applications, filed in accordance with order number ICC-01/09-02-11-673”, ICC-01/09-02/11-683-Red, 8 March 2013, paras. 22-23.
24 Rome Statute, art. 13.
26 Ngudjolo judgment, para. 1.
28 Rome Statute, art. 17.
29 Situation in Kenya, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an
Insufficient investigation before the confirmation of charges hearing

In the Kenya cases, TC V recently expressed concerns that the Prosecution collected too much of its evidence after the confirmation hearings were held. The Chamber stated that, while it “does not consider that the Statute prohibits the Prosecution from conducting post-confirmation investigations, it is mindful of the Appeals Chamber’s recent statement in Mbarushimana that the investigation should be ‘largely completed’ by the Confirmation Hearing.” The Majority held that, “the Prosecution should not continue investigating post-confirmation for the purpose of collecting evidence which it could reasonably have been expected to have collected prior to confirmation.” The Chamber suggested that remedies for delayed collection of information could include “the exclusion of all or part of the evidence so obtained”. The Chamber noted that, in the Kenyatta case, “at least 24 of the Prosecution’s 31 fact witnesses were interviewed for the first time after the Confirmation Hearing” and that “a large quantity of documentary evidence appears to have been collected post-confirmation and to have been disclosed at a late stage.” The Chamber remedied this by postponing the start of the trial so that the Defense could have more time to conduct investigations and prepare for trial.

In a separate opinion, Judge Van den Wyngaert stating that she had “serious questions as to whether the Prosecution conducted a full and thorough investigation of the case against the accused prior to confirmation.” She believed that, at the time when it sought confirmation of charges, the Prosecution had not complied with its obligations to “extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under [the Rome] Statute” and to “investigate incriminating and exonerating circumstances equally”, and “that it was still not even remotely ready when the proceedings before this Chamber started.”

In theory, the Chamber is correct – the Prosecution should collect as much of its evidence as possible before the confirmation hearing. This will facilitate the most accurate charging decisions and presentation of the case, and increase the number of cases confirmed for trial. It would also ensure that the accused has adequate time to prepare his defense, and is not expected to defend himself against a regularly changing case. Moreover, given the significance of the crimes within the jurisdiction of the ICC and the highly-publicized nature of the ICC’s cases, the Prosecution should be reluctant to publicly implicate suspects in crimes without properly assessing as much available evidence as possible.

The OTP has recognized that cases should be developed as thoroughly as possible before engaging in the judicial process, and would like to aim to be “trial ready” by the time of the hearing on the confirmation.
of charges. At the same time, the OTP’s ability to do this may be limited. Most significantly, the OTP is expected to execute quick and thorough investigations but often lacks enough staff to do so. The ICC’s case load continues to rise, as it seeks permission to open new investigations and as States Parties and the UN Security Council refer new cases to it. Yet the OTP is not provided with additional staff to handle these cases, and as a result the OTP is left to handle more and more investigations and prosecutions without increasing its staff. As a result, it has to stretch what staff it has thinner and thinner. With a small staff, the OTP can collect only a limited amount of evidence quickly, and may have to continue to collect evidence after the confirmation hearing to have sufficient evidence for trial.

The security circumstances of the countries in which the OTP investigates will also impact the OTP’s ability to investigate quickly or during certain periods. The Majority recognized this in the Kenyatta decision, accepting that “the circumstances under which the Prosecution was operating were difficult and may have affected its ability to conduct a fuller investigation prior to confirmation.” Thus, it is possible that ongoing armed conflict or other insecurity will force the OTP to proceed to confirmation hearing without the benefit of a complete investigation on the ground.

Lack of expertise

In a few instances, TC II criticized OTP staff for lacking appropriate knowledge of its case. For example, TC II stated that “it would have been beneficial for the Prosecution to visit the localities where the Accused lived and where the preparations of the attack ... allegedly took place, prior to the substantive hearings.” It noted that this would have helped the Prosecution examine witnesses and better assess the accuracy of their statements. It is agreed that this would be an asset to the Prosecution’s work. However, mainly due to security and budgetary constraints, the OTP can only send a limited number of staff to the field; as a result, lawyers who appear in court may not be able to travel to crime scenes or other relevant locations before examining witnesses about those matters at trial.

Preferably, all relevant staff would be able to travel to the field, but, if only limited staff can go, it would be highly valuable for those who do go to take the best possible documentation of their trip (learning distances and times for travel, taking photos or videos of relevant locations, etc.), and to give a detailed briefing to the rest of the team on return from mission.

TC II also criticized the OTP’s presentation at trial on the grounds that much of the “socio-cultural framework was discussed in response to the Chamber’s questions” while this “should have been discussed at the beginning of the Prosecution’s presentation of the evidence so as to prompt a more informed debate from the outset.” This is an excellent point, and one that should be easy for the OTP

40 Kenyatta decision, para. 124.
41 Ngudjolo judgment, para. 118.
42 Id.
43 Id. para. 123
to adopt. The cases at the ICC are in large part the product of socio-cultural circumstances in the situation countries, and possibly neighboring countries as well. Explaining these circumstances enhances an outsider’s understanding of the case. The Chamber’s criticism does not suggest that the OTP lacks such knowledge, but rather that it did not initially appreciate the importance of that evidence for the judges. As a result, the OTP should – to the extent possible – order its evidence so as to present contextual socio-cultural information at the beginning.

Conclusion

While ICC judges have made some unrealistic criticisms of OTP investigations, they have also identified room for improvement in the OTP. However, the OTP cannot fix all of these problems with its current limited budget. The OTP needs additional staff and resources to execute quick and effective investigations, and it needs a bigger budget to take these on. As Prosecutor Fatou Bensouda stated in a September 2012 interview, the OTP has “cut it as near as possible to the bone and we cannot go any further.” In her words: “If we want to improve on the quality of investigations and prosecutions, we must have the means to do that.”

The ICC’s budget is set by its Assembly of States Parties (ASP). The ASP has strongly resisted increases to the budget over the past few years (due in large part no doubt to the world financial crisis), and is pressuring the ICC not to increase its budget for 2014. Despite this, the OTP has asked for a significant increase to its 2014 budget. The OTP has learned from past experience and wants to adjust its plans and working methods to meet its challenges. It needs more money to do this. More money will allow the OTP to increase its staff, to increase the depth and breadth of its investigations, and to produce better results at future confirmation hearings and trials.

If States Parties want the Court to become a credible judicial institution, they must provide the OTP with enough money to support effective, thorough investigations. Only then can the OTP fully engage in best investigative practices.

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