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**OUTSOURCING THE COURT'S FACT FINDING MISSIONS TO THE
INTERMEDIARIES: EFFECTS ON THE FAIR TRIAL RIGHTS OF THE ACCUSED**

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Introduction

There can be no global Justice [...] unless the worst of crimes - crimes against humanity are subject to the law. [...] The international criminal court will ensure that humanity's response will be swift and will be just.¹

According to the founders of the Rome Statute of the International Criminal Court (the Rome Statute) as well as the international community in general, the *raison d'être* of the International Criminal Court (the ICC or the Court) is to bring the individuals suspected of committing the gravest of crimes to justice when the States having jurisdiction over their alleged crimes are unable or unwilling to prosecute. Despite the fact that the crimes ICC deals with usually take place in countries torn by war and conflict, where conditions are unstable, at least some actors hostile and investigation therefore extremely difficult, the Court has promised to deliver justice in a fair and expeditious manner.

The Rome Statute promising to prosecute the perpetrators of mass crimes in a fair trial was negotiated during the five weeks of the Rome Conference by 120 countries and a number of Non-Governmental Organizations (NGOs). During these weeks “a cornucopia of controversies, from the highly political, like the role of the Security Council, to detailed aspects of criminal procedure”² needed to be resolved. While only the states had an official voice, a huge part of civil society saw their chance to have a say at the proceedings. As has become common in international legal and political scene, non-governmental organizations were represented in large numbers.³ Although they could not partake in the negotiations directly, they presented papers and lobbied from the margins, establishing themselves as important sources of information and experts in critical areas.⁴

The affirmation that the Rome Statute would become a binding international treaty with its temporal jurisdiction commencing on July 1, 2002 was obtained on April 11,

¹ Annan. (1997). p 364.

² Cryer. (2010). pp 146-147.

³ Nowrot. (1998). pp 579-581 & 589-590.

⁴ Cryer. (2010). p 147.

2002, when sixty-six countries, six more than the threshold needed to establish the Court, ratified the negotiated treaty.⁵ Yet the new Statute born as a result of these fierce negotiations contained a number of problems. The result of the compromises between criminal lawyers from various common and civil law systems was a Statute that incorporated elements taken from different countries' legal systems, often meaning that rather than resolving the contentious issues by clearly favoring one standpoint over the other vague language was adopted whose meaning could vary considerably depending on the interpretation.⁶

During the Rome Conference the negotiators agreed upon a Statute for the new permanent international criminal court, but failed to provide it with the muscle to independently enforce its authority. As a result of this, investigative functions of the Court have to a huge extent been outsourced to third parties whose work is vital for enabling the Court to deliver prosecutions. The author of this thesis argues that on top of adopting a treaty whose provisions remain ambiguous due to the juxtaposition of different criminal procedures, the founders have failed to deliver legal tools tailored for the realities of an international criminal court that relies heavily on outside assistance to accomplish its tasks. As a result of this reliance on third party assistance endangers fair process trial rights promised to the accused by the international community.

The third parties the Court cooperates with can be the states or contractors, but often they are civil society organizations or individuals working on the ground, referred to as intermediaries by the Court. The aim of this thesis is a) to provide a definition for the intermediaries, b) to show what kind of problems their assistance brings about, mainly the problems associated with the fair trial rights of the accuse and c) to recommend some solutions to the mitigate the risks reliance on intermediaries may bring. Although intermediaries provide a wide range of services for the Court, this thesis centers on their role in gathering evidence for the court, since the collection of evidence lies at the basis of a fair trial, even in troubled situations where the ICC operates.⁷

⁵ Kippenberg. (2004). p 2.

⁶ De Smet. (2009). pp 407-408.

⁷ Stuart. (2008). p 414.

The author believes the themes to be highly relevant. Despite the Court's growing dependence on the intermediaries and the criticism received from different scholars, human rights activists and NGOs⁸ throughout the recent years following the beginning of the ICC's first case *Prosecutor v. Lubanga*, a comprehensive study aiming to determine who the intermediaries are and studying the impacts on the fair trial rights of the accused has not been produced.

The thesis is based on the ICC's regulatory framework governing the relationship between the Court and intermediaries, mainly the Rome Statute and the Rules of Procedure and Evidence (RPE). The author also relies on the case law of the ICC (mainly the *Lubanga* case) as well as the jurisprudence of the *ad hoc* tribunals, NGO reports and peer-reviewed literature. Some sections of the thesis are mainly based on the Draft Policies Regulating the Relationship between the ICC and the Intermediaries which at the moment are unpublished and still a work in progress. While researching this thesis, the author experienced difficulties accessing materials regarding intermediaries because their names and considerable parts of information about them has been redacted⁹ and most relationship agreements unpublished.

In order to show how reliance on intermediaries affects the rights of the accused, the author firstly examines whether fair trial rights in the Rome Statute are compatible to the guarantees set by international human rights standards, such as they are provided in the International Covenant of Civil and Political Rights (ICCPR or the Covenant). It is concluded that while the guarantees of a fair trial match the guidelines given to states by the United Nations Human Rights Commissioner (UNHR Commissioner), the procedural confusion regarding the admissibility of evidence makes it difficult to uphold those guarantees in practice. By examining the collaboration with the ICC in Sudan and Uganda, the second chapter further argues that the Court's cooperation regime created by the Rome Statute is naïve and out of touch with reality in placing most of its emphasis in regulating the Court's cooperation with states that are either unwilling or unable to bring the perpetrators of crimes to justice. The third and the fourth chapter show who the intermediaries are and how they cooperate with the

⁸ See for ex: De Vos. (2011). & Baylis. (2009). ; VRWG. (2013). & Open Society Justice. (2010).

⁹ See for ex: Lubanga. ICC-01/04-01/06. Decision on Intermediaries.

Court. The fifth, sixth and seventh chapters create a whole showing what kind of problems the reliance on the intermediaries by the Office of the Prosecutor (the OTP) creates and how it affects the Office of Public Counsel for Defense (the Defense) and the Trial Chambers. The author's main argument is that by cooperating with the intermediaries the OTP loses its control over the investigation, making it difficult for the underfinanced Defense to access necessary evidence and putting extra work on the judges whose task it is to oversee that the rights of the accused are guaranteed. The last chapter offers some recommendations for the future.

Lastly, the author would like to clarify that the thesis is not aimed at discrediting the work of intermediaries or undermining the humanitarian relief many of them bring in the situation countries. It is to bring attention to the problems of delivering justice that directly influence the defendant and indirectly affect the Court's image in the situation countries and in the international community.

In addition to my supervisor Andres Parmas, I would like to thank Dr. Aleksandar Momirov from the Erasmus School of Law for his helpful suggestions that enabled me to make progress with the topic.

Part I. Theoretical Background

Chapter 1. A Fair and Expeditious Trial

The aim of this Chapter is to provide an overview of what is considered a fair trial in international law in order to compare this against the standard set by the State Parties for the ICC. For lawyers educated in the law of their national legal system, it is hard not to compare the ICC standards against the standards established in their home countries, however, as standards vary from country to country, the author is of the opinion that comparing ICC standards against the norms in certain jurisdictions, without understanding their whole legal system, would be counter productive. Moreover, different countries have already come together and found compromises between their legal systems to create international law. The procedural system as laid down by the Rome Statute and Rules of Procedure and Evidence of the International Criminal Court does not align itself with any single existing domestic or international system of criminal procedure.¹⁰ Therefore, no lawyer should evaluate the ICC by the way it mirrors his/her national experience.

The chapter begins by explaining why the ICC, that faces enormous pressure to prosecute, should be concerned with providing the accused a fair trial. It goes on to provide an overview of the human rights norms established in the ICCPR that are relevant to this thesis. The chapter ends by comparing the fair trial norms provided in the Rome Statute against the internationally recognized human rights norms.

1.1 Importance of Fair Proceeding in the ICC

Before anyone can be tried in the ICC, it has to be established that his case is admissible and falls under the jurisdiction of the Court. To determine that the Court can take the case, a long investigation into the situation at hand is carried out. The scale of the crimes defendants are accused of, the resources the international community has contributed to put an end to the impunity, together with the fact that the perpetrators seem to be well known even before the trials begin puts enormous pressure on the Court to convict. “International criminal law developed as a response to grossest human rights violations” and its aim is to bring “suspected war criminals to justice and thus to end impunity.”¹¹ Making sure that the trial is compliant with all

¹⁰ De Smet. (2009). p 407.

¹¹ Groulx. (2010). p 22.

the fair trial guarantees of the accused seems to be somewhat of a secondary objective.

Yet the right to a fair trial has long been accepted as a basic human right and therefore in order for the ICC to have any integrity, the most despicable war criminals must have a fair trial.¹² As part of the international community consisting of states that are bound by international human rights norms, the international courts, although not themselves explicitly bound by those norms, are expected to adhere to “internationally recognized human rights standards.”¹³ In order to allow international institutions, instead of states, to prosecute individuals, it must be guaranteed that the individual’s rights are respected, just like the international community demands that they are respected within a state, which is traditionally responsible for ensuring the human rights within its borders.¹⁴ As the states are have obligations under international law to respect human rights, it can be said that the ICC’s adherence to international human rights standards is also important for the ICC in order to maintain the cooperation regime with states.

Guaranteeing a fair trial to the defendants is also important for political reasons that have an impact on the credibility and, to some extent, the resources of the Court. No matter how clear the guilt of the perpetrator may seem internationally, the individuals on trial at the ICC usually enjoyed a position of prevalence in their own communities and they continue to enjoy support throughout the proceedings and long after them. Rejecting the due process guarantees at the basis of human rights would mean that it has “little hope of successfully being a responsible entity with the capability to maintain the credibility and relevance necessary to punish the most serious crimes of concern to the international community and to help prevent future war crimes.”¹⁵

Finally, while the ICC is not expressly bound by the international human rights norms, the Rome Statute itself directs the Court to apply applicable human rights treaties and the principles and rules of international law as sources of law.¹⁶ The

¹² Universal Declaration of Human Rights. Articles 9-11.

¹³ Cryer. (2010). p 430.

¹⁴ ICCPR. Article 2(1).

¹⁵ Rome Statute. pmbi. (stating the purposes of the ICC).

¹⁶ Cryer. (2010). p 431.

Statute provides that the application and interpretation of the law “must be consistent with internationally recognized human rights.”¹⁷ Giving the defendants an opportunity to defend themselves in a fair trial was therefore the intention of the international community establishing the Court.

1.2. Standard for a Fair Trial in International Law

In order to establish whether the ICC upholds the international human rights norms, the ICCPR¹⁸ together with the UN Human Rights Committee’s Comments¹⁹ are examined. The Comments are directed to the state parties of the ICCPR because states have the primary responsibility for protecting human rights as per Article 2(1) of the ICCPR. It is appropriate to examine whether the standards provided by the ICCPR are upheld by the ICC, because the Court’s jurisdiction is complementary to that of the states,²⁰ meaning that it can intervene when states are either unwilling or unable to deal with the human rights violations.²¹ The international standards for a fair trial are provided in Article 14 of the Covenant. The ICCPR is monitored by the UN Human Rights Committee that has also issues General Comments on the interpretation of the Articles of the Covenant.

In a nutshell Article 14 ICCPR provides that all persons shall be equal before the courts and tribunals and if there are criminal charges against an individual, he shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law²² and that he has the right to be presumed innocent until proven guilty.²³ The notion of a fair criminal trial means that the accused persons shall be informed promptly and in detail in a language which they understand of the nature and cause of criminal charges brought against them,²⁴ they must have adequate time and adequate facilities for the preparation of their defense and communication

¹⁷ Rome Statute. Article 21(3).

¹⁸ Covenant on Civil and Political Rights adopted by the United Nations General Assembly on December 16, 1966, in force from March 23, 1976. **(ICCPR)**

¹⁹ UN Human Rights Committee. General Comment nr. 32. Article 14: The Right to a Equality before Courts and Tribunals and to a Fair Trial. Ninetieth session Geneva, 9 to 27 July 2007. **(UNHR Committee)**

²⁰ Rome Statute. Article 1.

²¹ Rome Statute. Article 17(1)(a).

²² ICCPR Article 14(1).

²³ ICCPR Article 14(2).

²⁴ ICCPR Article 14(3)(a).

with counsel of their own choosing,²⁵ they must be tried without undue delay,²⁶ in their own presence and they must be able to defend themselves in person or through legal assistance of their own choosing.²⁷ They shall also be able to examine, or have examined, the witnesses against them,²⁸ to have the free assistance of an interpreter if they cannot understand or speak the language used in court²⁹ and they must not be compelled to testify against himself or to confess guilt.³⁰ As the purpose of this thesis is to determine whether excessive reliance on intermediaries may endanger due process, the author has chosen the only the elements most relevant for this thesis to examine in detail.

ICCPR Article 14 (1) gives a general guarantee of equality before the courts and tribunals. This first sentence means that all the guarantees of a fair trial, but also the right to an equality of arms must be guaranteed. It also ensures that the parties to the proceedings in question are treated without any discrimination. This means that the same procedural rights are to be provided to all unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.³¹

ICCPR Article 14 (2) states that everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence is fundamental to the protection of human rights. It imposes the burden of proving the charge on the prosecution and guarantees that no guilt can be presumed until a charge has been proved a beyond reasonable doubt. It ensures that the accused has the benefit of doubt and all public authorities shall refrain from prejudging the outcome of a trial.³²

ICCPR Art 14, para 3(b) provides that the defendant must have adequate time and adequate facilities to prepare their defense and to communicate with their counsel.

²⁵ ICCPR. Article 14(3)(b).

²⁶ ICCPR. Article 14(3)(c).

²⁷ ICCPR. Article 14(3)(d).

²⁸ ICCPR. Article 14(3)(e).

²⁹ ICCPR. Article 14(3)(f).

³⁰ ICCPR. Article 14(3)(g).

³¹ UNHR Committee. para 7, 8, 13.

³² UNHR Committee. para 30.

According to the UNHR Committee, access to “adequate facilities” means access to documents and other evidence, including all exculpatory materials that the prosecution plans to offer in court. Exculpatory material that must be shown to the defendant are not only materials establishing innocence but also other evidence that could assist the defense.³³

The right of the accused to be tried without an undue delay does not relate only to the time between his formal charging and the time by which a trial commences, it relates to time until the final judgment on appeal. All stages, whether in first instance or on appeal must take place “without undue delay.” In addition to avoiding keeping persons in a state of uncertainty about their fate for too long and ensuring that deprivation of their liberty does not last longer than necessary, it is also meant to serve the interests of justice. The UNHR Committee admits that what is considered reasonable depends on the circumstances of each case. The complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities must all be taken into account.³⁴

The right of accused persons to examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them provided in Paragraph 3 (e) of Article 14 is an addition and specification of the principle of equality of arms provided in the first sentence of Article 14(1). The Human Rights Committee finds that this guarantee is important for ensuring an effective defense for the accused and their counsel and thus guarantees the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution. It is for the legislatures of specific jurisdictions to determine the admissibility of evidence and how their courts assess it, however, it must stay within these limits.³⁵

1.3. Standards for a Fair Trial in the ICC

This section examines what is considered to be a fair trial in the ICC legislation, specifically in the Rome Statute and the RPE. The rights to a fair trial are provided in

³³ UNHR Committee. para 33

³⁴ UNHR Committee. para 35.

³⁵ UNHR Committee. para 39.

Articles 21, 55, 63, 64, 66 and 67 of the Rome Statute. Like the previous section, only those rights that may be endangered when the evidence is collected by third parties are examined.

Article 66 of the ICC Statute, entitled “Presumption of Innocence” provides that everyone shall be presumed innocent until proven guilty before the Court in accordance with the applicable law. The onus is on the Prosecutor to prove the guilt of the accused.³⁶ In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.³⁷ The OTP therefore needs pertinent and accurate information. An individual cannot be tried fairly, convicted, sentenced and punished, without the prosecutor gathering evidence that proves individual criminal responsibility beyond the high burden “reasonable doubt.”³⁸ Article 67(1)(i) provides the right not to have the burden of proof reversed against him, making it absolutely clear that it is the Prosecutor that is tasked with establishing the guilt of the accused relying on credible evidence.

Article 67(1)(b) provides the right to have adequate time and facilities for the preparation of the defense. This basically means the right to an equality of arms. In order to understand what the equality of arms means for in international criminal justice, the case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY) can be applied. The Chambers have elaborated on the principle in the *Tadić* Appeals Case. The judges found that “there is no reason to distinguish the notion of fair trial from its equivalent in the [European Convention on Human Rights] ECHR and ICCPR, as interpreted by the relevant judicial and supervisory treaty bodies under those instruments.”³⁹ Nevertheless, they can be interpreted differently from the way it has been interpreted by the Commission of Human Rights, because the ICTY does not have its own police force and it cannot force states to cooperate. The Appeals Chamber therefore decided that in the context of international criminal proceedings “equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts,” meaning that the Court does not need to ensure that the defendant has equal possibilities to access materials

³⁶ Rome Statute. Article 66(2).

³⁷ Rome Statute. Article 66(3).

³⁸ Sunga. (2011). p 187.

³⁹ Knoop. (2007). p 297.

and evidence.⁴⁰ This interpretation was upheld by the International Criminal Tribunal for Rwanda (ICTR)⁴¹ In *Kayishema and Ruzindana* the ICTR Chambers also found that the equality of arms does not mean that a parity of resources between the parties, such as the material equality of financial or personal resources, must be ensured.⁴²

Article 67(1)(c) provides the right to be tried without undue delay. The international criminal courts are often criticized for excessively long proceedings and the Defenses have often claimed the violations of this right. However, the courts do not have sufficient resources to tackle the problem. Even if they did have more resources, the main reason for the long durations in the proceedings is that international investigations and prosecutions are very complex, factually, legally and politically, and thus more time-consuming than the domestic ones.⁴³ It has therefore been excepted that the proceedings in the ICC are lengthy, however, to comply with the UNHR Committee's interpretation of Article 14. para 3(c) of the ICCPR, whether a delay is reasonable should still be decided on a case-by-case basis.

Article 67(1)(e) provides the right to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. "The right to call witnesses has been interpreted as placing a positive duty upon the Tribunal to assist the accused with summonses, safe conducts and other measures necessary for obtaining the testimony."⁴⁴

This is related to the right provided in Article 67(2) stressing that the Prosecutor is obligated to disclose to the defense, as soon as practicable, any evidence in the Prosecutor's possession or control, which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. Materials that mitigate guilt or show innocence of the accused shall be disclosed as soon as practicable.⁴⁵ Rule 77 of the

⁴⁰ ICTY. Tadić Appeal. 1999. para 52.

⁴¹ ICTR. (2001). *Kayishema and Ruzindana* Appeal. para 73.

⁴² ICTR. (2001). *Kayishema and Ruzindana* Appeal. paras. 67–69.

⁴³ Cryer, p 435-436.

⁴⁴ Cryer. (2010). p 435.

⁴⁵ Rome Statute. Article 67(2).

RPE provides that the defense is allowed to inspect items in the Prosecution's possession, if it has not been obtained on the basis of confidentiality. The possibility of non-disclosure of evidence because of a confidentiality agreement is regulated in the Rome Statute, Article 54(3)(e). When read in conjunction with Rule 82 of the Rules), evidence obtained on the basis of a confidentiality agreement may not be introduced in Court. However, at times the confidential documents may contain material that is potentially exculpatory or mitigating⁴⁶ meaning that it shall be disclosed to the accused even if it is just lead evidence. In case of doubt the Trial Chamber shall have the authority to request that the parties submit all evidence that it 'considers necessary for the determination of the truth.'⁴⁷

1. Conclusion

The fair trial guarantees provided in the ICC documentation do not substantially differ from the ones provided in the International Covenant of Human Rights. However, there are a few slight differences in their interpretation. It is expected that the trials take longer than the national trials. The Chambers in the ICTR and ICTY have also established, that the approach to the equality of arms is more "liberal" and that the Defense does not need to have the same access to resources as the Prosecution. In addition to this, the provisions in the ICC regulatory framework contain a conflict with regards to the accused's right to examine all the evidence, especially the mitigating evidence, against him.

Scholars assessing the Rome Statute's compatibility with the international human rights norms, however, usually accept that the guarantees to a fair trial are provided. They have differing opinions about whether the Statute enables to uphold those guarantees in reality. Some, like Göran Sluiter, claim that on paper the ICC represents a clear improvement in the codification of human rights, sometimes going further than international human rights law, however, the case law of the ICC so far is not very promising.⁴⁸ The view is shared by the criminal defense lawyer Elise Groulx who finds that the right to a fair trial is fully protected in the Rome Statute, however, the problem is that a fair trial is not grounded in "institutional reality" of the Court,

⁴⁶ Stuart. (2008). p 411.

⁴⁷ Rome Statute. Article 69(3).

⁴⁸ Sluiter. (2009). p 474.

mainly because the ICC does not provide an independent defense.⁴⁹ Professor Andrew Walker remains more critical claiming that the “ICC Statute, as it is currently written, creates substantial risks of unfair trial proceedings and politically motivated prosecutions.”⁵⁰

None of the authors cited above contest that the fact to a fair trial rights themselves have been taken from the ICCPR to the Rome Statute almost verbatim. Both Elise Groulx and Professor Walker are worried that the Court can simply not uphold the guarantees provided in the Statute. Elise Groulx finds that the problems with the fair trial arise from the institutional reality of the way the Court is organized, claiming that this has a serious effect on the principle of equality of arms. Professor Walker refers to the lack of numerous provisions that, in his opinion, would make it possible to uphold these guarantees in reality.⁵¹

The fact that “[t]he Rome Statute envisages the systematic and comprehensive application of international human rights standards in ICC procedures,”⁵² shows despite the pressure of the international community to prosecute, the founders of the Rome Statute have made a commitment to ensure a fair trial to the accused. The rest of the thesis will therefore go on to analyze how does reliance on intermediaries influence the Court’s ability to uphold those guarantees.

⁴⁹ Groulx. (2010). p 22.

⁵⁰ Walker. (2003-2004). p 260.

⁵¹ Walker. (2004). p 277.

⁵² Sunga. (2003). Article on-line.

Chapter 2. Cooperation to Gather Evidence

In order to provide a fair trial for the accused, the Prosecutor has to prove the guilt of the accused⁵³ “beyond a reasonable doubt.”⁵⁴ In order to reach this threshold the OTP has to engage in complicated fact-finding missions to gather evidence from the situation countries. As the founders of the Court realized when drafting the Rome Statute that neither the OTP’s resources nor its know-how are sufficient to enable it to collect information independently in an efficient manner, the Statute enables the OTP to rely on third parties in order to gather the necessary evidence. This Court’s cooperation regime is provided in Part IX of the Rome Statute. It centers on cooperating with the State Parties, leaving cooperation with other parties practically unregulated.

The aim of this chapter is to show that the cooperation regime envisioned by the Rome Statute does not match the way the Court cooperates in order to gather evidence in reality. The author firstly provides an overview of the Court’s cooperation regime, after which she uses the examples of Sudan and Uganda to show that ‘unwilling’ or ‘unable’ states make ineffective partners for the Court. The final section shows that the provisions regulating cooperation with parties other than states are limited to allowing the Court to use their assistance without providing mechanisms to hold enforce their cooperation.

2.1. The State Parties’ Obligation to Cooperate with the Court

Article 4 of the Rome Statute declares that the Court has a legal personality and “such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes,”⁵⁵ meaning that the Court may request third parties to cooperate with it. The explicit duty to cooperate is set out in Part 9 (Articles 88-92) of the Rome Statute and is confined to States Parties, but Article 87(5) of the Rome Statute contains a special provision authorizing the Court to invite non-States Parties to cooperate in accordance with *ad-hoc* arrangements. In addition to that, according to Article 12(3) of the Statute the states not parties to the Statute that accept the jurisdiction of the ICC in individual cases must also cooperate with the Court in accordance with Part 9. Finally, the Security Council may, when referring a situation

⁵³ Rome Statute. Article 66(2).

⁵⁴ Rome Statute. Article 66(3).

⁵⁵ Rome Statute. Article 4(1).

to the ICC, require that UN Member States cooperate with the Court, regardless of whether those States are parties to the ICC Statute or not.

Article 86 of the Rome Statute states that the State Parties shall “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.” It is the state’s responsibility to ensure that its national law enables cooperation with the Court and it is the state that shall bare the costs. Article 88 declares that the States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under Part IX and Article 89(1) adds that the States shall comply with requests for arrest and surrender that are in accordance with the provisions of this Part and the procedure under their national law.

According to Article 93(1) the State Parties shall also comply with requests to provide assistance in relation to investigations or prosecutions. According to this clause, if so requested by the Court, the State Parties shall comply with an un-exhaustive list of requests to assist the investigation. Examples of the forms of assistance states have to comply with once required by the Court are providing identification and whereabouts of persons or items,⁵⁶ examining places or sites,⁵⁷ taking evidence including testimonies and expert opinions,⁵⁸ questioning people,⁵⁹ facilitating their appearance to Court⁶⁰ and servicing documents.⁶¹ They also have to provide any other type of assistance that would facilitate the investigation which is not prohibited by the law of the requested State.⁶² If the states having the obligation to cooperate with the Court refuse to comply with the Court’s requests, Article 87 states that they can be referred to either the Assembly of State Parties or the Security Council.

2.2. The Problems with Reliance on State Cooperation

The Court needs to cooperate with the states that can produce valuable documents from the state archives and facilitate access to witnesses⁶³ and as the

⁵⁶ Rome Statute. Article 93(1)(a).

⁵⁷ Rome Statute. Article 93(1)(g).

⁵⁸ Rome Statute. Article 93(1)(b).

⁵⁹ Rome Statute. Article 93(1)(c).

⁶⁰ Rome Statute. Article 93(1)(e).

⁶¹ Rome Statute. Article 93(1)(d).

⁶² Rome Statute. Article 93(1)(f).

⁶³ Nice. (2013). Lecture in Bernard’s Inn Hall.

previous section demonstrated, the states have the obligation to fully cooperate with the Court. Yet while the Rome Statute regulates the state cooperation in detail, there are several problems that might arise (and in practice have already risen) that hinder this cooperation.

The problems stem from the fact that the states that should cooperate with the ICC are unwilling or unable to do so. According to Article 17(1) of the Statute the Court's jurisdiction is complementary, meaning that the ICC has jurisdiction to take on a case only if the state appears "unwilling or unable genuinely to carry out the investigation or prosecution," or if the state's decision to refrain from prosecution "resulted from the unwillingness or inability of the State genuinely to prosecute." Therefore, the states that are (partly) responsible for the fact that the crimes against humanity have taken place under their jurisdiction or have been unable to deter those crimes from occurring, must guarantee that the Court succeeds in prosecuting the ones responsible. This obligation in itself is somewhat conflicting from the state's point of view, taken that it needs to provide evidence, while at the "same time they want or need to obscure information that would make public the involvement of the state in the commission of crimes and mass atrocities."⁶⁴

2.2.1. Sudan as an Unwilling State

The most straightforward example that can be brought about a state that is unwilling to assist the Court is probably Sudan. Not a member of the ASP, the situation in Sudan was referred to the ICC by the UN Security Council acting under Chapter VII of the Charter.⁶⁵ The Prosecutor opened an investigation in Darfur in 2005.⁶⁶ After initial cooperation with the Court, however, it became evident that the government had "backtracked from its initial decision to cooperate with the ICC."⁶⁷ Sudan's relationship with the ICC can be summarized the following statement by the Prosecutor:

I report today that the Government of Sudan is not cooperating with the Court [...] the Government of Sudan is not complying with Resolution 1593. [...] As of today, and even to Security Council members in Khartoum, Sudanese officials

⁶⁴ Nice. (2013). Lecture in Bernard's Inn Hall.

⁶⁵ SC Res 1593 of 2005.

⁶⁶ Minogue. (2008). p 665. (2005). Cited: press Release, Int'l Criminal Court, The Prosecutor of the ICC Opens Investigation in Darfur (June 6, 2005).

⁶⁷ Minogue. (2008). p 665.

*insist that 'the ICC has no jurisdiction over Sudan' [...] Sudanese officials protect the criminals and not the victims.*⁶⁸

An example of a state that seems willing to assist the Court, but has not been able to do so, is Uganda. As it is relatively difficult to provide examples of a state's inability to find evidence, unless it has flatly refused to cooperate like Sudan, the author has examined the state's ability to find and arrest the persons against whom the Court has issued arrest warrants, since in the author's opinion getting information about a person's whereabouts is to a huge extent indicative of its ability to collect evidence in general.

2.2.2. Uganda as an Unable State

The Ugandan government referred the crimes committed by Lord's Resistance Army (LRA) to the ICC but the Prosecutor extended its jurisdiction to cover all crimes committed in the country, making it possible to indict members of the Ugandan government as well.⁶⁹ Five arrest warrants were issued for the top members of the LRA in 2005. While Uganda as a state might have reservations against assisting the Court with regards to the crimes committed by the government, it does not have restraints against complying with the Court's requests regarding the LRA affiliates and it has made significant efforts to assist the Court⁷⁰ by forming a regional security group focused on disarming the LRA, executing the ICC's requests, and facilitating a dialogue between the Ugandan government and the LRA to reach a peaceful resolution to the conflict.⁷¹ Despite Uganda's efforts, however, the subjects of the warrants have remained at large for eight years.⁷²

Despite the fact that non-complying states can be reported to the ASP or to the UN Security Council to enforce compliance, cooperation in reality is not always achieved.

⁶⁸ Minogue. (2008). p 665. Statement by Mr Luis Moreno Ocampo, Prosecutor of the International Criminal Court, Statement to the UN Security Council pursuant to UNSCR 1593 (2005), 5 June 2008, at 2 and 4.

⁶⁹ Minogue. (2008). p 659. Cited: Office of the Prosecutor, Int'l Criminal Court, Statement by the Chief Prosecutor on the Uganda Arrest Warrants 2 (Oct. 14, 2005).

⁷⁰ Minogue. (2008). p 660.

⁷¹ Minogue. (2008). p 660. Cited: Press Release, Security Council, Uganda's Foreign, Defence Ministers Brief Security Council, Call for Strong Measures to Disarm Lord's Resistance Army, U.N. Doc. SC/8695

⁷² As per ICC Website. Situations and Cases: Four of the five men remain at large; one, Mr Lukwiya, has been confirmed to be killed and thus the proceedings against him have been terminated.

The Statute does not make clear what those bodies can do to states that withhold cooperation failing to enumerate “steps these bodies can take to ensure compliance with ICC requests as per Articles 86 to 89.”⁷³ Taking into account the fact that both the Security Council and ASP are rather rigid political institutions, it can be argued that the Court has no way to effectively force an unwilling state to cooperate. It can therefore be stated that despite the mechanisms provided by the Rome Statute, forcing states to comply with ICC requests is sometimes unrealistic.

2.3. Gathering Evidence in Cooperation with Non-State Actors

It is obvious from the previous section that the cooperation of states as an alternative to an ICC police force cannot guarantee the effective functioning of the Court. The cases judged by the ICC are so complex that even if a state is willing to cooperate, it is often unable to provide adequate assistance and although the Rome Statute implies that states shall be the Court’s main partners, in reality “the cooperation of entities other than States has proved indispensable.”⁷⁴ In the DCR, for example, in addition to the Congolese government a “networks of UN officers, NGOs, embassy officials, local lawyers and judges” have been working avidly to support international trials.⁷⁵ And yet, while the Rome Statute provides an elaborate framework for the Court’s cooperation with the State Parties and to a lesser extent with states that are not parties to the Statute, the cooperation with non-state actors remains poorly regulated.

The only provision in Part 9 of the Statute providing the framework for international cooperation and judicial assistance that regulates the Court’s cooperation with non-states is Article 87(6). The Article simply states that “[t]he Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.” This concept is confirmed elsewhere in the Statute without providing additional regulations or clarity.

Article 44(4) states that in exceptional circumstances the Court may “employ the expertise of gratis personnel offered by States Parties, inter-governmental

⁷³ Kuzmanov. (2001). pp 33-34.

⁷⁴ Cryer. (2010). p 516.

⁷⁵ Baylis. (2008). p 5.

organizations or non-governmental organizations to assist with the work of any of the organs of the Court.” The Statute also confirms that the OTP in particular can request information from states, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources.⁷⁶ Article 54(3)(c) adds that s/he can seek cooperation of any state or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate⁷⁷ and Article 54(3)(d) points out that in order to facilitate cooperation with those organs the Prosecutor can enter into agreements that are not inconsistent with the Statute itself.⁷⁸

The founders of the Statute thus envisioned a future involvement for intermediaries in ICC proceedings, foreseeing that they “might be the frequent recipients of requests for information in the course of trial proceedings and investigations by the ICC prosecutor's office.”⁷⁹ Yet, according to the wording of Article 44(4), the Court should limit employing the expertise of gratis personnel to “exceptional circumstances” and the Court cannot demand that the non-state parties cooperate with it. While the ICC “shall have the authority to make requests for the State Parties to cooperate,”⁸⁰ it merely **may** ask intergovernmental organizations to do the same.⁸¹ While the states shall comply with the Court’s requests, the non-state parties may do so if they wish; they seem to have no obligation even if they possess evidence that is vital to establish the guilt or innocence of the accused.

The only way to obligate the non-state actors to cooperate seems to be viewing the Articles regulating the Court’s cooperation with them together with Article 64 of the Statute. Article 64 states that the trial chamber has the power to “require the attendance and testimony of witnesses and production of documents and other evidence by obtaining, if necessary, the assistance of States”⁸² and to “order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties.”⁸³ This implies that the State Parties having

⁷⁶ Rome Statute. Article 15(2).

⁷⁷ Rome Statute. Article 54(3)(c).

⁷⁸ Rome Statute. Article 54(3)(d).

⁷⁹ Thomas. (2006). p 447.

⁸⁰ Rome Statute. Article 87(1)(a).

⁸¹ Rome Statute. Article 87(6). Emphasis added by author.

⁸² Rome Statute. Article 64(6)(b).

⁸³ Rome Statute. Article 64(6)(d).

the obligation to comply with the Court's requests, might also be obligated to compel non-state actors to comply with those requests."⁸⁴

While this seems to create a possibility for the Court to compel the NGOs to work with the ICC, in reality it can only work if the State is willing to cooperate with Court in the first place. In addition to this, it has also been established by the jurisprudence of the international tribunals that information held by organizations providing humanitarian relief in the situation countries do not have to submit that information to the Court. The ICTY trial chamber held that the International Committee of the Red Cross had a "right under customary international law to non-disclosure of the Information."⁸⁵ "Thus, in many instances, the ICC will have to depend on the voluntary cooperation and goodwill of NGOs."⁸⁶

2. Conclusion

As the Court has no means to carry out investigations on its own, it has to rely on other parties to gather evidence. According to the Rome Statute, the most important support system the Court can rely on consists of the states that would originally have had jurisdiction over the crimes. Part 9 of the Rome Statute that regulates the Court's cooperation with entities not affiliated to it centers on the relationship between the ICC and the states.

This chapter has demonstrated that states having jurisdiction over the crimes are often unreliable partners which means that in order to gather enough evidence to prove the accused guilty beyond a reasonable doubt and the Court therefore has to find non-state actors to cooperate with. The Rome Statute acknowledges the need to cooperate with NGOs and IGOs but it does not provide a framework for this cooperation. Despite the possibility of the information and know-how possessed by those organizations being vital for an ICC case, it is practically impossible to force them to give up the information.

⁸⁴ Thomas. (2006). p 447.

⁸⁵ IT-95-14-AR108. Prosecutor v. Blaskic.

⁸⁶ Thomas. (2006). p 463.

Chapter 3. Court's Relationship with Intermediaries

The use of third party investigations and evidence by internationalized criminal courts is nothing new; it can be tracked down to both ICTY and ICTR. The ICC has merely continued and expanded this practice.⁸⁷ The aim of this chapter is to provide an overview of how the Court has so far defined intermediaries, to describe who the most common intermediaries are and to show what mechanisms the Court can rely on in order to hold them accountable.

The chapter is to a huge extent based on the Draft Policies Regulating the Relationship between the ICC and the Intermediaries (Draft Policy)⁸⁸ presently developed by the Registrar in order to unify the Court's internal policies regarding the relationship with intermediaries. The Draft Policy has not yet been accepted as binding and therefore may not represent the Court's official position on the matter.⁸⁹ It is a regulatory document aimed at eventually issuing Guidelines Governing the Relations between the Court and Intermediaries (the Guidelines) that would become part of the ICC's regulatory framework.

In first section of this chapter the author tries to make sense of the Court's somewhat ambiguous definition of the intermediaries and to define the notion for the purpose of this thesis. After that, the suitability of NGOs is discussed and the suitability of the UN as an intermediary is examined. Finally the Court's ability to hold the intermediaries responsible or exercise oversight over their actions is considered.

3.1. Defining Intermediaries

Currently neither the Rome Statute nor the RPE provide a definition of intermediaries. Although the notion is widely used by different organs and units of the Court, a binding common definition has not yet been agreed upon.⁹⁰ Thus the first task for the Court's Working Group on Intermediaries identified in the Draft Policy was to find a clear definition of the notion "intermediary" in order to show which actors will fall under the Guidelines. The Draft Policy thus defines the notion by stating that an

⁸⁷ Baylis. (2009). pp 126-127.

⁸⁸ Draft Policy. p 3. Version of 10 May 2010.

⁸⁹ Draft Policy. p 3. The author has compared the references in the NGO reports to more recent versions of the Draft and can state that the problems addressed in this thesis have not been eliminated in the more recent versions.

⁹⁰ Draft Policy. p 9.

intermediary “is someone who comes between one person and another; who facilitates contact or provides a link between one of the organs or units of the Court or Counsel on the one hand, and victims, witnesses or affected communities more broadly on the other.”⁹¹

As this definition in itself is not clear enough, the Draft Policy goes on to provide instructions on how to determine who the intermediaries are. Intermediaries could come from a wide variety of backgrounds. An intermediary may assist the Court on a one-off basis, or cooperate with it over extended time periods. It could be someone that the Court itself has contacted or asked for assistance, but does not have to be. An intermediary may act with or without a contractual relationship with the ICC. Also, an ICC intermediary usually fulfills its own daily tasks that are separate from the Court’s mission; being an intermediary is usually not a full-time mission.⁹²

The agencies that do not fall under the Court’s regulation of intermediaries are those that the Court “simply contracts,” for example to prepare a mapping of victims in a particular area.⁹³ The draft guidelines also do not consider inter-governmental organizations and national authorities whose relationship with the Court is based on co-operation agreements, such as a Memorandum of Understanding or national implementing legislation, as intermediaries.⁹⁴ For example, the authorities that agree to assist in the protection of witnesses on the basis of an agreement are therefore not considered intermediaries. Neither are the victims and witnesses whose actions can be regulated by Art 87 of the RPE considered intermediaries.⁹⁵

Among the organizations that have previously acted as intermediaries were local and international NGOs, religious institutions, local communities, local councils, foreign embassies and universities. The list of individuals who have acted as intermediaries in the past includes community or local leaders, cultural or religious leaders, human rights defenders, lawyers, journalists, volunteers, university professors, teachers and

⁹¹ Draft Policy. p 9.

⁹² Draft Policy. p 9.

⁹³ Draft Policy. p 9.

⁹⁴ Draft Policy. p 11.

⁹⁵ Draft Policy. p 11.

victims themselves. Other intermediaries included local authorities, parliamentarians, national authorities and inter-governmental organizations.⁹⁶

The determining factor in whether or not a relationship will be governed by the Guidelines is not the nature of the individual or organization, but the nature of the function that they carry out in relation to the Court.⁹⁷ In order to show what are the main functions of the intermediaries, please see the Table 1⁹⁸ on page 84.

The paragraphs explaining which entities are excluded from the intermediaries falling under the scope of the agreement seem to conflict with the list of actors that have worked as intermediaries in the past. The instruction to look at the nature of the function that an entity carries out in relation to the Court is also only partly helpful. It would seem that all agencies that perform the tasks outlined in Table 1 are intermediaries when they carry out those tasks. The author is therefore inclined to think that all actors that perform tasks outlined in Table 1 are intermediaries, excluding those that have an official cooperation agreement or implementing legislation.

This still leaves the question of how exactly the Court plans to distinguish government officials acting as intermediaries from government officials acting under implementation legislation. It also remains unclear how to distinguish intermediaries from agencies that are “simply contracted” to carry out certain tasks because the intermediaries can also be approached by the Court and they may have a contractual relationship with the Court; in fact, contracting intermediaries is to be preferred to an unregulated relationship. Finally it does not exactly state, in under which circumstances intergovernmental organizations could be considered as intermediaries. The author has highlighted those conflicts to the Public Affairs Unit of the ICC who replied that as the Guidelines are still in draft form, they “are not yet in a position to give definitive answers to [the] questions.”⁹⁹ They did add, however, that the UN will likely not be bound by the Guidelines.

⁹⁶ Draft Policy. p 10.

⁹⁷ ICC, Public Affairs Unit. (2013). Private communication with the author, on file with the author.

⁹⁸ Draft Policy. pp 4-6.

⁹⁹ ICC, Public Affairs Unit. (2013). Private communication with the author, on file with the author.

In this thesis the author considers all individuals, NGO-s and intergovernmental organizations who gather evidence under the Court's orders to be intermediaries because reliance on their services may put the guarantees to a fair trial on peril. Due to the amount of evidence previously obtained from them, the following sections take a closer look at NGOs and at intergovernmental organizations (in the example of the UN)¹⁰⁰ as intermediaries.

3.2. NGOs Intermediaries

According to the Draft Policy, NGOs seem to be the important of the Court's intermediary relationships. Their value to the Court relies on the fact that they are useful sources of information as they can relate to events and may even witness or be victims of serious human rights violations. Often they learn things that could be used as evidence in international criminal proceedings and the practice of the ICC has shown that the documents they produce are relied on as evidence.¹⁰¹ Due to their value to the communities, they are sometimes the only international presence that the parties to the conflict allow to areas where violations of human rights take place.¹⁰² Some of them collect evidence as part of their work, often long before the OTP opens an official investigation. For example, the ICC's involvement in the Central African Republic (CAR) "has been largely instigated by the local civil-society figures."¹⁰³ It has been documented that both the *Ligue Centrafricain pour la Defence des Droits de l'Homme* and the *Observatoire Centrafricain des Droits de l'Homme* started gathering evidence in 2002-2003, while the Prosecutor officially opened an investigation in CAR in 2007.¹⁰⁴

Yet there are NGOs that wish to distance themselves from the Court. The internal guidelines of the ICRC make it evident that the organization does not participate in legal proceedings.¹⁰⁵ It does not provide internal or confidential documents or testimony but it is prepared to provide documents that have already been published.¹⁰⁶ This shows that ICRC and organizations with similar goals prefer not to have strong links to the ICC, although the information they possess could be vital for establishing

¹⁰⁰ Considering the UN as an intermediary is further justified in chapter 3.3.

¹⁰¹ La Rosa. (2006). pp 169-170.

¹⁰² La Rosa. (2006). pp 169-170.

¹⁰³ Glasius. (2008). p 413.

¹⁰⁴ Glasius. (2008). p 416.

¹⁰⁵ ICRC. (2005). Internal Guidelines. pp. 393-400.

¹⁰⁶ ICRC. (2005). Internal Guidelines. pp. 393-400.

the guilt or innocence of the accused.

It was shown in chapter 2.3, that it would be practically impossible to coerce NGOs to submit the evidence against their will. Even if this were possible, the Court should refrain from coercion because the reason why some humanitarian organizations prefer to distance themselves from the ICC is often the fear of losing their appearance of neutrality that is vital for maintaining relationships that enabled them to carry out their humanitarian missions in the first place. If the groups fearing prosecution by the ICC start viewing those NGOs as “auxiliaries in the inquiry, potential informants or key witnesses for the prosecution,”¹⁰⁷ they may begin to work against those organizations, either by refusing them access to the crime scenes and, consequently, to the populations that depend on them or by attacking or threatening to attack their staff. Both the attacks on humanitarian workers in Uganda in 2005 just after the ICC issued the LRA arrest warrants¹⁰⁸ and the expulsion of ten international humanitarian organizations and dissolution of two local ones in 2009 after the ICC issued an arrest warrant for the President Omer Hassan Al-Bashir¹⁰⁹ are good examples of the reality of this danger. If these scenarios materialize, the NGOs would become both less effective in delivering humanitarian assistance and also less beneficial partners to the Court. Losing access to crime scenes and affected communities means that they will no longer have access to information that the Court needs.¹¹⁰

On the other hand, the Court should also understand the risks about cooperating with organizations eager to work with the ICC. As the Draft Policy highlights, a number of intermediaries have reoriented the nature of their work in order to assist the Court, some have even allocated resources and staff that deal exclusively with the Court-related activities.¹¹¹ Many of those NGOs are often active members of affected communities, who hope to bring an end to impunity and to contribute to justice, who “have both a personal and professional stake in the Court’s success.”¹¹² International crimes virtually always target whole peoples, so victims of such crimes are not

¹⁰⁷ La Rosa. (2006). p 170.

¹⁰⁸ Oxfam International. (2005). On-line article.

¹⁰⁹ Sudan Tribune. (2009). On-line article.

¹¹⁰ Kuzmanov. (2001). pp 10-11.

¹¹¹ Draft Guidelines. p 10.

¹¹² ICC-01/04-545. (2008). Situation in the DCR, Decision on the Applications for Participation. para 25.

randomly chosen but rather become victims because of their membership in a certain group. As the victims usually fall within a certain group, so do many of the intermediaries.

For example, the NGOs IBUKA¹¹³ and AVEGA¹¹⁴ are among the ICTR's intermediaries that regularly "prepare" witnesses before they attend Trial.¹¹⁵ Yet their understanding of justice seems to sometimes differ from the Court,¹¹⁶ IBUKA for example has played a leading role in propagating the fundamental view that anyone who believes that there was a genocide against both Tutsis and Hutus, is guilty of the crime of genocide denial, or negationism.¹¹⁷ Similarly to the intermediary NGOs to the ICTR, there are NGOs cooperating with the ICC whose aim is to support victims. Those groups are sometimes formed by former victims themselves. For example OCODEFAD¹¹⁸ in CAR was formed by Bernadette Sayo Nzale, a schoolteacher, who had herself been raped and widowed in the outbreak of violence in CAR in October 2002.¹¹⁹

It is also worth noting that different NGOs tend to operate together, forming networks. "[T]here is not just one 'intermediary' serving as a conduit between the ICC and victims, instead, it is often the case that a large organization may be working locally with multiple local groups and it involves a chain of contacts."¹²⁰ In their investigations ICC representatives come into contact with national and international humanitarian players, with representatives of third states, and with international and non-governmental organizations, all working to different ends among the same populations. Some organizations operating in the field are also actively involved in

¹¹³ As per IBUKA website: The word "ibuka" means "remember," the NGO is committed to preserving the memory of the 1994 genocide of Tutsi and it supports survivors in overcoming its continuing effects.

¹¹⁴ As per AVEGA website: Formed in 1995, Association of the Widows of Rwanda (AVEGA) is a non-profit organization that aims to bring hope to widows, orphans, parents who lost their children and the elderly and the handicapped.

¹¹⁵ Lyons. (2011). p 294.

¹¹⁶ Lyons. (2011). p 294.

¹¹⁷ Lyons. (2011). p 294. Citing: IBUKA's "Open Letter to United States Congress Regarding HR#1426", 17 June 2010, stating that Professor Peter Erlinder is a genocide denier, at www.businesswire.com.

¹¹⁸ The Organisation pour la Compassion des Familles en Détresse or OCODEFAD does not have an official website, for contact details please visit <http://www.fidh.org/-REPUBLIQUE-CENTRAFRICAINE-> (last visited 04.05.2013).

¹¹⁹ Glasius. (2008). p 417.

¹²⁰ Draft Policy. pp 9-10.

gathering evidence that could be useful to the ICC Prosecutor, making it difficult at times to draw a clear distinction between all the players concerned.¹²¹ In order for the Court to decide with which NGO to cooperate with, it is important to know what their goals are and to whom they are accountable and with whom they communicate.

3.3. UN as Intermediary

According to the Public Affairs Unit of the ICC the UN and other entities whose relationship with the Court is based on cooperation agreements (such as a memorandum of understanding) “are generally not considered to be intermediaries under the draft Guidelines.”¹²² The author has nevertheless decided to consider the UN as an intermediary for the purposes of this thesis for three reasons. Firstly, the UN missions, mandates and relationship with the ICC may differ considerably and UN as a whole should therefore not be excluded from being considered an intermediary. Secondly, the function the UN has played in aiding the OTP so far would definitely qualify it as intermediary. Thirdly and most importantly, reliance on the UN to carry out tasks during an investigation may bring about problems from the accused’s point of view.

The International Criminal Court, as an autonomous international institution, is not related to the UN but it maintains a cooperative relationship with it. Of the eight ICC situation countries five have either a UN Peacekeeping Operation (DRC, Côte d'Ivoire, Sudan, Central African Republic) or a UN Political and Peace building Mission (Libya). In addition to that, the possibility of sending UN forces to Mali is currently being considered.¹²³ Different UN missions cooperate with various state and regional partners and have differing relationships with the ICC. The UN Security Council Resolution 1856 establishing MONUC included an explicit mandate to cooperate with international efforts to bring perpetrators to justice was added in Articles 4 and 25.¹²⁴ Article 4(c) states that MONUC has the mandate to “cooperate in national and international efforts to bring to justice perpetrators of grave violations of human rights and international humanitarian law.” Unlike Resolution 1856, the UN Security Council Resolution establishing the Sudan’s Darfur mission (UNAMID)

¹²¹ La Rosa. (2006). p 170.

¹²² ICC, Public Affairs Unit. (2013). Private communication with the author, on file with the author.

¹²³ Reuters. (2013). On-line article.

¹²⁴ SC res 1856 of 22.12.2008

avoided establishing any links with the Court.¹²⁵ The former UN Secretary-General Kofi Annan has noted that the UN missions in the situation countries “already have challenging tasks to perform in their respective areas of responsibility” and they “should channel their capacities and resources primarily to address those challenges.”¹²⁶

Different authors have considered the UN to be among the most fruitful of the Court’s intermediary relationships.¹²⁷ In the *Lubanga* case for example, “the significance of UN evidence [...] is so great that some have argued the OTP has effectively outsourced a great part of the control and direction of its investigation to MONUC, the UN Mission in Congo.”¹²⁸ A trial chamber ruling making public redacted versions of a number of the documents that had been obtained under confidentiality agreements credited roughly half of those documents to MONUC.¹²⁹ Elena Baylis has noted in the context of the DRC investigations that the scale of inquiries that UN actors have been able to conduct dwarfs the ICC’s. For instance, prior to filing its charges against Lubanga, the ICC Prosecutor reported that it had conducted a one-and-a-half year inquiry, in which it conducted over 70 missions and interviewed 200 people; yet, the MONUC interviewed 150 people and travelled to 30 towns within 10 days following one specific incident.¹³⁰

In addition to the fact that the functions the UN fulfills enable to consider it an intermediary, so do the problems reliance on the UN presents. The relationship agreement between the Court and the UN does not enable to hold the organization accountable for misconduct.¹³¹ The Prosecutor is unable to oversee the way the UN carries out the fact-finding missions.¹³² The UN fact-finding missions are not tailored for establishing individual criminal responsibility.¹³³ Furthermore, the UN that provided most of the non-disclosed materials to the OTP has been called ‘unrelenting’ in its demand for confidentiality, “even refusing the Trial Chamber’s proposal to

¹²⁵ SC res 1769 of 31.07.2007.

¹²⁶ The Secretary General. (2006). Report of the Secretary-General Pursuant to Resolutions 1653.

¹²⁷ Baylis. (2009). & de Vos. (2011).

¹²⁸ Stuart. (2008). pp. 412-414.

¹²⁹ Baylis. (2008). p 142. Citing: ICC-01/04-01/06.

¹³⁰ Baylis. (2008). p 142.

¹³¹ See the end of chapter 3.4. where the Cooperation Agreement is analyzed.

¹³² See chapter 4.2. - 4.4.

¹³³ See chapter 4.3.

review the evidence in question ex parte and in camera”¹³⁴ or to at least verify “whether the confidentiality agreements were in principle justified.”¹³⁵

The argument against relying on the UN as an intermediary is the fact that it has a Relationship Agreement with the Court.¹³⁶ Differently from the NGOs that can not be coerced into cooperating with the Court, this Agreement states that the UN shall cooperate with the Court¹³⁷ and with the OTP in particular.¹³⁸ The Agreement also states that UN officials shall testify if they happen to witness a crime that the Court is investigating.¹³⁹ In the author’s opinion this does not disqualify the UN from the status of an intermediary, firstly because many NGOs may have similar agreements and even if they do not have them, they are willing to cooperate and testify. Secondly, the Relationship Agreement does not eliminate the problems reliance on the UN as a third party investigator may bring about.

3.4. Intermediaries’ Accountability to the Court

Accountability has several different meanings and uses. As the this thesis examines the use of intermediaries by the ICC, the author looks at a very specific aspect of accountability, mainly the accountability of intermediaries to the ICC through legal procedure for the intermediaries’ conduct while carrying out investigating activities for the Court. The legal procedure in this context means any legislation binding on the intermediary or a contract between the Court and the intermediary that enables the Court to oversee the intermediary’s actions and to hold it liable for misconduct.¹⁴⁰

It is unfortunate that despite the substantial role that the intermediaries play in international criminal investigations, the Rome Statute and RPE contain only minimal possibilities in controlling or monitoring their conduct. The only provisions in the Rome Statute and RPE that could be used to discipline intermediaries are the ones

¹³⁴ De Vos. (2011). p 221.

¹³⁵ Swoboda. (2008). p 469.

¹³⁶ The Negotiated Relationship Agreement between the United Nations and the International Criminal Court, 2283 UNTS 195 (signed and entered into force 4 October 2004). (**The Relationship Agreement**).

¹³⁷ Relationship Agreement. Article 17.

¹³⁸ Relationship Agreement. Article 18.

¹³⁹ Relationship Agreement. Article 18.

¹⁴⁰ This definition is compatible with the concept of accountability (mainly first and third level accountability) developed by the International Law Association at the Berlin Conference in 2004, however, its scope has been narrowed down due to the specific aspect of accountability examined by the author; see ILA. (2004). Accountability of International Organizations.

dealing with intentionally obstructing administration of justice.¹⁴¹ According to Article 70 anyone obstructing the Court's work can be held accountable if they present evidence that they know to be false or forged;¹⁴² corruptly influence a witness;¹⁴³ impede, intimidate or corruptly influence an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;¹⁴⁴ or retaliate against an official of the Court on account of duties performed by that or another official.¹⁴⁵

As the provisions discussed above enable to hold the intermediaries accountable on very limited circumstances, the author goes on to analyze other pieces of legislation that could be used to administer intermediaries. One relevant document could be the Code of Conduct for the Investigator (the Code of Conduct) that was promulgated by the Registrar on the basis of Article 17(2)(a)(v) of the RPE in 2008 and declassified for in November 2012. It contains important obligations on the investigators that, if binding and enforceable, would enable to minimize the risks to the defendant's rights to a fair trial. According to Section 2.2, the Code of Conduct applies to investigators of the Court, the Defense as well as to the investigators of all intergovernmental and non-governmental organizations that are acting at the request of the Court while they are carrying out their official functions.

If binding, the Code would ensure, in Section 4.6, that an obviously biased intermediary is excluded from carrying out tasks for the Court by stating that an investigator shall not engage in any other employment or occupation that compromises or appears to compromise the integrity of his or her investigation. Section 4.2 would obligate the intermediary to comply with the Rome Statute and the RPE while carrying out an investigation. The Code would also compel the intermediaries to behave in a professional manner,¹⁴⁶ to keep the evidence secure,¹⁴⁷ prohibit them from harassing witnesses and taking bribes.¹⁴⁸ Section 8.4 would

¹⁴¹ Rome Statute. Article 171.

¹⁴² Rome Statute. Article 171(1)(b).

¹⁴³ Rome Statute. Article 70(1)(c).

¹⁴⁴ Rome Statute. Article 70(1)(d).

¹⁴⁵ Rome Statute. Article 70(1)(e).

¹⁴⁶ Code of Conduct. Section 4.1.

¹⁴⁷ Code of Conduct. Section 5.1.

¹⁴⁸ Code of Conduct. Section 4.5.

obligate them to pay particular attention to the integrity of evidence whether collected in written, oral or any other form. Section 8.5 would prohibit deceiving or knowingly misleading the Court.

Although the Code is written as if it were binding on all investigators acting under instructions of the Court, the illusion that the is could be used to discipline intermediaries is refuted already in Section 2.3, which states that the Organ which appoints an IGO or NGO shall ensure that this Code of conduct and any amendments thereto “are brought to the attention of the investigators.” This provision makes it clear that while the Code contains important provisions not found on the RPE, it is really only binding on the organs and units of the Court themselves. This is further shown by Section 10 that regulates breaches or attempted breaches of the Code providing appropriate disciplinary measures to be taken according to the Court’s staff regulations. In case the Code is breached by a representative of an intergovernmental or non-governmental organization, Section 10.2 states that “the Organ which appointed such organization shall request the organization to take appropriate disciplinary measures or penal action, if necessary, against the concerned representative.” This shows that the intermediary is not accountable to the Court and the Court has no way to ensure that the intermediaries comply with the regulations. The obligations and prohibitions that the Registrar has found necessary to bind investigators with, are not binding on the intermediaries that collect a critical amount of the evidence.

Having established that the intermediaries are not bound by the Court’s legislation, the Relationship Agreement between the Court and the UN is now examined to see whether contractual relationships provide the necessary accountability to the Court.¹⁴⁹ Article 3 of the Relationship Agreement states that the UN and ICC “shall cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest pursuant to the provisions of the present Agreement and in conformity with the respective provisions of the Charter and the Statute.” Article 5 of the Relationship Agreement regulates the exchange of information stating that “concerning the submission of documents and information concerning particular cases

¹⁴⁹ It is the one relationship agreement that is available to the public and also relevant for this thesis.

before the Court, the United Nations and the Court shall, to the fullest extent possible and practicable, arrange for the exchange of information and documents of mutual interest.” However, this relates mostly avoiding undesirable duplication in the collection, analysis, publication and dissemination of information relating to matters of mutual interest between the Secretary General and the Registrar of the Court. They shall strive, where appropriate, to combine their efforts to secure the greatest possible usefulness and utilization of such information. The ICC can therefore not hold accountable even those intermediaries that are in contractual relationships with the Court.

3. Conclusion

To conclude it must be pointed out that the definition of an “intermediary” as accepted by the Court is far from being clear. Judging from the information available in the Draft Policy as well as the Public Relations Unit’s communication with the author, the ICC has still not reached a final decision on which entities’ actions shall eventually be governed by the Guidelines and which shall not. In this thesis all individuals, NGO-s and intergovernmental organizations that carry out tasks for the Court during the investigation phase are considered as intermediaries.

There is a wide variety of intermediaries that have various aims in their daily work as well as different expectations from the Court. While some prefer to distance themselves from the Court and the others are happy to take on additional tasks to assist the ICC, there are good reasons to be cautious in cooperating with both. Often different intermediaries cooperate among each other. In Congo MONUC, NGOs, local attorneys and government officials, and the aid branches of foreign embassies together played a variety of roles in promoting post-conflict justice, frequently engaging in joint action: “embassies finance projects that are then carried out by international and national NGOs, which often manage the projects through local partners.”¹⁵⁰

Considering the amount of work the intermediaries carry out under the Court’s orders it is surprising that the Court currently has no means to hold them accountable for

¹⁵⁰ Baylis. (2008). p 59.

their actions. The regulations that are binding on the Court's own investigators and enable to hold them responsible for misconduct are not applicable to intermediaries.

Part II. Problems Arising from the Court's Reliance on Intermediaries

Chapter 4. OTP and Intermediaries

In order to be effective the Court, just like any other criminal court, must be able to investigate and prosecute the accused.¹⁵¹ The OTP, one of the four organs of the Court, whose actions are mainly governed by the Rome Statute and the RPE, is tasked with conducting the investigation and prosecution. The aim of this chapter is to show how the OTP's practice of outsourcing its investigations to intermediaries weakens its control over the fact-finding process, thus bringing about problems that have an effect on the accused's right to a fair trial.

The chapter firstly provides an overview of the OTP's relationship with intermediaries as regulated by the Rome Statute and the RPE, then turn to the jurisprudence of the ICC in order to show how the cooperation has worked in practice. After that the chapter will go on to show the typical problems that stem from the OTP's reliance on intermediaries to gather evidence. Those problems are, firstly, a large amount of evidence that is not suitable for establishing individual criminal responsibility, and secondly, witness manipulation leading to perjury that sometimes occurs as a result of the intermediaries' contact with them.

4.1. OTP as the Head of an Impartial Investigation

To fulfill its important mission to prosecute individuals regardless of their rank or official capacity for committing the most egregious of crimes "the ICC must gather and analyze pertinent, credible and reliable information that can be corroborated and adduced as evidence in court for the purposes of criminal prosecution."¹⁵² To gather this evidence, the Rome Statute gives the Prosecutor an 'exclusive control over the investigation.'¹⁵³ The OTP can initiate investigations *proprio motu*,¹⁵⁴ steer their course, as well as end them once it deems necessary.¹⁵⁵ The Prosecutor is also responsible for taking appropriate measures to ensure the effectiveness of the investigation.¹⁵⁶ S/he may (but it does not have to) collect and examine evidence.¹⁵⁷

¹⁵¹ Minogue. (2008). p 640.

¹⁵² Sunga. (2011). p 187.

¹⁵³ Röben. (2003). p 522.

¹⁵⁴ Rome Statute. Articles 15 and 53(1).

¹⁵⁵ Rome Statute. Articles 15(3) and 52(2).

¹⁵⁶ Rome Statute. Article 54(1)(b).

Instead of doing it directly the Prosecutor may “seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources.”¹⁵⁸ To facilitate the cooperation and ensure that the investigation is effective it can enter into agreements that are not inconsistent with the Statute¹⁵⁹ and take necessary measures to ensure the confidentiality of information.¹⁶⁰

While the Statute provides the Prosecutor with the power to lead the investigation, it also makes it responsible for guaranteeing that it is impartial, conducted in accordance with the Statute and guarantees the “full rights of persons arising under this Statute,”¹⁶¹ thus also the accused. The Rome Statute obliges the Prosecutor not only to investigate accusatory evidence but also to establish the truth by extending the investigation to cover all relevant facts and evidence, to investigate incriminating and exonerating circumstances equally.¹⁶² The Statute therefore gives the Prosecutor “the role of an independent and impartial organ responsible for seeing to it that the interests of justice and the rule of law prevail.”¹⁶³ The Prosecutor has to make sure that when it outsources its vast capacities as an investigator, the Rome Statute obligates him to guarantee that the intermediaries to whom the information is outsourced, keep the same level of impartiality. While the OTP has the right to outsource its investigative powers, it must still remain in control over the course of the fact-finding to ensure that it conducted in the interests of the truth. The OTP must balance between choosing the most effective means to conduct an investigation and ensuring that the investigation is conducted fairly without severely impairing the rights of the accused.

The conflict between overseeing that the investigation is conducted with due respect to the rights of the all persons arising under the Statute and outsourcing the fact-finding capabilities to intermediaries is worrisome. Chapter 3.4 demonstrated that the Organ or Unit of the Court that relies on the merits of the intermediaries cannot

¹⁵⁷ Rome Statute, Article 54(3)(a).

¹⁵⁸ Rome Statute, Article 15(2).

¹⁵⁹ Rome Statute, Article 54(3)(d).

¹⁶⁰ Rome Statute, Article 54(3)(f).

¹⁶¹ Rome Statute, Article 54(1)(c).

¹⁶² Rome Statute, Article 54(1).

¹⁶³ Röben. (2003). p 522.

obligate the intermediary to comply with the Court's legislative framework, nor is it able to hold an intermediary accountable for misconduct. The conflict becomes ever clearer when reviewing the provisions regulating the OTP's obligation to disclose mitigating evidence. Once the OTP discovers that the evidence in its possession (regardless of whether it is obtained from intermediaries or collected by the Court) mitigates or might mitigate the guilt of the accused, it must disclose this evidence to the Defense "as soon as practicable."¹⁶⁴ On the other hand, the OTP shall not be obligated to disclose evidence obtained from intermediaries and aimed solely for generating new evidence, unless the provider of the information consents to its disclosure.¹⁶⁵ The regulatory framework does not provide guidelines for situations where the Prosecutor finds out that the lead evidence obtained from intermediaries mitigates or might mitigate the guilt of the accused.

The same conflicting concept is reinforced the Relationship Agreement between the ICC and the UN, demonstrating that a contract between the ICC and the intermediary does not prevent this problem from occurring. The Relationship Agreement stipulates that UN can provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence.¹⁶⁶ It goes on to state that such documents or information shall not be disclosed to other organs of the court or to third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.¹⁶⁷ The intention of the provision is to obligate the Prosecutor itself to come up with evidence that establishes the guilt or innocence of the accused that is to be submitted to the Chambers; the material gathered from the intermediaries can only be used to lead the OTP to the evidence it will later rely on. Yet the conflict described above remains; the OTP still has an obligation arising from the statute to conduct the investigation, to oversee that the rights of the accused are protected and to disclose mitigating evidence regardless of whether it is lead evidence obtained from an intermediary.

¹⁶⁴ Rome Statute. Article 67(2).

¹⁶⁵ Rome Statute. Article 54(3)(e).

¹⁶⁶ The Relationship Agreement. Article 18(3).

¹⁶⁷ The Relationship Agreement. Article 18(3).

4.2. OTP's Control Over Intermediaries During an Investigation

The last section demonstrated that the Prosecutor has exclusive control over the investigation and the responsibility to guarantee its effectiveness and fairness. Yet the practice of gathering evidence as made evident by the ICC case law shows a significantly different picture of how the Prosecutor carries out its duties as an investigator.

In the *Lubanga* case the Prosecutor, instead of using evidence gathered from intermediaries as leads to find evidence in line with Article 54(3) of the Rome Statute, based his case to a huge extent directly on evidence coming from intermediaries. Fifty-five percent of the evidence presented at trial was collected from intermediaries under confidentiality agreements as per Article 54(3)(e).¹⁶⁸ “Quite possibly additional information was gathered from third parties not under confidentiality agreements.”¹⁶⁹

The problems in the investigation phase are not limited to the cases related to situation in Congo DR. In the situation in Sudan the Government, in violation of its obligations under the Rome Statute discussed in Article 2.1, has refused to assist the Court.¹⁷⁰ The OTP has abstained from conducting its own investigation in the area for reasons of security.¹⁷¹ Most of the work has thus been done outside the country, limiting the investigation in Sudan to interviews with government officials in Khartoum.¹⁷² According to Luis Moreno-Ocampo, the lead prosecutor, the OTP can carry out a successful investigation from outside Sudan.¹⁷³

What Moreno-Ocampo leaves unsaid, is that while he investigates from outside, he relies excessively on evidence collected by intermediaries inside Sudan. Otherwise it would simply be impossible to gather evidence to effectively prosecute. A 2006 OTP report indicated that it had conducted 70 formal witness interviews in other countries, in addition to screening numerous additional witnesses and documents and consulting

¹⁶⁸ ICC-01/04-01/06. (2007). Decision on Disclosure. para 6.

¹⁶⁹ Baylis. (2009). p 130.

¹⁷⁰ See chapter 2.2.1.

¹⁷¹ Prosecutor's Response to Cassese's Observation. Sept. 11, 2006. para 19.

¹⁷² Baylis. (2009). p 132.

¹⁷³ Flint & de Waal. (2009). On-line article. Cited: 'Prosecutor's Response to Arbour's 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, October 19. 2006.

with experts.¹⁷⁴ For information from witnesses within Darfur and from the crime scenes there, the OTP is thus entirely reliant on reports from the UN and other third parties. In particular, the UN Commission of Inquiry provided the OTP with “more than 2,500 items, including documentation, video footage and interview transcripts,” as well as “a sealed envelope from the UN Secretary General containing the conclusions reached by the Commission as to persons potentially bearing criminal responsibility for the crimes in Darfur.”¹⁷⁵

Moreover, the Prosecutor’s later statements show that he never intended to start collecting evidence independently. During the trial hearing the Prosecutor admits that neither he nor the UN intended the obtained information to be solely lead evidence. According to him: “[t]he point was to obtain these materials as quickly as possible (...) and then to allow the Office of the Prosecutor to identify the materials it wishes to use as evidence and then seek permission (to lift confidentiality).”¹⁷⁶

The Prosecutor’s investigation technique in Sudan has attracted the attention of the authorities on international criminal law. His methods were most notably criticized in July 2006 by Antonio Cassese, the first president of the ICTY, and Louise Arbour, the UN High Commissioner for Human Rights, who were invited to conduct a peer review of the Court. Among other things Cassese criticized the OTPs “failure to undertake even targeted and brief interviews” in Darfur¹⁷⁷ and Arbour claimed that it is possible to conduct “serious investigations of human rights violations during an armed conflict in general, and in Darfur in particular, without putting victims at unreasonable risk.”¹⁷⁸ The disagreements about the right way to collect evidence were also present inside the OTP itself and were among the reasons why many prominent OTP lawyers and investigators left their posts.¹⁷⁹

¹⁷⁴ ICC OTP. (2006). Report on the Activities Performed During the First Three Years. paras 41-42.

¹⁷⁵ ICC OTP. (2006). Report on the Activities Performed During the First Three Years. para 39.

¹⁷⁶ Lubanga. Transcript of hearing on 6 May 2008. pp 22-23.

¹⁷⁷ Flint & de Waal. (2009). On-line article. Citing: Antonio Cassese, ‘Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending Before the ICC,’ ICC-2/05, August 25, 2006.

¹⁷⁸ Flint & de Waal. (2009). On-line article. Citing: Louise Arbour, ‘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, October 10, 2006.

¹⁷⁹ Flint & de Waal. (2009). On-line article. Stating: “Those who left included Silvia Frenandez de Gurmendi, the first cabinet chief of the OTP; senior legal adviser Morten Bergsmo; legal adviser

It is obvious that in the past the OTP has repeatedly taken used intermediaries in order to collect vast amounts of evidence. It can be argued that both in the *Lubanga* case and in the cases related to the situation in Sudan, the OTP maintained its control over the investigation.

4.3. Suitability of Intermediaries Work for Court's Fact Finding

Once the suspects the proceedings against the suspected perpetrators of the most serious crimes have been successfully commenced, the problems stemming from the OTP's reliance on the intermediaries start to arise. Although several of the intermediaries are "keenly interested in providing evidence to aid prosecutions,"¹⁸⁰ the materials they provide have not been constructed to prove individual criminal responsibility and may not be suitable for the purpose of convicting. The evidence is random from the OPT's point of view; it is not tailored for the Court and not necessarily aimed at establishing the individual criminal responsibility of those alleged of committing the most serious crimes as observed by an objective bystander but, at best, establishing the guilt of those that they have come across when dealing with their work.¹⁸¹

Fact-finding activities are normally part of the intermediaries' daily work that is carried out in order to advance their aims, often taking place in order to compile reports that attract the attention of the international community and thus put pressure on the governments to comply with their human rights obligations. The reports usually focus on "human rights situation as a whole," and deal with the responsibilities of the states, "[r]eferences to individual cases more often are used to illustrate patterns and trends in violations rather than to follow up on individual cases themselves."¹⁸² Sometimes fact-finding commences long before the OTP opens an official investigation.¹⁸³ Whereas the fact-finding missions of the intermediaries rely primarily on information in the public domain, criminal prosecutions must obtain

Gilbert Bitti; DRC team leader Bernard Lavigne; Uganda team leader Martin Witteveen; Andrew Cayley; chief analyst Paul Seils; and Deputy Prosecutor Serge Brammertz, now Prosecutor of the Yugoslavia tribunal."

¹⁸⁰ Kuzmanov. (2001). p 30.

¹⁸¹ See chapter 3.2. for more information.

¹⁸² Sunga. (2011). p 189.

¹⁸³ See for ex: Glasius. (2008). p 416. Citing Situation in CAR. The example is further elaborated on in chapter 3.2.

specific evidence confidentially to avoid tampering, interference or other tainting of potential evidence, and to ensure an unbroken chain of custody from collection to analysis to court.¹⁸⁴

Moreover, Professor Sunga points out that human rights fact-finding reports that intermediaries compile as part of their work and international-prosecution related fact-finding reports differ as regards to their respective burdens of proof, and in relation to special procedural requirements in criminal trials.¹⁸⁵ The Rome Statute requires that the criminal guilt of the accused has to be proven 'beyond a reasonable doubt' in line with all applicable international fair trial standards. The prosecution has to establish that the accused committed the *actus reus* specific to the particular act that qualifies as a crime within the tribunal or court's competence and that he or she possessed the requisite *mens rea* at the time he or she committed the criminal act. In a non-criminal case on state responsibility, however, it suffices to have "proof at a high level of certainty appropriate to the seriousness of the allegation,"¹⁸⁶ or even simply "a more liberal recourse to inferences of fact and circumstantial evidence."¹⁸⁷

According to the Draft Policy on Intermediaries the ICC admits that there are problems with reliance on the evidence submitted by the intermediaries.¹⁸⁸ It acknowledges that the intermediaries "are not necessarily familiar with the development of the judicial proceedings before the Court" and they are not trained in the legal matters. Moreover, the Draft Policy states that the "intermediaries are normally affiliated with particular interest groups."¹⁸⁹ The intermediaries that are willing to provide their reports to the Court also often understand that their reports should not be relied on as evidence, for example the Amnesty International sees that its role is to simply assist the prosecution, convicting itself is the Prosecutor's job.¹⁹⁰ Yet the Human Rights Watch, *Medicins sans Frontières*, Amnesty International, Physicians for Human Rights, Kosovo Humanitarian Law Documentation Project, and

¹⁸⁴ Sunga. (2011). p 190.

¹⁸⁵ Sunga. (2011). p 189.

¹⁸⁶ Sunga. (2011). p 189.

¹⁸⁷ The Corfu Channel Case, para 18.

¹⁸⁸ Draft Policy. p 19.

¹⁸⁹ Draft Project. p 19.

¹⁹⁰ Kuzmanov. (2001). p 30.

No Peace Without Justice¹⁹¹ are among the intermediaries whose reports are known to have been admitted directly into evidence in the cases in the Special Court for Sierra Leone, ICTY and ICTR, the practice continues in the ICC.¹⁹² As the intermediaries' names are usually redacted in the judgments,¹⁹³ it is difficult to say, who else has submitted evidence to the Court.

Despite the fact that materials compiled by intermediaries provide valuable information for the Court, those materials do not have the same value as the evidence collected by the Prosecutor who is targeting the investigation to the facts of the criminal case at hand and is bound by the Court's Code of Conduct for the Investigator. Intermediaries' fact-finding "is usually more general and less rigorous than fact-finding required for criminal prosecutions."¹⁹⁴

4.4. The Role of Intermediaries in Witness Preparation

"Because written evidence is likely to be elusive,"¹⁹⁵ the success of the ICC trials depends largely on the OTPs ability to find witnesses to testify. In the previous chapters the author has demonstrated that the OTP faces difficulties in finding witnesses willing to testify on its own and frequently outsources this task to intermediaries. The number of witnesses brought forward by the intermediaries varies depending on the criminal court or tribunal as well as the case, but as bringing forward witnesses and helping them fill out witness forms is one of the key tasks of the intermediaries, it can be assumed that the less involved the OTP is in the investigation, the more witnesses are presented by the NGO intermediaries. As it has been established that a "great deal of false testimony is being presented during international criminal proceedings,"¹⁹⁶ the author examines the relationship between the false testimonies and the involvement of intermediaries.

The review of the trial transcripts makes it difficult to ascertain how many witnesses were either initially identified by third-party investigations or are otherwise connected to third parties. Nevertheless, it is regularly alleged in the ICTR that intermediaries

¹⁹¹ Baylis. (2009). p 128.

¹⁹² See chapter 6.1.3.

¹⁹³ See, for example Decision on the Intermediaries, Lubanga.

¹⁹⁴ Sunga. (2011). p 190.

¹⁹⁵ Glasius. (2008). p 422

¹⁹⁶ Combs. (2010). p 149.

prepare their members to testify for the Prosecution. As an undefined yet significant number of witnesses are brought forward by intermediaries, it is not surprising that the Defense Counsels claim that the problem of testimonial deficiencies often stems from the intermediaries.¹⁹⁷ According to Ms. Lyons, a Defense Counsel in the ICTR here appears to be hardly a Prosecution witness “who has not been ‘prepared’ to present particular evidence.”¹⁹⁸ She goes on to claim that the “witness preparation is as much focused on style and attitude as it is on the content of testimony,”¹⁹⁹ observing that during a cross-examination the Prosecution witness’s testimony can flip-flop 180 degrees, that they “routinely and aggressively refuse to answer questions,” and demand that Defense counsel start answering their own questions.²⁰⁰

The fact that intermediaries involvement with the witnesses increases the likelihood of testimonial discrepancies is not something that only the Defense Counsels imagine can be seen at the *Lubanga* case, where the Trial Chamber held that there was evidence that two intermediaries “may have misused their positions in varying ways [and that] they have persuaded or invited witnesses to give false testimony to the Court.”²⁰¹ In addition to that according the single judge found that “there is evidence that this behavior may have extended beyond those two intermediaries.”²⁰² The judge also established that the intermediaries knew each other and collaborated and since extensive allegations were made against the two key intermediaries, there is a real risk that the alleged about other intermediaries, if their roles were fully investigated and researched.²⁰³ The judge stressed that the precise role of the intermediaries had become “an issue of major importance”²⁰⁴ at the trial and contrary to the Prosecution’s response, the defense submissions were “not dependent on speculative assertions: they are, to an important extent, clearly evidence based.”²⁰⁵

The Decision on Intermediaries also makes it obvious that the Defense believes that the OTP is cooperating with the intermediaries who provide false testimonies “were

¹⁹⁷ Lyons. (2011). p 294.

¹⁹⁸ Lyons. (2011). p 289.

¹⁹⁹ Lyons. (2011). p 289.

²⁰⁰ Lyons. (2011). p 289.

²⁰¹ ICC-01/04-01/06. (2007). Decision on Intermediaries. para 139(b).

²⁰² ICC-01/04-01/06. (2007). Decision on Intermediaries. para 140.

²⁰³ ICC-01/04-01/06. (2007). Decision on Intermediaries. para 140.

²⁰⁴ ICC-01/04-01/06. (2007). Decision on Intermediaries. para 135.

²⁰⁵ ICC-01/04-01/06. (2007). Decision on Intermediaries. para 135.

fabricated with the assistance of intermediaries who collaborated with the Office of the Prosecutor.”²⁰⁶ The connection of the OTP to the witness manipulation schemes can be illustrated by the following example, involving the OTP itself, “Witness 298” who was the OTPs first witness and “Intermediary 321” who seems to be an NGO helping troubled children:²⁰⁷

In the morning of 28 January 2009 Witness 298 testified about being abducted by armed UPC soldiers and taken to their military training camp. After lunch break, however, Witness 298 claimed that his earlier testimony was causing him problems, because what he had said that morning did not come from him but “from someone else.” In return for clothing and other things, the witness and his friends were given fake addresses and fake IDs, together with a story that had was “taught [to the witness] over three and a half years.”²⁰⁸ At this point OTP requested a break and invited the witness back to testify in two weeks, at which point the witness provided elaborate testimony about training camps and claimed he had not lied after all.

Despite the witnesses claims that it had not lied, the Trial Chamber I decided in its 31 May 2010 Judgment on Intermediaries that there was grounds to believe that witness manipulation had taken place. In the final judgment it claimed that “on the basis of the matters set out above the significant possibility has been established that P-0321 improperly influenced the testimony of a number of the witnesses called by the prosecution. Additionally, real doubt has been cast over the propriety of the way in which children were selected for introduction to the prosecution.”²⁰⁹

In order to counter the abuse of process allegations, the prosecution argued that the focus in this case should not be on whether intermediaries approached some children and proposed that they lie but instead on “whether this was known, or should have been known, within the OTP.”²¹⁰ This claim by the OTP demonstrates that the OTP, if

²⁰⁶ ICC-01/04-01/06. (2007). Decision on Intermediaries. para 25.

²⁰⁷ This example is summarized from the ICC-01/04-01/06. (2007). Decision on Intermediaries.

²⁰⁸ ICC-01/04-01/06. (2007). Decision on Intermediaries. para 7.

²⁰⁹ ICC-01/04-01/06. (2007). Decision on Intermediaries. para 450.

²¹⁰ ICC-01/04-01/06. (2007). Decision on Intermediaries. para 50.

it did not cooperate with the intermediaries, was clearly not in control of the investigation. This example shows that while the OTP may not know that some of its intermediaries conduct elaborate schemes of falsifying evidence, it does not exercise a level of concern appropriate to choosing intermediaries, nor does it raise necessary questions about the witnesses' integrity. The OTP chooses to rely on the evidence intermediaries that are willing to assist and if problems arise, it insists on the credibility of the evidence obtained from the intermediaries, even after the Trial Chamber has pointed out its obvious faults. This is a material breach of the Prosecutor's obligation arising from the Rome Statute to conduct an investigation "in the interest of the truth that has a direct effect on the defendant's rights to a fair trial. In addition to that, the example shows that not only does the OTP lack procedural and practical means to scrutinize the evidence provided by the intermediaries, it also lacks the wish to do so.

4. Conclusion

"The first testing field for any authority internationally established to bring justice for crimes of international concern is the ability to collect sufficient and reliable evidence to successfully prosecute."²¹¹ The Rome Statute tasks the Prosecutor with ensuring that the prosecution is successful and fair. At the same time it allows the Prosecutor to outsource its investigative powers to the intermediaries. While the Court's regulatory framework does not make it clear to which extent the OTP can rely on the intermediaries, the extensive outsourcing of fact-finding missions can pose several challenges to an individual's right to a fair trial.

Using information collected by the intermediaries as an alternative to the OTP's own in situ investigation becomes a problem because those materials are not tailored to establish individual criminal liability of the accused. If materials collected by the intermediaries make up the majority of all the evidence submitted, the pressure on the Trial Chambers increases considerably making it difficult for them to uphold the fair trial guarantees.²¹² The danger of not maintaining control over intermediaries who bring forward and take care of the witnesses is even more acute, considering the ease with which the intermediaries can manipulate the witnesses into giving false testimony.

²¹¹ Bellelli. (2010). p 124.

²¹² See chapter 6.2.

When reading out Lubanga's guilty verdict in the 14 March 2012, the judges pointed out that "the prosecution should not have delegated its investigative responsibilities to the intermediaries" and warned against witness manipulation.²¹³ As the prosecutor did not have control over how the evidence was gathered, it was unable to effectively prosecute causing suspensions in the proceedings and creating an undue delay.

To ensure that the trial is fair, the Court's own investigators must conduct, or at least participate in, the investigation in order to secure the collection of evidence that can later be used in the proceedings. The Rome Statute therefore grants the OTP the exclusive power to conduct an investigation choosing the means it deems most effective.

²¹³ ICC-01/04-01/06. (2012). Judgment, Prosecutor v. Lubanga. para 482.

Chapter 5. Defense's Access to Information Provided by Intermediaries

Unlike the OTP, the Office of Public Counsel for Defense is not an organ of the Court, but a "semi-autonomous office" having the same official relationship with the Court as the Office of the Public Counsel for Victims.²¹⁴ According to the ICC website, these Offices fall under the Registry for administrative purposes but otherwise function wholly independently.

The aim of this chapter is to illustrate how the reliance on intermediaries by the OTP, that has been granted exclusive control over the Court's investigations, affects the work of the Defense. As the Defense's ability to effectively represent the accused bears direct influences the accused's fair trial rights, this chapter is crucial to understanding how this reliance on intermediaries influences the rights of the accused.

The chapter will firstly show how the practice of relying on intermediaries coupled with the institutional weaknesses in the Defense's ability to carry out its own investigations puts the accused at a disadvantage at the investigation phase. After that, the chapter focuses on the shortcomings in the OTP's obligation to disclose evidence, especially exculpatory evidence, to the Defense. Lastly, the *Lubanga* case is used to illustrate how the conflicts in the Courts disclosure regime that stem from the Rome Statute and the RPE have affected the accused in the jurisprudence of the ICC.

5.1. The Defense's Ability to Conduct an Investigation

In its independent capacity the Defense is always free to conduct its own investigation, however, it faces severe difficulties in doing it. Firstly, its private investigations are made difficult by the lack of resources allocated to it. "Although the ICC's legal aid scheme does foresee some funds for independent investigation by the Defense, they are rather limited, especially when compared to those of the Prosecutor."²¹⁵ In addition to that, its powers as granted by the Rome Statute and the RPE with regard to conducting an investigation are not comparable to the OTP's.

Part 5 of the Rome Statute, which provides the OTP's powers during the investigation fails to even mention the Defense, let alone grant it any explicit rights with respect to the investigation. While the Prosecutor has the ability to seek cooperation (either from

²¹⁴ ICC website. (2013). Structure of the Court.

²¹⁵ De Smet. (2009). p 425.

the states or intermediaries) independently, including the power to authorize provisional arrests and seizures of evidence in urgent cases, the Defense is directed to request the PTC to issue the relevant order or seek cooperation on its behalf.²¹⁶ To complicate this further, the RPE Rule 116(2) provides that the PTC can proceed with assisting the Defense and issue any orders for the collection of evidence by the Defense, but is encouraged to seek the views of the Prosecutor. In addition to that, the Statute does not give the power to PTC to instruct the Prosecutor to carry out investigations for the benefit of the Defense. If the Prosecutor refuses to take specific investigatory steps, the PTC may have to authorize the Defense itself to investigate.²¹⁷ “It seems fair to say that the system of pre-trial fact-finding has not yet found a proper place for defense investigations.”²¹⁸

Examining these deficiencies in light of the knowledge that basically every ICC investigation is outsourced to some extent makes the situation even more dire for the Defense. Since even the Prosecutor does not automatically have the right to investigate on the territory of a State Party and is heavily dependent on third party assistance, it is hard to see how the Defense manages to cooperate, in the absence of any specific or implicit provision to that effect.

Another issue that deserves attention at this point is perjury discussed in more detail chapter 5.5. The Trial Chamber at *Lubanga* established, that OTP has repeatedly outsourced its investigations to intermediaries with questionable interests that coach witnesses to give false testimonies. If the OTP relies on intermediaries because of its limited resources and lack of abilities to find evidence, it is clear that the Defense whose budget is only a fraction of that of the OTP, to whom the Statute does not provide explicit powers to carry out investigations and with whom the intermediaries cooperating with the OTP hardly wish to communicate, faces extreme difficulties to uncover any plot to manipulate witnesses. The Defense’s limited means to cooperate do not only make it hard to find exculpatory evidence, but also to investigate perjury.

²¹⁶ Rome Statute, Article 57(3)(b) & RPE, Rule 116.

²¹⁷ De Smet. (2009). p 425.

²¹⁸ De Smet. (2009). p 426.

5.2. Disclosure of Evidence to the Defense

Since the accused is at a disadvantage during the investigation phase, the Defense is reliant on the evidence collected by the OTP that has an obligation to disclose the materials necessary for the Defense to prepare its case.²¹⁹ If the OTP has relied heavily on intermediaries, the disclosure phase may prove problematic for the Defense because of the confidentiality agreements the Prosecutor signed with the intermediaries in order to obtain evidence.

The legal basis of the provisions governing disclosure is set forth in Articles 54(3), particularly (e) and (f), 64(3), particularly (c), 67, 68 of the Rome Statute, and Chapter 4, Section II of RPE. In addition to the Prosecutor's obligation to disclose evidence as discussed in chapter 4.1, the Defense's rights to obtain information are further clarified in the RPE. Rule 77 provides that the Defense is allowed to inspect items in the Prosecution's possession, if it has not been obtained on the basis of confidentiality.

As per Rules 76(1) and (2) of the RPE, the Defense must have access to the names of the witnesses that the Prosecutor intends to call to testify, as well as to copies of any previous statements made by those witnesses. In addition, the OTP must permit the Defense to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor which are material to the preparation of the Defense or that the Prosecutor intends to use as evidence at the confirmation hearing or at trial, or which were obtained from or belonged to the person who is the subject to the investigation or prosecution.²²⁰

Despite the fact that the Defense needs the Prosecutor to disclose evidence in order to build its case, the OTP cannot provide the necessary documents if it has obtained the information from the intermediaries do not consent to disclosing materials. The conflict between the provisions regulating disclosure frequently caused problems in *ad hoc* tribunals and continues to do so in the ICC. Beth Lyons, an ICTR Defense Counsel claims not to know “of any ICTR case where Rule 68²²¹ disclosure is not an

²¹⁹ See chapter 4.1.

²²⁰ RPE. Rule 77.

²²¹ RPE in ICTR. Rule 68.

issue that the defense has had to (or should have had to) litigate,²²² and as illustrated by the *Lubanga* case, it has become equally problematic in the ICC jurisprudence.

5.3. Problems with Disclosure in the *Lubanga* case

As the OTP relied heavily on intermediaries when gathering evidence for prosecuting Lubanga, it comes as no surprise that it was unable to obtain the necessary agreements with the intermediaries to lift the confidentiality agreements and disclose the information as evidence to the Defense. The confidentiality agreements turned out to be so restrictive that at first the Prosecution could not even furnish the PTC, let alone the Defense “with descriptions of the undisclosed potentially exculpatory material, together with explanations as to why each document was not in the prosecution’s view exculpatory.”²²³ In total the Prosecution was unable to disclose 207 documents from its collection of 27,500.²²⁴

As the PTC started demanding disclosure, the Prosecutor began to convince the judges that its investigation technique and the arising problems were inevitable in difficult circumstances and that the Court should therefore accept them. The Prosecutor submitted to the Court that it “has to accept” that the mandate of the information-providers does not permit to disclose the evidence.²²⁵ It also claimed that if the Court would not accept the “realities on the ground,” the intermediaries would not provide evidence at all and insisted that “there was no other option available” to effectively prosecute.²²⁶ The fact that the OTP had outsourced its power to conduct the investigation therefore meant that it also had lost the control over it and was unable to comply with the requests of the judges.

After months of waiting for the OTP to turn over the materials, the Chamber decided that the OTP had to turn disclose “only because the Prosecution had abused Article 54(3)(e) by obtaining a substantial number of documents under the provision (rather than using the Article on an exceptional basis), and by obtaining information that it fully intended might be used at trial rather than using the provision only to obtain lead

²²² Lyons. (2011). p 299. Citing: Defence motions and ICTR decisions in the Nzirorera case, where Lead Defence Counsel Peter Robinson filed seventeen Rule 68 and twenty-seven Rule 66 disclosure motions, available at: www.peterrobinson.com, and in other cases at: www.ictr.org.

²²³ ICC-01/04-01/06. (2007). Decision on Intermediaries. para 44.

²²⁴ ICC-01/04-01/06. (2007). Decision on Disclosure. para 2.

²²⁵ ICC-01/04-01/06. Transcript of hearing on 1 October 2007. p 15.

²²⁶ ICC-01/04-01/06. Transcript of hearing on 1 October 2007. p 86.

evidence.”²²⁷ The Trial Chamber found that “[t]he prosecution’s approach constitutes a wholesale and serious abuse.”²²⁸ The single judges gave the OTP a choice: it could disclose the materials to the Court and to the Defense or the proceedings would be indefinitely suspended. In the meantime, the Trial Chamber ordered Lubanga’s release in July 2008.²²⁹

The Appeal’s Chamber overturned this decision arguing firstly that there is nothing in Article 54(3)(e) that says it can be used only on an exceptional basis and the that the Trial Chamber did not offered a basis to differentiate between the exceptional and the unexceptional.²³⁰ Secondly, the Appeals Chamber found that the distinction the Trial Chamber had made between the “lead evidence” was both artificial and unworkable. It argued that the ICC rules plainly contemplate that sometimes information that is obtained as lead evidence under Article 54(3)(e) will later become evidence at trial if the provider consents to its use. Article 54(3)(e) itself explicitly contemplates the possibility that the provider will consent to disclosure, and Rule 82 of the Rules of Procedure and Evidence directly addresses those situations where evidence originally obtained under Article 54(3)(e) becomes evidence for trial.²³¹

The appeals Chamber also held that there are no limits on the Prosecution's use of Article 54(3)(e) but concluded that the Prosecution could withhold potentially exculpatory evidence not on its own decision but only through a decision of the court (which could be obtained *ex parte*).²³² At the same time, the Appeals Chamber made it clear that the Trial Chamber (as well as the Appeals Chamber itself) would be required to respect the confidentiality of the evidence, and therefore could not itself disclose the evidence to the defense without the authorization of the provider.²³³

²²⁷ Whiting. (2009). p 225. Cited: ICC-01/04-01/06. (2008). Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by Article 54(3)(e) Agreements. paras 72-73.

²²⁸ ICC-01/04-01/06. (2008). Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by Article 54(3)(e) Agreements. para 73.

²²⁹ Whiting. (2009). p 209. ICC-01/04-01/06. (2008). Decision on the Release of Thomas Lubanga Dyilo.

²³⁰ Whiting. (2009). p 220. Cited: Whiting. (2009). p 220. Cited: *Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 13, Appeals Chamber Decision, at 1 44 (Oct. 21, 2008).

²³¹ Whiting. (2009). p 218.

²³² Whiting. (2009). p 220. Cited: *Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 13, Appeals Chamber Decision, para 46 (Oct. 21, 2008).

²³³ Whiting. (2009). p 220. Cited: *Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 13, Appeals Chamber Decision, para 48 (Oct. 21, 2008).

Although Lubanga was eventually not released and the proceedings continued after the OTP reluctantly had reluctantly disclosed redacted versions of some of the documents it had obtained, the Appeals Chamber did not “provide a complete resolution of the potential for conflict between the provisions.”²³⁴ Stating that the OTP can use its own discretion when deciding whether to collect evidence as per Article 54(3)(e), it does not clarify, how the Court is supposed to be able to decide on whether the material should be disclosed to the Defense in accordance with Article 67. The Trial Chamber was also not able to remove the conflict between the obligation to disclose mitigating evidence and the duty to respect confidentiality agreements prohibiting the release.

In addition to the fact that this case was unable to bring clarity to the conflicting provisions, it can be argued that Lubanga’s rights provided in Article 67 of the Rome Statute were infringed upon during the proceedings. The trial Chamber determined that it was ‘impossible to piece together the constituent elements of a fair trial’ after the Prosecution revealed that it was unable to disclose potentially exculpatory evidence it had been provided confidentially.²³⁵ According to Professor Schabas the whole trial was “a nightmare since the disputes between judges and the prosecutor began in 2008.”²³⁶ Moreover, the problems with disclosure at Lubanga are far from being an isolated case, they “are symptomatic of larger tensions over the proper scope and application of the Court’s disclosure regime. Moreover, they call into question the ICC’s ability to protect not only the integrity of its trials but the cooperative regime that should govern its relationships with local actors.”²³⁷

5. Conclusion

The Defense’s independence is not guaranteed in the ICC Statute which, just like the statutes of the ICTY and ICTR before, clearly define the powers of the judiciary and the prosecutor, but fail to provide an institutional basis for an independent defense body. “Such an institutional weakness can undermine the legitimacy of any criminal court over time and affect its credibility”²³⁸ because it has serious implications on the

²³⁴ Whiting. (2009). p 220.

²³⁵ ICC-01/04-01-06. (2008). Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by Article 54(3)(e) Agreements. paras 91-93.

²³⁶ Simons. (2010). On-line article. Citing William A Schabas.

²³⁷ De Vos. (2011). p 219.

²³⁸ Groulx. (2010). p 22.

rights of the accused.

Whereas the ICC's regulatory framework does not provide the Defense sufficient means to conduct an investigation equal to that of the OTP's, the Prosecution's reliance on intermediaries makes it even more difficult for the Defense to assist the accused. Outsourcing investigations makes the OTP lose its control over the investigation thus shifting the equality of arms even more to the disadvantage of the accused.

“Issues of non-disclosure go to the heart of the fairness of criminal procedural law”²³⁹ because they have an effect on the length of a trial as well as the right of the defendant to be informed of the evidence and information that is brought forward against him. Other rights of the accused that are affected by the disclosure are the right to be informed promptly and in detail of the nature, cause and content of the charge²⁴⁰ and the right to have adequate time and facilities for the preparation of the defense.²⁴¹

²³⁹ Kuschnik. (2009). p 158.

²⁴⁰ Rome Statute, Article 67(a).

²⁴¹ Rome Statute, Article 67(b).

Chapter 6. Trial Chambers Responsible for Guaranteeing a Fair Trial

Like the OTP, the Judicial Divisions examined in the following chapter are one of the Court's four organs. It 18 judges are divided into three Trial Divisions that are the Pre-Trial Chambers that admit evidence, issue warrants, and determine whether a crime falls under the ICC jurisdiction, the Trial Chambers that conduct trials and issue sentences and the Appeals Chambers that conduct the appeal hearings and issue appeal sentences. The following chapter will examine the role of the PTC and the Trial Chambers.

The aim of this chapter is to show the effects the OTP's reliance on intermediaries on the ability of the judges to guarantee a fair trial to the accused. In addition to the Rome Statute and the RPE, the chapter is to a huge extent based on professor Nancy Combs' groundbreaking study on the international criminal fact-findings conducted by international courts and tribunals titled "Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions."²⁴²

The chapter will firstly show the importance of the judges in guaranteeing the fair trial rights of the accused and provide an overview of the legislative means the judges have to uphold those rights while overseeing the phases of investigation, disclosure and the admissibility of evidence. After that the chapter will go on to show the the difficulties the judges have to evaluate the evidence that is to a huge extent obtained from intermediaries.

6.1. The Judges' Obligation to Guarantee that the Accused's Fair Trial Rights are Upheld

The ICC judges are tasked with overseeing that the trial is fair and expeditious and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.²⁴³ The duty of ensuring that the accused's rights are not infringed upon during the proceedings therefore falls on the judges. If any risks to an individual's right to a fair trial stem from the fact that the Defense's means to investigate are not equivalent to the those of the OTP or that the OTP outsources its

²⁴² Prof. Nancy Combs went through the transcripts of hearings to establish that facts were not very well grounded. (2010). *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*. Cambridge University Press.

²⁴³ Rome Statute. Article 64(2), Article 64(3)(a) & Article 64(8)(b).

extensive investigative powers to the intermediaries, the judges must be able to make sure that those risks never materialize into actual breaches of rights.

In order to uphold this duty, the Court's regulatory framework enables the PTC to oversee the investigation and to use its discretionary powers with regards to disclosure of evidence and admitting evidence.²⁴⁴

6.1.1. PTC Overseeing the Investigation

The investigation is overseen by the Pre-Trial Chamber (PTC). The PTC being a judicial body of the Court with a threefold function: it must act as a check on the powers of the Prosecutor as regards his investigation and prosecution activities; it must guarantee the rights of suspects, victims and witnesses during the investigation phase; and it must assure the integrity of the proceedings.²⁴⁵ The Pre-Trial Chamber should therefore function as a defendant-friendly institution exercising necessary control over the Prosecutor's extensive investigative powers that were described in chapter 4.1.

Yet it has only a passive role during an investigation. Its involvement has to be stimulated by a request submitted, or act performed by either the Prosecutor or the defense.²⁴⁶ The PTC itself does not have to but **may** take measures on its own initiative only when it considers that the evidence would be essential for the defense at trial.²⁴⁷ The Rome Statute and the RPE make it clear that "the Pre-Trial Chamber is not supposed to perform a function akin to that of an investigating judge."²⁴⁸ It has no supervisory role and therefore no real power to safeguard the impartiality and objectivity of the investigation,²⁴⁹ meaning that it cannot exercise systematic judicial oversight over the direction or execution of the investigation by the Prosecutor.²⁵⁰

²⁴⁴ Rome Statute. Article 64(3). RPE Rule 140.

²⁴⁵ De Smet. (2009). p 406. Citing: ICC. (2004). The Role of the Pre-Trial Chamber. *ICC Newsletter*. Available at www.icc-cpi.int/library/about/newsletter/files/ICC-NL2-200410_En.pdf.

²⁴⁶ Prosecutor can request the measures from the PTC as per Rome Statute, Article 56(1)(b); Defense can request them as per Article 57(3)(b).

²⁴⁷ Rome Statute. Art 56(3)(a)

²⁴⁸ De Smet. (2009). p 422.

²⁴⁹ Miraglia. (2006). p 191.

²⁵⁰ De Smet. (2009). p 423.

The PTC is supposed to have a limited but vital purpose that demands professional due diligence by the Prosecutor, “a defendant-friendly watchdog for due process requirements.”²⁵¹ It is difficult to see what exactly are the means of the PTC to watch over the due process requirements, if it is has no real obligation to conduct a systemic review over the way the evidence is gathered. It also remains unclear how can the PTC learn about “evidence that is essential for the Defense at the Trial” if it is not involved in the proceedings. The author is of the opinion that the PTC’s passive role could be sufficient if both the Prosecutor and the Defense had equal means to conduct their own investigations, but does not seem to be enough in a situation where the Defense’s means to investigate are severely limited and the OTP itself is at times dominated by the intermediaries not always interested in a fair trial for the accused.

6.1.2. The Judges Discretionary Power Regarding Disclosure

The importance of timely disclosure of evidence to the Defense as well as the difficulties the OTP faces with regard to its obligation to disclose evidence has already been explained in chapters 5.2. In order to enable the Defense to prepare for trial and to facilitate the fair and expeditious conduct of proceedings, the Trial Chamber is the last resort capable ensuring that the individual’s rights to a fair trial are not breached by making any necessary orders for the disclosure of documents or for information not previously disclosed and for the production of additional evidence.²⁵² Article 64(3)(c) of the Rome Statute implicitly states that the judges have to guarantee that the Prosecutor respects its disclosure obligation by enabling the Defense to review documents or information sufficiently in advance of the commencement of the trial to enable adequate preparation.

In practice disclosure under the supervision of the judges is regulated by Articles 61(3)(b) and 64(3)(c) of the Rome Statute. As per Article 61(3)(b) of the Rome Statute, the accused has the right to be informed of the evidence on which the OTP intends to rely on at the hearing within a reasonable time before the confirmation hearing. The rest of the relevant evidence is to be disclosed to the Defense at the sufficiently in advance of the commencement of the trial to enable adequate preparation for trial as per Article 64(3)(c) of the Rome Statute. The PTC must also decide on whether disclosure is necessary in case the Prosecutor is in doubt

²⁵¹ Scheffer. (2009). p 586.

²⁵² Rome Statute. Article 64(3)(c).

of whether evidence is mitigating and shall be disclosed to the Defense.²⁵³ Article 69(3) of the Rome Statute states that the Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth. Nevertheless, the rules granting the judges the responsibility are impaired for two reasons.

Firstly, in order to know whether disclosure of evidence is necessary, the PTC must have a good overview of the evidence in possession of the OTP. Yet the previous section displayed that it does not conduct systemic review of the evidence. If the OTP does not disclose documents voluntarily, the Chambers are unable to order disclosure because often they do not know that the OTP possesses exculpatory evidence and can't therefore compel the Prosecutor to submit it. According to Beth Lyons, a defense counsel for the defense at the ICTR, the Defense's discovery of exculpatory material is often accidental, arising from a legal assistant's discovery while searching for something else on the Prosecution's Electronic Disclosure System, or a Prosecution witness's testimony that s/he gave evidence and these documents are still "missing" from the disclosure turned over by the Prosecution.²⁵⁴

Secondly, as described in detail in chapter 6.3, the *Lubanga* case demonstrated that even if the judges order disclosure, the OTP has serious difficulties in complying with the Court's orders due to the confidentiality agreements it has signed with the intermediaries. According to the provisions discussed above, the Trial Chamber as the watchdog over the prosecutor should have been able to demand the disclosure. However, the difficulty for the Trial Chamber in *Lubanga* was that "it was no less stuck than the Prosecution. It could not order the Prosecution to turn over the materials, and without seeing the documents, it could not fashion an appropriate remedy."²⁵⁵ The use of intermediaries therefore has an impact on the efficacy of the judges ability to obligate the disclosure of necessary documents.

²⁵³ Rome Statute. Article 67(2).

²⁵⁴ Lyons. (2011). p 299.

²⁵⁵ Whiting. (2009). p 218.

6.1.3. The Judges' Discretionary Power Regarding the Admissibility of Evidence

Most of the evidence is submitted to the Court at the Confirmation of the Charges Hearing, at which point the Pre-Trial Chamber decides on its admissibility. The parties may submit all the evidence they consider necessary.²⁵⁶ The only statutory limit²⁵⁷ on admissibility of evidence is given in Article 69(7) of the Rome Statute which states that evidence obtained by means of violation of the Statute or internationally recognized human rights norms shall not be admissible if the violation casts substantial doubt on the reliability of evidence or it would be antithetical to and would seriously damage the integrity of the proceedings.²⁵⁸ Violations of the Statute are provided in Article 70 and they consist of offenses against the administration of justice, such as intentionally submitting false evidence or tempering with evidence.²⁵⁹ Even when the evidence is collected by a state, the Statute expressly prohibits taking into account the provisions of the state's national law that regulate the relevance and admissibility of evidence.²⁶⁰

As the parties can submit all the evidence they perceive as relevant, as long as they do not "intend" for it to be false, the judges have to use their discretionary power and "rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or a fair evaluation of the testimony of a witness, in accordance with the rules of procedures and evidence."²⁶¹ According to Rule 64(2) RPE, they shall give reasons for any rulings made on evidentiary matters; all evidence that has not been ruled irrelevant or inadmissible shall be considered by the Chamber.²⁶²

The case law of the ICC has shown that the Chambers usually admits all the evidence presented and count on the judges to evaluate it at the course of the trial to decide its credibility and value to the case. In *Lubanga* the all the items contained in the Prosecutor's and Defense's lists of evidence were admitted, without ruling on

²⁵⁶ Rome Statute. Article 69(3).

²⁵⁷ Although Rule 71 of the RPE prohibits the admissibility of evidence regarding the prior or subsequent sexual conduct of a victim or witness is also applicable in specific cases.

²⁵⁸ Rome Statute. Article 69(7)(a)-(b).

²⁵⁹ The author has described the contents of Article 70 of the Rome Statute in detail in Chapter 3.4, para 2.

²⁶⁰ Rome Statute. Art 69(8).

²⁶¹ Rome Statute. Article 69(4).

²⁶² RPE. Rule 64(3).

inadmissibility on a case-by-case basis. The Chambers accepted intermediaries' reports over the Defense's objections that they were anonymous hearsay the reliability of which could not be confirmed, declaring that "such questions go to the probative value of the evidence and not to its admissibility"²⁶³ and creating the obligation on the judges to assess the evidence at later "in light of the other evidence admitted."²⁶⁴

This practice causes enormous workload for the Trial Chamber that, as a result, has to review vast amounts of materials some of which only remotely connected to the individual criminal liability of the accused, others of dubious quality. "The documentary evidence disclosed shortly before trial that had been received from third parties under the auspices of confidentiality agreements apparently exceeded 37,000 pages."²⁶⁵ Instead of being able to concentrate on establishing the guilt or innocence of the accused, the judges therefore have to separately evaluate each piece of evidence to decide how much weight to attribute to it, assessing them in a whole of tens of thousands of documents, together with witness statements.

6.2. The Judges' Capacity to Evaluate Evidence

To make sure that the judges are capable of upholding their responsibilities deriving from the Rome Statute and the RPE, Article 36(3)(a) of the Statute states that they have to be competent, impartial and of a high moral character. This section subsequently explores how the Trial Chambers cope with their duty to evaluate the evidence it has decided to admit, arguing that the judges' ability to rightly assess evidence in international courts may be lower than generally expected.

The judges face difficulties, because forensic evidence is rarely offered in cases where the evidence is largely gathered by intermediaries not specialized in criminal investigations and whether or not there is documentary evidence depends on a defendant's former position in the government or the military as well as on the disclosure practices of the Prosecution.²⁶⁶ As pointed out in chapter 4.3, the documentary evidence submitted is often not tailored for establishing the individual

²⁶³ ICC-01/04-01/06. (2007). Decision on the Confirmation of Charges. paras 99-104.

²⁶⁴ ICC-01/04-01/06. (2007). Decision on the Confirmation of Charges. para 106.

²⁶⁵ Baylis. (2009). p 131. Baylis adds that these were merely 37,000 pages of redacted materials, indicating that the original volume was greater, and again, this number concerns only the evidence gathered under confidentiality agreements and not other, non-confidential evidence provided by third parties.

²⁶⁶ Combs. (2010). p 174.

criminal liability of the accused. Yet the judges' ability to assess witness testimonies is especially worrisome.

Professor Combs has found that merely the cultural and linguistic gap between the Court's staff and the witnesses alone is so huge that not only are judges, but almost everyone else at the courtroom are at the mercy of the interpreters.²⁶⁷ A further difficulty is that the Chambers allow the parties to submit eyewitness testimony that is "told by someone to at least one (if not more) other person(s). This so-called "eyewitness testimony", which is once, twice and even thrice or more removed, is actually hearsay."²⁶⁸

On top of that perjury is a serious problem. Apart from Article 69(1) of the Rome Statute that requires each witness to give "an undertaking as to the truthfulness of the evidence," there is little else that guarantees that witnesses speak the truth in the Court. Professor Combs has found inconsistencies and omissions to be "commonplace"²⁶⁹ during international criminal proceedings. She claims that "although inconsistencies are particularly easy to explain by means of the "innocent" explanations [such as the cultural-linguistic gap], they are also particularly likely to reflect perjury."²⁷⁰ As determined by the ICC jurisprudence, lying and distorting the truth also is not rare in the cases in front of the ICC and the intermediaries play an important role in encouraging witnesses to commit perjury.²⁷¹

Combs has concluded that the determinations of international criminal courts and tribunals "in many cases constitute little more than guesses."²⁷² She concludes that the proceedings in international criminal institutions are:

. . . conducted in a way that creates the illusion they are routinely capable of reaching reliable factual conclusions on the basis of evidence presented to them, when, in fact, they are not. The Trial Chambers are adrift, and they are

²⁶⁷ Lyons. (2011). p 290.

²⁶⁸ Lyons. (2011). p 289.

²⁶⁹ Combs. (2010). p 119-120.

²⁷⁰ Combs. (2010). p 105.

²⁷¹ See the example provided chapter 4.4.

²⁷² Combs. (2010). p 179.

*adrift in a way that calls into question the very foundation of the international criminal justice project.*²⁷³

6. Conclusion

It seems that the regulatory framework of the ICC does not provide the Chambers with necessary procedural means to enable them to guarantee that the fair trial rights of the accused are not breached. The passive role of the PTC during an investigation leads to near powerlessness at the disclosure phase because often the judges simply do not know to request the OTP to make necessary materials available to the Defense. If they do request disclosure, the OTP may well be unable to comply with the request due to the confidentiality agreements signed with intermediaries that the Court is obligated to respect. Even though the equality of arms is a more liberal concept in international criminal law than in national criminal law,²⁷⁴ it can be argued that the Defense's inability to access mitigating information is a breach of the accused's right to review evidence that also has serious implications on the equality of arms. While the Defense's access to resources does not have to be equal to that of the Prosecution, its inability to review materials the accused has a right to as per the Rome Statute unreasonably weakens its ability to conduct an effective defense. In addition to this, due to the delays judges' attempts to make the relevant materials available to the Defense, it seems they sometimes have to choose between continuing to order disclosure for the Defense on the one hand and the accused's right to a trial without an undue delay on the other hand. No matter which way they choose, the OTP's excessive use of materials obtained through confidentiality agreements has a negative impact on the accused's rights.

The regulatory framework also puts very little constraints on the way evidence is collected and to which evidence is admitted. Due to the lack of regulation, the Chambers usually have to admit all the evidence presented by the parties, regardless of the fact that a lot of it comes from the intermediaries and is thus not tailored to establishing individual guilt. As a result of that the judges have to go through copious amounts of materials whose evidentiary value they have to assess while deciding on the guilt of the accused. This complicates the work of their work and may impair their

²⁷³ Combs. (2010). p 186.

²⁷⁴ See chapter 1.3.

ability to make the right decisions. Again, the complications of looking through tens of thousands of materials loosely connected to the case definitely prolong the time the judges spend on the case, thus also impacting the accused's right to a trial without a delay.

The situation is even more alarming when it comes to the judges' ability to cope with the witness testimonies. It was established in chapter 4.4. that the intermediaries sometimes encourage witnesses to distort the truth. The judges due to several social and cultural factors have serious difficulties in understanding when the witnesses tell the truth. They have even more difficulties in finding out, whether the witness lied on its own or was influenced by an intermediary. The inability to filter out false evidence definitely effects the accused's right to be proven beyond a reasonable doubt.

Part III. Outsourcing Investigations in the Future

Chapter 7. Improving the Relationship with Intermediaries

The aim of this chapter is to reflect on the Court's current relationship with intermediaries and to predict what it could be like in the future. The author outlines some general steps that could make the Court's relationship with intermediaries more effective and ensure that this cooperation influences the rights on accused's to the least extent possible.

The chapter begins by explaining why the Court cannot replace reliance on intermediaries without large-scale structural changes. After that, firstly the necessary legislative changes are outlined and secondly the possibilities of improving the relationship without implementing new legislation are explained.

7.1. Future Reliance on the Intermediaries

The ICC is currently investigating eighteen cases in eight situation countries.²⁷⁵ Since 2010, four countries: Mali, Kenya, Côte d'Ivoire and Libya have been added as situation countries. Within the same timeframe, the Court's budget has risen from \$138 million in 2010 to around US\$144 million in 2013, with possible access to a contingency fund of up to \$9.3 million. The prosecutor's office, which carries out the investigations, was allocated \$37 million, which represents an increase of just \$1.3 million since 2010.²⁷⁶ Even in 2009, when the ICC operated in only four situations, CAR, DRC, Sudan and Uganda, Professor Baylis of the Pittsburgh School of Law claimed that the OTP's present investigative capacity was not sufficient to enable it to fully investigate the situations itself. She argued that "any proposal that would call on the Prosecutor to end its use of third-party evidence must also contemplate some expansion and redirection of investigative resources."²⁷⁷ It is thus clear that the Court's budgetary constraints do not allow the OTP to start investigating on its own and, if anything, the practice of relying on intermediaries will increase in the future.

Besides the budgetary implication, any alternative to the reliance on intermediaries could only be brought about by considerable political cooperation by the members of the ASP and possibly the members of the UN Security Council. The Court can neither

²⁷⁵ ICC Website. (2013). List of Cases.

²⁷⁶ IRIN. (2013). On-line article.

²⁷⁷ Baylis. (2009). p 134.

construct its own police force, nor start cooperating with the forces of an international or regional organization without the relevant agreements between the State Parties to the Rome Statute and the members of the IGO. Under the circumstances where support among the members of the African Union remains relatively low,²⁷⁸ where only 121 states have ratified the Rome Statute²⁷⁹ and where three of the five permanent members of the UN Security Council, China, Russia and USA have not announced plans to do this in the foreseeable future, it can be argued that it is politically impossible to construct a more reliable police force for the Court.

Lastly, despite the problems reliance on intermediaries brings, the OTP's use of evidence gathered by third parties also demonstrates a resourceful use of this network and its investigative resources. On account of this, the OTP should keep taking "advantage of the expertise and local connections offered by embedded third parties."²⁸⁰ Considering the benefits of relying on the intermediaries that were show in chapter 3.2 and Table 1, it will be impossible to replace the intermediaries with anything that could match them without bringing about large changes in the system of international criminal procedure. With that being said, the Court must realize that in order to use intermediary relationships to their fullest potential only when the cooperation is properly regulated and capitalized.²⁸¹

7.2. Consolidation of the Relationship with Intermediaries

Judging from the Draft Guidelines that admit the existence of a vacuum in the legislation as well as the lack of a clear framework to govern the Court's relationship with them,²⁸² the Court has realized the risks reliance on intermediaries may bring about and the need for further legislation. However, the Court alone cannot tackle the problems. According to Article 112 of the Rome Statute, the power of bringing about many of the necessary changes in the legislation falls on the ASP that shall consider and, if appropriate, adopt new legislation and/or amendments to the Court's existing

²⁷⁸ 33 of the 52 member states to the African Union have ratified the Rome Statute as per: ICC website. (2013). How Many Countries Have Ratified the Rome Statute?

²⁷⁹ ICC website. (2013). How Many Countries Have Ratified the Rome Statute?

²⁸⁰ Baylis. (2008). p 126.

²⁸¹ Open Society Justice Initiative. (2011). p 3.

²⁸² Draft Policy. p 1.

legislation.²⁸³ It is also the task of the ASP to “consider and decide the budget for the Court.”²⁸⁴

7.2.1. Finalizing and Adopting the Draft Guidelines.

The most essential legislative change is the adoption of the Draft Guidelines by the ASP. On 11 May 2012 the Court presented ASP with its “Draft Guidelines governing the Relations between the Court and Intermediaries”, “Code of conduct for intermediaries” and “Model contract for intermediaries.”²⁸⁵ The ASP took note of accepting the documents in November 2012²⁸⁶ and started a more in-depth discussion with the Court on this issue.

The ASP admits that the Draft Guidelines contain necessary modifications whose implementation would be essential in order to align the Court’s policies with the Trial Chamber’s findings at the *Lubanga* ruling. It admits that there is a need for more clarity, security, and the financial planning. The ASP also acknowledges that the implementation should take place as soon as possible, because even after the adoption of the Guidelines they would be subject to periodic review and assessment and could be amended if necessary.²⁸⁷

The author would also like to suggest that the final version of the Guidelines could contain clearer instructions on how to differentiate between the ICC intermediaries, contractors and other actors the ICC comes into contact with. If the distinction between the intermediaries that fall under the Guidelines and other actors the Court works with is the formality of their relationship, the Guidelines should clearly state that.

7.2.2. Accountability of intermediaries

Accepting the Draft Guidelines would make it possible to increase the accountability of intermediaries, but only slightly. The intermediaries would be liable for their own misconduct, as set out in the Code of Conduct, which is to be read in conjunction with the guidelines.²⁸⁸ Were an intermediary to violate any term of the contract, the Court

²⁸³ Rome Statute. Article 112(2)(a).

²⁸⁴ Rome Statute. Article 112(2)(d).

²⁸⁵ ICC-ASP/11/30. (2012). para 11.

²⁸⁶ ICC-ASP/11/20 (2012). para 50.

²⁸⁷ ICC-ASP/11/30. (2012). para 12.

²⁸⁸ ICC-ASP/11/30. (2012). para 16.

would be obligated to terminate the contract immediately. Since the intermediary is not part of the structure of the Court and therefore not subject to disciplinary measures, termination is the effective measure available to the Court.²⁸⁹ While this situation is still far from ideal, it could be helpful in cases where intermediaries convince witnesses to provide false statements. In addition to making it obligatory for the OTP to avoid contact with intermediaries that have breached the contract, the measure might also have a disciplinary effect on the intermediaries.

In cases of misconduct, the intermediaries' behavior would be subject to national civil or criminal proceedings; the Court's privileges and immunities will not apply to the intermediaries. The intermediaries will not be employed by the ICC, rather a contract for the provision of services would be executed between the parties. In circumstances where the Court deemed it appropriate to compensate them for tasks performed, such payment would be done in conformity with the contract.²⁹⁰ Under no circumstances could the Court itself be held liable for the activities of intermediaries carried out for the Court.²⁹¹

7.2.3. Funds for intermediaries

While paying the intermediaries for their services remains a controversial topic, it is clear, that in order to consolidate the relationship, at least some funds must be allocated to intermediaries in the Court's budget. "An essential element to making the Draft Policy effective in practice will be the provision of adequate resources to ensure their full implementation."²⁹² This would enable the intermediaries to fulfill their tasks more efficiently. It would also create a legitimate way for the OTP to oversee the intermediaries' activities and thus enable the Prosecutor to maintain better control over the intermediaries' conduct. It would also make it easier to sign contracts with the intermediaries outlining their obligations and responsibilities with regard to the relationship as well as the Court's obligation to pay.

In addition to reimbursing the intermediaries' expenses, the Court must also allocate resources in relation to protection related costs and capacity building.²⁹³ Organizing

²⁸⁹ ICC-ASP/11/30. (2012). para 16.

²⁹⁰ ICC-ASP/11/30. (2012). para 15.

²⁹¹ ICC-ASP/11/30. (2012). para 16.

²⁹² VRWG. (2013). p 3.

²⁹³ VRWG. (2013). p 3.

protective measures and making security arrangements for those intermediaries who have risked their own well being on account of their Court-related duties will enable the Court to form long lasting relationships with the intermediaries. Funds should also be allocated for training the intermediaries and increasing their expertise by organizing information sessions and training.²⁹⁴ According to the Draft Policy, some organs and units do provide training to for intermediaries already,²⁹⁵ but this practice neither regular nor properly funded.

7.2.2.4. Staff to manage the relationship with intermediaries

On top of that, the Court needs the human resources to oversee the relationship with intermediaries. This should start by the Assembly's President appointing "a dedicated intermediaries facilitator through The Hague Working Group specifically to be available to interact with the Court on intermediaries and to take forward review of the Draft Guidelines as they are implemented through the Court's activities."²⁹⁶ The task does not match with anyone's current position within the Court, as the current mandates of all other facilitators within the Court are already full of time-consuming activities.²⁹⁷

The intermediaries facilitator could therefore take up the tasks that do not touch on anybody else's job description in the Court, such as negotiating with the states to organize visas for intermediaries who need to flee quickly or implement "relocation agreements with the Court for intermediaries who have been expelled or otherwise need to spend extended time out of their country of residence due to security risks." An intermediaries facilitator could assist the Court in addressing these needs, including through identifying State Parties candidates willing and able to assist with these problems, both over the long-term and in crisis situations.²⁹⁸

7.3. OTP's Strict Adherence to Current Norms

Regardless of whether the ASP succeeds in implementing the legislative changes described above, the Court, especially the OTP, should consider making internal changes to the way it communicates with intermediaries when it comes to gathering

²⁹⁴ VRWG. (2013). p 3.

²⁹⁵ Draft Policy. p 19.

²⁹⁶ Open Society Justice Initiative. (2011). p 1.

²⁹⁷ Open Society Justice Initiative. (2011). p 4.

²⁹⁸ Open Society Justice Initiative. (2011). p 4.

evidence. The internal changes are inevitable in order to strictly adhere to the current norms that regulate OTP's conduct during an investigation, described chapter 4.1.

The OTP must understand that the intermediaries have their own mandate and priorities which may not always coincide with the Court's.²⁹⁹ In order to maintain control over the investigation, in situ investigations remain vital. First and foremost, the ICC should, wherever possible, conduct its own local investigation. It should also negotiate with the territorial authorities "to allow the installment of a robust and professional investigative presence in situ to send a clear signal of the ICC's resolve to prosecute individuals responsible for crimes under international law and to help deter further violations."³⁰⁰ The OTP should not call on the intermediaries to act as substitutes for staff shortages in the field. ICC must maintain adequate field presence to implement its mandate and intermediaries should undertake tasks that they are better placed to perform (such as access to some regions, knowledge of local languages, direct access to victims, etc.). They should not be expected to take risks the Court's staff are not able or willing to take,³⁰¹ nor should they be expected to collect evidence that may eventually determine whether the accused is innocent or guilty, if they do not have the necessary skills and training.³⁰²

Another important factor in maintaining control over the intermediaries is an improved understanding of their mandates and activities. The OTP needs to know more about the intermediaries who it cooperates with, to check whether they are credible and what kind of promises they have made to the witnesses.³⁰³ The Prosecutor should systematically review all information available from the full range of possible intermediaries including UN human rights treaty bodies, human rights field presences, special investigative missions, human rights units in peacekeeping missions and intelligence from cooperating transnational, regional and domestic agencies as well as NGOs.³⁰⁴

²⁹⁹ See chapter 3.2.

³⁰⁰ Sunga. (2011). p 201.

³⁰¹ VRWG. (2013). p 3.

³⁰² Sunga. (2011). p 201.

³⁰³ IRIN. (2013).

³⁰⁴ Sunga. (2011). p 202.

The OTP should also conduct assessments of intermediaries, and develop criteria and vetting procedures for that purpose. According to the Draft Policy the OTP already develops profiles on intermediaries and conducts initial assessments in order to evaluate their functionality against defined criteria. OTP should therefore make it a rule to always abide by these criteria and take note of the profiles created. Also, it is important that an evaluation of an intermediary is not just a one-off exercise, but monitoring should continue throughout the entire period of the relationship with the intermediary.³⁰⁵

7. Conclusion

To conclude it can be stated that despite the risks to the accused's rights, the Court does not have any viable alternatives to intermediary relationships; its practice on relying on intermediaries' assistance is caused by necessity rather than choice. While it is unrealistic to expect that the indirect model for enforcement will be replaced and it will therefore remain the weakest link of the Court's procedural framework, the ICC cooperation regime can be strengthened and improved over time.³⁰⁶

The Court needs to adopt pertinent legislation regulating the way evidence should be collected by the intermediaries and enabling to hold the intermediaries accountable. The adoption of the Guidelines regulating the relationship between the ICC and the intermediaries is the clearest step to that needs to be taken. Together with implementing the Guidelines, it is important to allocate sufficient funds and staff to manage the relationship. If the ASP does not succeed in bringing about changes to the legislation, however, the risks to the accused's fair trial rights could also be substantially reduced if the OTP starts to strictly comply with its obligations under the Rome Statute and develops internal guidelines regarding its cooperation with the intermediaries.

³⁰⁵ Draft Policy. p 15

³⁰⁶ Cryer. (2010). p 529.

Conclusion

Since the ICC has not yet provided an official definition an intermediary and the unofficial definitions remain unclear, the author defined intermediaries for the purpose of this thesis as all individuals, NGO-s and intergovernmental organizations that assist the Court in gathering evidence. The intermediaries' contribution to the ICC investigations cannot be underestimated, often they have knowledge about the local situation that the Court lacks and are able to access locations, individuals and materials that the Court can not. Yet outsourcing investigations to the intermediaries brings about numerous risks to the fair trial rights of the accused.

The author of the thesis argues that although the guarantees to a fair trial in the Rome Statute seem to have been taken over from the ICCPR almost verbatim, the Court's extensive reliance on intermediaries endangers the accused's rights in numerous ways. Reliance on intermediaries aggravates the fundamental problems arising from the fact that the Rome Statute is not an inherently coherent document but a result of countless compromises where the provisions relating to the gathering of evidence have been left ambiguous.

Mindful of the fact that the Court does not have it's own police force, the founders have admitted that the single most important factor for the ICC's success is state cooperation, without formally acknowledging that the states unable or unwilling to prosecute mass atrocities falling under their jurisdiction, may not be reliable partners. While the Rome Statute does allow the Court to gather evidence in cooperation with intermediaries, it does not provide a coherent framework for the cooperation, nor does it foresee any realistic mechanisms for exercising supervision or for holding the intermediaries accountable for their conduct, if such a need should arise.

Oversight of intermediaries is necessary, because they are not entities affiliated with the Court; they assist the ICC by providing materials gathered in course of their daily work or cooperate to advance their own aims that may not necessarily include providing a fair trial to the accused. As the OTP relies on the evidence collected by the intermediaries in course of their regular work it ends up with copious amounts of

materials that are not suited for establishing individual criminal responsibility. As much of the evidence provided by intermediaries has been obtained through confidentiality clauses, the OTP is also prevented from disclosing the necessary materials to the Defense. The accused's right to examine evidence against him, as well as his right to a trial without undue delay are thus endangered.

In addition to that, the ICC jurisprudence has already demonstrated that some intermediaries deliberately fabricate evidence. The Defense, having only limited means to conduct its own investigation, faces difficulties in contesting the falsified evidence. The judges, foreign to the socio-cultural peculiarities of the situation countries and overburdened with assessing materials from very different sources, may be unable to rectify the situation, especially when it comes to assessing the evidentiary value of witness statements.

In the view of the author, the problems to an individual's fair trial rights stem from the fact that the OTP loses the control it is supposed to maintain over an investigation to intermediaries. Rome Statute provides, on the one hand, that the OTP is in charge of the investigation in the interests of the truth without giving the Defense more than limited powers to challenge its methods, and, on the other hand, that the OTP is allowed to outsource its responsibilities to third party intermediaries thus inevitably giving up some of the control the Statute requires it to have. The *Lubanga* case analyzed in this thesis has shown that the materialization of those problems is real indeed. If the OTP's relationship with intermediaries creates risks to the accused's rights, even the judges tasked with guaranteeing a fair trial may not be able to prevent those risks from becoming actual violations on the accused's rights.

Regardless of the risks reliance on intermediaries brings about, the practice of outsourcing investigations is only likely to increase in the future. By commencing to work on the Draft Guidelines for Intermediaries, the Court has demonstrated an understanding of many of the risks the cooperation brings about and admitted the need to work towards regulating the relationship. However, together with adopting the Guidelines, the Court should also allocate funds and staff in order to make the cooperation functional. Only by providing both institutional and budgetary means to

effectively cooperate with the intermediaries is it possible to ensure that the rights to a fair trial incorporated into the Rome Statute are fully upheld.

Kati Roostar.

06.05.2013

A handwritten signature in blue ink, appearing to read 'Roostar', with a large, stylized initial 'R'.

Résumé:

LA SOUS-TRAITANCE DES INQUIETES DE LA COUR PENALE INTERNATIONALE AUX INTERMEDIAIRES: LES EFFETS SUR LES DROITS DE L'ACCUSE A UN PROCES EQUITABLE

Ni le statut de Rome de la Cour Pénale Internationale (CPI) ni le règlement de procédure et de preuve ne donnent de définitions des « intermédiaires. » Pour l'objet de cette mémoire l'auteure a donc créé sa propre définition du terme. Les organisations non gouvernementales, les associations sur le terrain, les particuliers, les organisations internationales ou tout autres organisations ou groupements faisant le lien entre la CPI (y compris le fond pour les victimes) peuvent être des intermédiaires, pourvu qu'ils assistent le bureau du procureur (le bureau) à mener une enquête. Agissant avec ou sans bases contractuelles avec la Cour, les intermédiaires assistent le bureau de multiples façons. Souvent ils aident le Procureur à trouver et contacter des témoins, ou mener des autres pistes dans les enquêtes, ou de faire les liens et garder les contacts entre le bureau et les témoins, particulièrement en situations dangereuses. Les intermédiaires peuvent également assister et aider le bureau à trouver et recueillir des informations et tout autre élément de preuves.

La coopération avec les intermédiaires est très utile pour la Cour et sans intermédiaires le bureau de procureur ne pourrait pas mener une enquête efficace, mais cette coopération engendre également des risques sur les droits à un procès équitable. Le Statut de Rome ne pourvoit aucune clause pour les superviser, ni pour les tenir responsable pour leur conduite. Pour cette raison il faut que la Cour régisse ses rapports avec les intermédiaires.

L'auteure de la mémoire soutient que le recours aux intermédiaires par le Bureau du Procureur compromet les droits de l'accusé. En effet, même si le Statut de Rome reprend quasiment mot pour mot les dispositions concernant les garanties d'un procès équitable contenues dans le Pacte international relatif aux droits civils et politiques, une telle dépendance met ces garanties en péril. Cela renforce l'idée que le Statut de Rome n'est pas un texte cohérent dans la mesure où les

dispositions qui prévoient le rassemblement des preuves demeurent très ambiguës. Le recours à des intermédiaires est en constante progression et il est donc important que les mentions relatives au droit à un procès équitable soient mieux articulées. Dans ce sens, il serait souhaitable qu'une nouvelle législation voit le jour. La Cour doit aussi jouer un rôle financier majeur afin de soutenir une meilleure coopération entre le Bureau du Procureur et les intermédiaires.

Après avoir institué la CPI, sans toutefois lui conférer une force de police, les fondateurs se sont mis d'accord pour que le facteur clé de son succès soit la coopération internationale et l'assistance juridique. Cependant, les Etats qui manquent de volonté ou qui sont dans l'incapacité de poursuivre des crimes contre l'humanité ne sont pas nécessairement des collaborateurs fiables ; et cela les fondateurs ne l'ont pas pris en considération. Le Statut de Rome permet à la Cour d'inviter les intermédiaires à coopérer pour rassembler des preuves, mais ne prévoit rien pour encadrer cette coopération. De plus, le texte ne met en place aucun mécanisme qui permettrait de tenir les intermédiaires responsables de leur conduite selon la situation donnée.

Des problèmes peuvent surgir en raison du fait que les intermédiaires ne sont pas affiliés à la Cour. Ils assistent la Cour en fournissant des informations et des pièces pour l'enquête, déjà rassemblées pendant leur travail, et coopèrent avec celle-ci pour avancer dans leurs buts. Cependant, il ne fait aucun doute quant au fait que les garanties d'un procès équitable ne sont pas respectées. Aussi, le Statut de Rome prévoit que le Procureur a la charge de conduire l'enquête pour établir la vérité, mais le texte ne confère pas à la Défense des moyens réels pour contester ses actions. D'autre part, le Statut de Rome autorise le Bureau du Procureur à sous-traiter ses responsabilités aux intermédiaires, auquel cas, il abandonne la supervision qu'il doit avoir sur l'enquête. Dès lors, il perd véritablement sa position de dirigeant de l'enquête et le contrôle lui en échappe. De ce fait, plusieurs problèmes, ayant un effet direct ou indirect sur les droits de l'accusé, surviennent.

Puisque le Bureau du Procureur bénéficie des preuves rassemblées par les intermédiaires pendant leurs missions habituelles, le nombre de cas susceptibles d'entraîner des poursuites devant la CPI devient limité. Beaucoup d'éléments ainsi obtenus ne sont pas pertinents pour établir une quelconque responsabilité pénale individuelle. Comme la plupart des preuves fournies par les intermédiaires sont obtenues sous couvert de clauses de confidentialité, les droits de l'accusé, en particulier son droit de disposer du temps et des facilités nécessaires à la préparation de sa défense et son droit d'être jugé sans retard excessif, sont mis en danger. Les preuves fournies par les intermédiaires peuvent également compliquer le travail des juges. En effet, ce sont eux qui doivent vérifier les nombreux éléments de preuves qui ne sont pas forcément en adéquation avec les cas à traiter. Ainsi, ils ne doivent pas seulement déterminer si l'accusé est pénalement responsable, ils doivent aussi évaluer la valeur probante de chaque pièce.

En plus de cela, la jurisprudence de la CPI a déjà montré que certains intermédiaires fabriquent intentionnellement des preuves. La Défense, en possession de moyens limités pour mener sa propre enquête, est donc confrontée à d'énormes difficultés lorsqu'elle étudie les liens entre les preuves et les intermédiaires dans le but de rechercher d'éventuelles falsifications. Les juges qui ne connaissent pas bien les particularités socio-culturelles des situations et qui sont surchargés par l'examen des preuves venant de multiples sources, ne sont pas en mesure de rectifier la situation. Ils ne peuvent simplement pas reconnaître les preuves qui sont fausses. Si le Bureau du Procureur ne peut pas superviser le travail des intermédiaires, ceux-ci ont la possibilité d'abuser de la situation des témoins avec lesquels ils entrent en relation. Il est très difficile pour la Défense de prouver une telle situation et il l'est d'autant plus pour les juges de l'évaluer. Par conséquent, l'accusé peut voir sa culpabilité reconnue en deçà de tout doute raisonnable.

Non seulement le recours aux intermédiaires par les enquêteurs de la Cour viole les droits de l'accusé mais la pratique montre aussi que cette dépendance va aller croissante dans le futur. En commençant la rédaction d'un « Projet de directives

régissant les relations entre la Cour et les intermédiaires », la CPI a montré sa compréhension des multiples risques engendrés par ces relations. Elle prend ainsi conscience de la nécessité de régir les rapports qu'elle entretient avec les intermédiaires. L'auteur de la thèse soutient que ce Projet devrait être mis en œuvre aussi vite que possible. Toutefois, la Cour doit également allouer les ressources adéquates pour maintenir et améliorer les relations avec les intermédiaires. Les moyens financiers, en particulier en ce qui concerne les coûts liés à la protection, le remboursement des frais et le renforcement des capacités, sont indispensables pour la pleine réalisation du Projet. Les garanties d'un procès équitable énoncées dans le Statut de Rome ne peuvent être pleinement respectées que si la Cour fournit les moyens institutionnels et budgétaires permettant de renforcer l'efficacité des rapports entre les intermédiaires et la Cour et, plus généralement, ses opérations.

Kati Roostar.

06.05.2013



Table of Abbreviations

CAR	Central African Republic
The UN Charter	Charter of the United Nations
The Code of Conduct	Code of Conduct for Investigators
The Draft Policy	Draft Policies Regulating the Relationship between the ICC and the Intermediaries
DRC	Democratic Republic of Congo
The Guidelines	Guidelines Governing the Relations between the Court and Intermediaries
ICCPR; the Covenant	International Covenant of Civil and Political Rights
ICC or the Court	International Criminal Court
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IGO	Intergovernmental Organization
LRA	Lord's Resistance Army
OTP	Office of the Prosecutor
OPCV	Office of the Public Counsel for Victims
PTC	Pre-Trial Chamber
PIDS	Public Information and Documents Section
RPE	Rules of Procedure and Evidence
SC	Security Council
UNSC	Security Council of the United Nations
The Rome Statute; the Statute	Statute of International Criminal Court
UNHD	United Nations Human Rights' Division
UNAMID	United Nations Mission in Darfur
MONUC	United Nations Mission in the Democratic Republic of Congo
TFV	Trust Fund for Victims
UN	United Nations
UNHR Committee	UN Human Rights Committee
VWU	Victims and Witnesses Unit

Bibliography

Articles & Books:

- Annan, Kofi. (1997). Advocating for An International Criminal Court. *Fordham International Law Journal*, 21. pp 363-366.
- Baylis, Elena A. (2008). Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks. *Pittsburgh University of Law, Legal Studies Research Paper Series*. Working Paper N. 2008-06. pp 1-84.
- Baylis, Elena A. (2009). Outsourcing Investigations. *University of Pittsburgh, Legal Studies Research Paper Series, Working Paper No. 2010-20*. pp 122-143. Available at: <http://ssrn.com/abstract=1604561>. (last visited 05.05.2013).
- Bellelli, Roberto. (2010). International Criminal Justice: Law and Practice from the Rome Statute to Its Review. Farnham, Surrey, GBI: Ashgate Publishing Group.
- Combs, Nancy A. (2010). Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions. Cambridge: Cambridge University Press.
- De Smet, Simon. (2009). A Structural Analysis of the Role of the Pre-Trial Chamber in the Fact-Finding Process of the ICC. Ch 22, pp 405-440. In: *The Emerging Practice of the International Criminal Court* (eds Stahn, Carsten & Sluiter, Göran). 2009 Leiden; Boston: Martinus Nijhoff Publishers.
- Del Ponte, Carla. (2006). Investigation and Prosecution on Large-scale Crimes at the International Level. *Journal of International Criminal Justice*, 4. pp 539-558.
- De Vos, Christian M. (2011). Prosecutor v. Lubanga 'Someone Who Comes Between One Person and Another': Lubanga, Local Cooperation and the Right to a Fair Trial. *Melbourne Journal of International Law*, 12. pp 217-236.
- Flint, Julie & de Waal, Alex. (2009). Case Closed: A Prosecutor Without Borders. *World Affairs*. Available at: <http://www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders> (last visited 04.05.2013)
- Gladius, Marlies. (2008). Global Justice Meets Local Civil Society: The International Criminal Court's Investigation in the Central African Republic. *Alternatives*, 33. pp 413-433.

Groulx, Elise. (2010). "Equality of Arms": Challenges Confronting the Legal Profession in the Emerging International Criminal Justice System. *Revue quebecoise de droit international*, vol: Hors-série. pp 22-38.

Knoops, Geert-Jan Alexander. (2007). International and Comparative Criminal Law. *Volume 27: Defenses in Contemporary International Criminal Law* (2nd ed). Leiden, NLD: Martinus Nijhoff Publishers.

Kuschnik, Bernard. (2009). International Criminal Due Process in the Making: New Tendencies in the Law of Non-Disclosure in the Proceedings before the ICC. *International Criminal Law Review*, vol 9. pp 157-185.

Kuzmanov, Betina. (2001). An Uneasy Synergy: The Relationship Between Non-Governmental Organizations and the Criminal Court. *Windsor Review of Legal and Social Issues*, 11. pp 7-39.

Lyons, Beth S. (2011). Enough is enough: the illegitimacy of international criminal convictions: a review essay of Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions by Nancy Amoury Combs. *Journal of Genocide Research*, 13/3. pp 287-312.

Minogue, Elizabeth C. (2008). Increasing the Effectiveness of the Security Council's Chapter VII Authority in the Current Situations Before the International Criminal Court. *Vanderbilt Law Review*, 61/2. pp 647-680

Miraglia, Michela. (2006). The First Decision of the ICC Pre-Trial Chamber. *Journal of International Criminal Justice*, 4. pp 188-195.

Miraglia, Michela. (2008). Admissibility of Evidence, Standard of Proof, and Nature of the Decision in the ICC Confirmation of Charges in *Lubanga*. *Journal of International Criminal Justice*, 6. pp 489-503.

Nowrot, Karsten. (1998). Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law. *Indiana Journal of Global Legal Studies*, 6/2. pp 578-643.

Röben, Volker. (2003). The Procedure of the ICC: Status and Function of the Prosecutor. *Max Planck UNYB*, 7. pp 513-552.

Scheffer, David. (2009). A Review of the Experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence in emerging practice. In: *The Emerging Practice of the International Criminal Court* (eds Stahn, Carsten & Sluiter, Göran). Leiden; Boston: Martinus Nijhoff Publishers.

Sluiter, Göran. (2009). Human Rights Protection in the ICC Pre-Trial Phase. Ch 24, pp 459-476. In: *The Emerging Practice of the International Criminal Court* (eds Stahn, Carsten & Sluiter, Göran). Leiden; Boston: Martinus Nijhoff Publishers.

Stuart, Heikelina V. (2008). The ICC in Trouble. *Journal of International Criminal Justice*, 6. pp 409-417.

Sunga. (2003). Will the International Criminal Court Be Fair and Impartial. *Asian Human Rights Commission*, 2/1. Available at: <http://www.humanrights.asia/resources/journals-magazines/article2/0201/will-the-international-criminal-court-be-fair-and-impartial>. (last visited at 04.05.2013).

Sunga, Lyal S. (2011). How Can UN Human Rights Special Procedures Sharpen ICC Fact-Finding? *The International Journal of Human Rights*, 15/2. pp 187-205.

Thomas, Andrea E. K. (2006). Nongovernmental Organizations and the International Criminal Court: Implications of Hobbes' Theories of Human Nature and the Development of Social Institutions for Their Evolving Relationship, *Emory International Law Review*. pp 435-472.

Walker, Andrew J. (2003-2004). When a Good Idea Is Poorly Implemented: How the International Criminal Court Fails to Be Insulated from International Politics and to Protect Basic Due Process Guarantees. *West Virginia Law Review* 106. pp 245-304.

Whiting, Alex. (2009). Lead Evidence and Discovery Before the International Criminal Court: The Lubanga Case. *UCLA Journal of International Law and Foreign Affairs*, 14. pp 209-234.

Legislation:

United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: <http://www.refworld.org/docid/3ae6b3930.html> [accessed 6 May 2013]

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 6 May 2013]

UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html> [accessed 6 May 2013]

UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August

2007, CCPR/C/GC/32, available at:
<http://www.refworld.org/docid/478b2b2f2.html> [accessed 6 May 2013]

UN General Assembly, *Relationship Agreement Between the United Nations and the International Criminal Court*, 20 August 2004, A/58/874, available at:
<http://www.refworld.org/docid/43f203bb4.html> [accessed 6 May 2013]

Assembly of State Parties, *Rules of Procedure and Evidence of the International Criminal Court*, 09 September 2002, ICC-ASP/1/3, at 10, and Corr. 1 (2002), U.N. Doc. PCNICC/2000/1/Add.1 (2000).

UN Security Council, *Security Council resolution 1856 (2008) [on extension of the mandate of the UN Organization Mission in the Democratic Republic of the Congo (MONUC)]*, 22 December 2008, S/RES/1856 (2008), available at:
<http://www.refworld.org/docid/4961deff1a.html> [accessed 6 May 2013] (**SC res 1856 of 2008**)

UN Security Council, *Security Council Resolution 1593 (2005) on Violations of International Humanitarian Law and Human Rights Law in Darfur, Sudan*, 31 March 2005, S/RES/1593 (2005), available at:
<http://www.refworld.org/docid/42bc16434.html> [accessed 6 May 2013] (**SC res 1593 of 2005**)

Refugees International, *UN Security Council Resolution 1769 for Darfur: An Important but Insufficient First Step Towards Protecting Civilians*, 2 August 2007, available at: <http://www.refworld.org/docid/47a6ee9d0.html> [accessed 6 May 2013] (**SC res 1769 of 2007**)

Case Law

ICC-01/04-0-06. 15.05.2006. Decision on the Final System of Disclosure and the Establishment of a Timetable. *Pre-Trial Chamber I*. (ICC-01/04-0-06. (2006). **Decision on Disclosure**)

ICC-01/04-545. 04.11.2008. Decision on the Applications for Participation Filed in Connection with the Investigation in the DRC by Applicants. *Pre-Trial Chamber I*. (ICC-01/04-545.(2008). **Decision on the Applications for Participation**)

ICC-01/04-01-06. 13.06.2008. Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by Article 54(3)(e) Agreements. *Trial Chamber I*. (ICC-01/04-01-06. (2008). **Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by Article 54(3)(e) Agreements.**)

ICC-01/04-01/06. 02.07.2008. Decision on the Release of Thomas Lubanga Dyilo. *Trial Chamber I*. (ICC-01/04-01/06. (2008). **Decision on the Release of Lubanga**)

ICC-01/04-0-06. 31.05.2010. Decision on Intermediaries. *Trial Chamber I*. (ICC-01/04-0-06. (2010). **Decision on Intermediaries**)

ICC-01/04-01/06. 14.04.2012. Judgment Pursuant to Article 74 of the Statute. *Trial Chamber I*. (ICC-01/04-01/06. (2012). **Judgment, Prosecutor v. Lubanga**)

IT-95-9-T. 17.10.2003. Prosecutor v. Blagoje Simić, Miroslav Tadić, Simo Zarić. *Trial Chamber II*. (ICTY Prosecutor v. Simić)

IT-99-36-T. 01.09.2004. Prosecutor v. Radoslav Brdjanin. *Trial Chamber II*. (ICTY Prosecutor v. Brdjanin)

IT-94-1-A. 15.07.1999. Prosecutor v. Dusko Tadić. *Appeals Chamber*. (ICTY Tadić Appeal)

ICTR-95-1-A. 01.06.2001. The Prosecutor v. Clément Kayishema and Obed Ruzindana. *Appeals Chamber*. (ICTR Kayishema and Ruzindana Appeal)

ICJ. The Corfu Channel Case. 09.04.1949. United Kingdom of Great Britain and Northern Ireland v. Albania. (The Corfu Channel Case)

IT-95-14-AR108 bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (Oct. 29, 1997), (ICTY Prosecutor v. Blaskić)

Other material

ICC Materials:

ICC. (2010). Project to Define Policies Governing Relations Between the ICC and Intermediaries. Draft. *Maanweg 174, 2516 AB The Hague, The Netherlands* www.icc-cpi.int. On file with the author.

ICC-ASP/11/30. (2012) Report of the Bureau on the Strategic planning process of the International Criminal Court, , , 6 November 2012 Available at: http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-30-ENG.pdf. (last visited 02.05.2013).

ICC-ASP/11/20. (2012). Strengthening the International Criminal Court and the Assembly of States Parties, 21 November 2012, para 50. Available at: http://icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP11/ICC-ASP-11-Res8-ENG.pdf. (last visited 02.05.2013).

ICC-02/05. (2006). Prosecutor's Response to Cassese's Observation on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC. Available at: <http://www.icc-cpi.int/iccdocs/doc/doc259764.pdf>. (last visited 04.05.2013).

ICC OTP. (2006). Report on the Activities Performed During the First Three Years (June 2003-June 2006). Available at: http://www.icc-cpi.int/NR/ronlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf. (last visited 04.05.2013).

NGO Materials:

ICRC (International Coalition for the Red Cross) Guidelines. (2005). Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence. *International Review of the Red Cross* 87/858. pp. 393–400.

ILA (International Law Commission). (2004). Accountability of International Organizations. *Final Conference Report, Berlin*. Available at: <http://www.ila-hq.org/en/committees/index.cfm/cid/9>. (last visited 05.05.2013).

Kippenberg, Juliane. (2004). The International Criminal Court: How Nongovernmental Organizations Can Contribute To The Prosecution Of War Criminals. *Human Rights Watch*. A Guide. Available at: http://www.iccnw.org/documents/HRW_iccProsecutions_0904.pdf (last visited 04.05.2013).

Open Society Justice. (2011). Intermediaries and the International Criminal Court: A Role for the Assembly of States Parties. *Open Society Justice Initiative*. Available at: <http://www.opensocietyfoundations.org/publications/intermediaries-and-international-criminal-court-role-assembly-states-parties>. (last visited 04.05.2013).

Victims' Rights Working Group (VRWG). (2013). VRWG Submission Ahead of the Discussions on Intermediaries to Take Place in The Hague Working Group available at: http://www.iccnw.org/documents/2013_March_VRWG_HWG_Intermediaries.pdf (last visited 01.05.2013).

Nice, Geoffrey. (10.04.2013). State Involvement in War Crimes. *Gresham College, Lecture in Bernard's Inn Hall*. Available at: <http://www.gresham.ac.uk/lectures-and-events/state-involvement-in-war-crimes-trials> (last visited at 01.05.2013).

Websites:

AVEGA (Association of the Widows of Rwanda) official website. (2013). Available at: <http://avegaagahozo.org/>. (last visited 04.05.2013).

IBUKA official website. (2013). Available at: <http://www.ibuka.rw/>. (Last visited 04.05.2013).

ICC Website. (2013):

How Many Countries Have Ratified the Rome Statute? Available at: http://www.icc-cpi.int/en_menus/icc/about%20the%20court/frequently%20asked%20questions/Pages/4.aspx (last visited 04.05.2013).

Situations and Cases. Available at: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx. (last visited 04.05.2013).

Structure of the Court. Available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/Pages/structure%20of%20the%20court.aspx. (last visited 04.05.2013).

News & Newspaper Articles:

IRIN (UN Integrated Regional Information Networks). (29.01.2013). Analysis: Cash-strapped ICC Takes on Mali. Available at: <http://www.irinnews.org/report/97359/Analysis-Cash-strapped-ICC-takes-on-Mali>. (last visited 01.05.2013).

Oxfam International. (22.11. 2005). Recent killings of aid workers leave hundreds of thousands without help and living in fear in northern Uganda. Press Release. Available at http://www.oxfam.org/en/news/pressreleases2005/pr051026_uganda. (last visited 1 May 2013).

Polgreen, Lydia & Simons, Marlise. (11.07.2008). The Pursuit of Justice vs. The Pursuit of Peace. *New York Times*. Available at: http://www.nytimes.com/2008/07/11/world/africa/11sudan.html?pagewanted=all&_r=0. (last visited 05.05.2013).

Reuters. (27.02.2013). U.N. Security Council asks for report on possible Mali peacekeepers <http://www.reuters.com/article/2013/02/27/us-mali-crisis-un-idUSBRE91Q1EX20130227>. (last visited 04.05.2013).

Simons, Marlise. (21.11.2010). For International Criminal Court, Frustration and Missteps in Its First Trial. *The New York Times*. Available at http://www.nytimes.com/2010/11/22/world/europe/22court.html?pagewanted=all&_r=0. (last visited 05.05.2013).

Sudan Tribune. (04.03.2009). Sudan Expels 10 Aid NGOs and dissolves 2 local groups. Available at: <http://www.sudantribune.com/Sudan-expels-10-aid-NGOs-and,30382> (last visited 1 May, 2013).

Wakabi, Wairagala. (08.02.2010). Lubanga Witness Says He Was Paid USD200 To Tell Lies. *The Lubanga Trial at the International Criminal Court*. Available at: <http://www.lubangatrial.org/2010/02/08/lubanga-witness-says-he-was-paid-us200-to-tell-lies/>. (last visited 05.05.2013).

The Secretary General. (2006). *Report of the Secretary-General Pursuant to Resolutions 1653 (2006) and 1663 (2006)*, 51, delivered to the Security Council, U.N. Doc. S/2006/478 (June 29, 2006), available at <http://daccessdds.un.org/doc/UNDOC/GEN/NO6/415/40/PDF/N0641540.pdfOpenElement>.

Table 1.

Function	Organ/Unit	Activities carried out (non-exhaustive)
To assist in carrying out outreach and public information activities in the field.	Public Information and Documents Section (PIDS)	<ul style="list-style-type: none"> • Raise awareness of the affected communities in “situation” countries about the Court and its work and conduct outreach activities • Raise public awareness about the Court and provide information relating to the Court • Inform victims about TFV • Organize capacity building workshops for or with local actors (including officials, media, legal profession, community leaders, NGOs)
To assist a party to conduct investigations in identifying evidentiary leads and/or witnesses and facilitate contact with witnesses.	OTP Counsel	<ul style="list-style-type: none"> • Monitor the situations and document international crimes • Assist in the preservation of evidence • Assist the OTP to locate and contact witnesses and other investigative leads, and/or to maintain contacts between the OTP and witnesses (for both investigation and protection purposes), particularly where it is adjudged to be too insecure for OTP staff to do so directly • Assist Defense Counsel to contact potential witnesses and collect evidence for a particular submission • Assist legal representatives of victims to contact potential witnesses and collect evidence for a particular submission
To assist (potential victims in relation to submission of an application, request for supplementary information and/or notification of decision concerning representations, participation or reparations.	Victims Participation and Reparations Section (VPRS); Office of the Public Counsel for Victims (OPCV)	<ul style="list-style-type: none"> • identify victims in affected communities • inform victims to get in touch with the Court • Assist Court staff to meet with victims • Assist victims in completing applications for representations, participation or reparation • Provide support and assistance to victims linked to their participation, e.g. psychosocial services, security, legal services etc. • Facilitate the information flow between the Court and the victim applicants e.g. to obtain missing information or implement other orders of the Chambers • Assist victims to understand judicial decisions of the Court relevant to them (eg regarding common legal representation or criteria for acceptance as a victim)
To communicate with a victim/witness, in situations in which direct communication could endanger the safety of the victim/witness	OTP Counsel; Victims and Witnesses Unit (VWU) Counsel; VPRS	<ul style="list-style-type: none"> • Assist OTP to communicate with victims to communicate with victims/witnesses • Facilitate the flow of information between the Court and the victim applicants • Assist the OPCV or VPRS to communicate with victims • Act as the first contact point, receiving security concerns and providing them with advice • Monitor the physical and psychological well-being of victims and witnesses • Locate and/or provide medical assistance, psychological support and other services for victims and witnesses • Assist witnesses to appear before the Court
To liaise between Legal	OTP Counsel;	<ul style="list-style-type: none"> • Facilitate contact between victims and their legal

Representatives and Victims for the purposes of victim participation / reparations.	VWU Counsel; VPRS; OPCV	representative to convey information to clients, collect evidence for a particular submission, and determine victims' views and concerns and/or obtain instructions
To assist the TFV to identify potential benefactors and / or to implement TFV schemes in connection with the use of their "other resources" or to implement reparations orders of the Court	Trust Fund for Victims (TFV)	<ul style="list-style-type: none"> • Inform victims about the TFV • Assist staff of the Secretariat of the TFV to identify and implement projects for the benefit of victims and their families, and to communicate with victims

Lihtlitsents

Lihtlitsents lõputöö reprodutseerimiseks ja lõputöö üldsusele kättesaadavaks tegemiseks

Mina Kati Roostar (sünnikuupäev: 01.12.1986)

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