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Front cover: *Mr. Renzo Scarpelli of Florence at work, one of the leading* pietre dure *craftsmen and artists in the world. He displays the utmost quality control in his selection of motive, types of stone, their preparation, combination, and finish. In his field, Mr. Scarpelli epitomizes the idea of quality control, as illustrated by this picture. As such, he symbolizes the craftsman-like sense of quality that should be exercised in the establishment and operation of non-criminal justice fact-finding mandates. Photograph: © TOAEP 2012.*

Back cover: *A centuries old, hand-made brick taken from the wall during the restoration of the CILRAP Bottega or office in Florence. Quality control entails immediate engagement with the matter before us, seeking to alleviate hollowness or weak foundation through a hands-on approach. Photograph: © TOAEP 2020.*

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International(ised) Criminal Justice at a Crossroads: The Role of Civil Society in the Investigation of Core International Crimes and the 'CIJA Model'

William H. Wiley*

19.1. Introduction

International(ised)[1] criminal justice is at a crossroads: State-donor fatigue, driven by dissatisfaction with the financial cost relative to output of international courts and tribunals – mostly the International Criminal Court ('ICC') and the United Nations International Residual Mechanism for Criminal Tribunals ('MICT') – has given rise to a much-reduced preparedness on the part of Western States to agree to the establishment of new international courts and tribunals.[2] As an alternative, the international

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[1] The adjective 'international(ised)' is employed in this chapter to denote purely international bodies, such as the International Criminal Court ('ICC') and the United Nations *ad hoc* Tribunals, hybrid courts, and tribunals as well as domestic courts addressing the alleged perpetration of core international crimes.

[2] 'Hybrid' courts and tribunals are bodies which bring together, in the same institution, domestic and international judicial actors. Such institutions generally apply international criminal and humanitarian law as well as domestic substantive and procedural provisions. Examples of hybrid bodies include the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the Court of Bosnia and Herzegovina, and the Special Tribunal for Lebanon. The initial appeal of hybrid bodies, in the minds of the States funding them, was their limited budgets relative to the United Nations *ad hoc* Tribunals as well as the ICC. For its part, civil society champions of the hybrid model have pointed to the transitional-justice benefits ostensibly accruing where adjudicative mechanisms are situated in close physical proximity to the conflict-affected societies.

community would appear to be experimenting with the establishment of *ad hoc* criminal-investigative bodies, with annual budgets in the region of USD 12,000,000 to 20,000,000. Three such institutions were established during 2016–2018.[3] However, the so-called International, Impartial and Independent Mechanism ('IIIM'), the United Nations Investigative Team for Accountability of Da'esh/ISIL ('UNITAD'), and the Independent Investigative Mechanism for Myanmar ('IIMM') have no adjudicative arm nor, for that matter, any prosecutorial role. It remains to be seen how they will entreat in practice with domestic and international courts. It appears unlikely that the world of international(ised) criminal justice is seeing the start of a trend towards the establishment of United Nations-mandated, criminal-investigative bodies in response to each and every situation in which there are credible reports of the widespread perpetration of core international crimes.[4] Amidst all this, groups claiming to speak for victims

[3] The IIIM was established by the United Nations General Assembly ('UNGA') through UNGA resolution 71/248 (December 2016), International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, UN Doc. A/RES/71/248, 11 January 2017, para. 4 (https://www.legal-tools.org/doc/fecaf0). It is known formally as the International, Impartial and Independent Mechanism to assist in the investigation and prosecution of persons responsible for the most serious crimes under International Law committed in the Syrian Arab Republic since March 2011. UNITAD (the United Nations Investigative Team for Accountability of Da'esh/ISIL) was created by the United Nations Security Council ('UNSC') through UNSC resolution 2379 (September 2017). Finally, the IIMM (Independent Investigative Mechanism for Myanmar) was called into being by Human Rights Council ('HRC') resolution 39/2 (September 2018).

[4] The limited (that is, Islamic State in Iraq-specific) mandate of UNITAD reflects the fact that it was established by the UNSC, where three of the five Permanent Members (that is, France, the United Kingdom and the United States) were engaged militarily against Da'esh when UNSC resolution 2379 was passed. For its part, a fourth Permanent UNSC Member, the Russian Federation, was concomitantly attacking Islamic State forces in Syria – at least in those operational sectors where Da'esh constituted a military threat to the Government of Syria. The broad mandate of the IIIM to examine allegations of criminal misconduct by all belligerent parties to the war is far more problematical, from a politico-diplomatic point of view, insofar as a number of Western States see the Syria Mechanism as an unwelcome precedent for the establishment, through the UNGA, of further investigative bodies designed to target allied States, in particular, Israel. Other considerations mitigating against the establishment of additional conflict-specific investigative mechanisms include (i) the desire of ICC States Parties to avoid the creation of public bodies whose jurisdiction might overlap with that of the ICC, for fear of undermining the latter, and (ii) the financial cost of these limited initiatives which, whilst modest compared to an entire court or tribunal, is not insignificant. All things considered, the establishment by the HRC of the IIMM in Septem-

in conflict-affected societies are increasingly frustrated with the pace at which criminal prosecutions for violations of core international crimes are being brought – where cases are brought at all. By 2025, there is every possibility that the only international court or tribunal will be the ICC. In that event, the well-documented problems which the ICC Office of the Prosecutor ('OTP') has in bringing substantive cases to trial and in securing convictions on a consistent basis threatens to reduce that body to the sort of practical irrelevancy which plagued the International Court of Justice during the Cold War.

The leadership cadres dominating the existing international offices of the prosecutor, including that of the ICC, are collectively a good deal more capable than they have ever been. A wealth of creative thinking is very much in evidence, not least in response to (i) funding constraints and (ii) certain intractable challenges inherent where investigations require forays into high physical-risk environments. The same might be said about the leadership of the IIIM, UNITAD and IIMM[5] as well as the war-crimes programmes situated in key Western States. However, more out-of-the-box thinking shall be required if the system of international(ised) criminal justice is to remain a stalwart in the fight against impunity for core international crimes. For instance, investigations must be more expeditious in order to facilitate timely prosecutions with an eye to meeting the demands of conflict-affected societies as well as donor States. What is more, the sort of enhanced investigative pace posited here in response to outbreaks of egregious violations of international criminal and humanitarian law, such as that witnessed in Syria from 2011, must be realised at a cost much reduced from current expenditures, the latter being clearly unsustainable in the minds of the national governments footing the bills. Aside from donor concerns regarding ICC and MICT expenditures, the cost-to-output ratio of the IIIM was first called into question fewer than two years after it was established.[6]

ber 2018 came as something of a surprise insofar as there was only modest political opposition to the IIMM initiative.

5 At the time of publication, key personnel in all three mandates formerly served at the ICTY.

6 Since the last quarter of 2018, the author of this chapter has been questioned in increasingly pointed terms by a range of Western diplomats (speaking privately) and non-governmental actors (in public forums) regarding the perceived – by the various interlocutors – insufficiency of output of the IIIM which had begun concomitantly to signal a desire to its donors that its annual budget should rise by not less than 50 per cent in the near term.

The demands of donors for greater efficiency, coupled with the understandably low physical-risk tolerance of public institutions, can be met only through the effective engagement of civil society in criminal-investigative processes, where the development of both crime-bases and linkage-cases is concerned. The system of international(ised) criminal justice might be saved in something like its current form – and indeed strengthened – only through the establishment of effective public–private partnerships at the investigative stage. Recent United Nations tinkering with the architecture of international(ised) criminal investigations, whilst most welcome, will not in and of itself solve all or even most of the challenges plaguing this structure; simply put, the root of the difficulties undermining purely public-sector investigations lies in the general inability of public institutions to collect evidence in high physical-risk situations or otherwise find expeditious routes into operational environments characterised by politico-diplomatic complexity.

Founded as it was with a detailed understanding of the unavoidable limitations of public institutions, the Commission for International Justice and Accountability ('CIJA') constitutes the first meaningful effort on the part of a private institution – in this case, a non-profit foundation – to undertake investigations to criminal-evidentiary standards with the sole objective of rendering support to public investigative and prosecutorial organs, both international and domestic. What is more, since its establishment in 2011, CIJA has demonstrated the immense contribution which a private institution, led by personnel with experience of both the criminal investigation and prosecution of core international crimes, is able to make to the pursuit of criminal justice whilst operating on, by public-sector standards, a modest budget.

It is the practice of CIJA to defer on questions of law to those of its partners with a prosecutorial arm, the primary role of CIJA being to secure evidence for present and future prosecutions within complex operating environments where the public-sector investigative response to the

In the event, the objectives of the IIIM are not the business of the CIJA. The fact that senior CIJA personnel are being questioned about such matters is evidently a function of a prevailing understanding amongst Syria observers that the IIIM will assume responsibility not only for the immense volumes of *prima facie* evidence collected by the CIJA in Syria since 2011, but also for the prosecution case-building function of the CIJA, where the Syrian regime and Islamic State operations in Syria are concerned. The IIIM has enjoyed access to all CIJA evidence relevant to the mandate of the IIIM since 2017. CIJA leaves it to others to determine what the CIJA should do with these materials.

perpetration of egregious core international crimes is unavoidably weak or non-existent. Whilst not envisioned by the founder of CIJA at its creation, the application of the CIJA model has had the unintended effect of affording to civil society – and especially the conflict-affected populations alongside which CIJA engages – a voice in the application of international criminal justice which has most certainly not been characteristic of the international-adjudicative institutions established since 1993, for instance, the United Nations *ad hoc* Tribunals and the ICC. Where the CIJA model is applied in a conflict zone, decisions on what is investigated and how tend to be taken in part from the hands of public officials and placed into those of civil-society groups with an investigative focus such as CIJA. In turn, such a civil-society actor, required as it is to conform to the evidentiary standards informing criminal investigations and prosecutions, must distribute the responsibility for evidence collection within its own structure between international criminal and humanitarian law specialists and the locally retained personnel who are responsible in the first instance for the collection of *prima facie* evidence. Public–private partnerships operating in the justice space necessarily shift decision-making power to a degree from the public space to the private – and, arguably, from the international level to the domestic.[7]

In CIJA's experience, public-sector investigative and prosecutorial authorities are comfortable with this evolution in the power dynamic in the investigation of core international crimes, if that they give it any thought at all. Where the partial shift of power from the public to the private domain *is* questioned – invariably in the context of a discussion on whether it is desirable that a private organisation should be undertaking complex criminal investigations – such concerns have been put forward, somewhat paradoxically, by international human rights groups which have long been calling for a greater role to be played by conflict-affected societies in criminal justice processes. The view taken here is that the international human-rights community might wish to compare the socio-justice benefits to a conflict-affected population of passive participation in inter-

[7] On the question of the ownership, so to speak, of international criminal justice and the CIJA, see Melinda Rankin, "Investigating Crimes Against Humanity in Syria and Iraq: The Commission for International Justice and Accountability", in *Global Responsibility to Protect*, 2017, vol. 9, no. 4, pp. 395–421; Rankin, "The Future of International Criminal Evidence in New Wars? The Evolution of the Commission for International Justice and Accountability (CIJA)", in *Journal of Genocide Research*, 2018, vol. 20, no. 3, pp. 392–411.

national(ised) criminal justice processes, through victim-participation arrangements and the like, with those to be accrued where local civil-society actors have a role in shaping, alongside international experts, the wider criminal justice response to the alleged perpetration of core international crimes.

19.2. Current Level of International(ised) Investigative Capacity

The difficult situation in which international(ised) criminal justice finds itself is not immutable. International criminal and humanitarian law has emerged as a field of legal practice in its own right since 1993, with the discipline now populated by a great many more talented practitioners than the current range of international institutions is capable of employing and, as a reasonable body of available literature demonstrates, the last 25 years have witnessed the emergence of coherent investigative methodologies which can be brought to bear in any situation in which core international crimes have been (or are being) perpetrated. What is more, the domestic application of international criminal and humanitarian law is increasingly widespread in the West, and occasionally seen in the developing world, with a case in point being the successful prosecution of the former President of Chad, Hissène Habré before a specially-constituted trial chamber in Senegal.

The domestication of international criminal and humanitarian law is a necessary rejoinder to politico-diplomatic complexity and the cost of organising an international-institutional response to every conflict and disturbance which has given rise to the perpetration of core international crimes. Most European and North American States now have dedicated 'war-crimes' units, and the co-operation of their investigators, analysts and prosecutors is facilitated greatly by the Eurojust Genocide Network[8] (a group which regularly brings together domestic officials from every credible national programme). Likewise, Europol was afforded competence over war-crimes issues in 2017.[9] Suspects identified by war-crimes units operating within national jurisdictions can expect to be investigated

[8] Formally the European Network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, situated in The Hague, Netherlands.

[9] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA.

and, where the evidence warrants, prosecuted with relative despatch in accordance with fundamental due process guarantees. That noted, there remains very limited capacity outside the West – notwithstanding *Habré* – to investigate and prosecute core international crimes domestically in accordance with the requirements of international criminal and humanitarian law as well as internationally-agreed due process guarantees. The most egregious and widely-known failure in this respect would be the Iraqi High Tribunal which, whilst ostensibly applying international criminal and humanitarian law, had investigations, prosecutions, adjudication and defence advocacy found to be appallingly flawed with near-uniform consistency.[10]

The raw numbers of perpetrators of core international crimes emerging from dictatorships and armed conflicts of any magnitude necessarily render highly symbolic the criminal justice response to each and every situation characterised by a widespread violation of international criminal and humanitarian law. The joint capacity at the present time of international(ised) prosecutorial bodies as well as domestic war-crimes programmes to respond, in even a token manner, to the majority of situations in which international offences are witnessed, is grossly insufficient where the application of international criminal and humanitarian law is seen to be a key tool in the fight against impunity for the perpetrators of egregious crimes. The root of this problem is often the sort of politico-diplomatic resistance to criminal justice accountability which is sometimes evident where efforts are made to bring warring sides to the peace table or otherwise nudge recalcitrant dictators towards retirement. At the same time, the insufficiency of resources referenced here is often a function of the considerable financial cost of undertaking to a criminal law standard of evidence the investigation of high-level perpetrators, that is, suspects who operate at arm's length from the physical acts for which, in law, they might nonetheless be held accountable.

[10] See the selected scholarship of two former IHT international legal advisors: Eric H. Blinderman, "The Execution of Saddam Hussein – A Legal Analysis", in Jann K. Kleffner and Timothy McCormack (eds.), *Yearbook of International Humanitarian Law*, Asser Press, 2006, pp. 153–179; William H. Wiley, "The Case of Taha Yaseen Ramadan before the Iraqi High Tribunal: An Insider's Perspective", in Jann K. Kleffner and Timothy McCormack (eds.), *Yearbook of International Humanitarian Law*, Asser Press, 2006, pp. 181–243. A more charitable assessment of the IHT might be found in Michael A. Newton and Michael P. Scharf, *Enemy of the State: The Trial and Execution of Saddam Hussein*, St. Martin's Press, 2008.

19.3. Civil Society and Criminal Justice

Civil society groups of many stripes – and those concerned with human rights especially – have long railed against the effective impunity enjoyed by all but the unluckiest perpetrators of core international crimes. Such expressions of disquiet are well placed. However, where those calling for an end to de facto impunity come up short is in demanding a criminal-investigative response to every situation in which core international crimes would appear to be perpetrated. Such calls are invariably made without any evident thought having been given to the question of how such engagement might be staffed and funded, even where there are no jurisdictional hurdles to the engagement of a given public institution such as the ICC.

Demands from civil society for the application of criminal justice are extraordinary by virtue of their volume and geographical breadth. By way of random example, in 2016 Human Rights Watch joined Amnesty International and a handful of other (including African) organisations in informing the United Nations Human Rights Council member States that a referral of North Korea to the ICC "should remain a priority for the international community".[11] The year prior, a coalition of human rights groups, including at least one of the signatories to the aforementioned letter, demanded that the ICC Prosecutor commence a preliminary examination into the conduct of State security forces in Mexico.[12] The civil society coalition calling for the referral of the Syria situation to the ICC in 2014 cobbled together the most impressive numbers, that is, a total of 117 groups from around the world.[13] Every apparent outburst of criminality in Africa gives rise to like demands for international-judicial (usually ICC) intervention, the unrest in Burundi constituting but one exemplar.[14] The calls of non-governmental organisations ('NGOs') for ICC engagement in

[11] Human Rights Watch, "Joint Letter to UN Human Rights Council Members, Re: DPRK Resolution – Need for Enhanced focus on Accountability", 15 February 2016 (https://legal-tools.org/doc/87b4qt).

[12] International Federation for Human Rights ('FIDH'), "Human Rights Groups Call on the ICC to Proceed with the Preliminary Examination into the Situation in Mexico", 12 September 2014 (https://legal-tools.org/doc/ghqw0l).

[13] GCHR, "Syria: Groups Call for ICC Referral/Statement by Civil Society Organizations on Need for Justice", 15 May 2014 (available on its web site).

[14] FIDH, "Burundi: NGOs Call for a Special Session of the Human Rights Council", 9 November 2015 (https://legal-tools.org/doc/0g6sjf).

response to alleged crimes perpetrated in Myanmar against ethnic Rohingya were at one juncture too numerous to read.[15] The NGO cacophony clearly caught the attention of policy-political actors, leading indirectly to the establishment of the IIMM whilst concomitantly facilitating a rather novel decision by an ICC pre-trial chamber which afforded the OTP at least partial jurisdiction over *prima facie* crimes perpetrated on the territory of a non-State party to the Rome Statute.[16]

Taken as a whole, demands of the foregoing nature for criminal justice intervention are wildly at odds with the material resources and physical reach of the system of international(ised) criminal justice as it exists currently. The only extant *public* criminal-investigative body which can in principle, where it is afforded jurisdiction, engage anywhere in the world is the ICC-OTP. However, the Investigations Division of the ICC-OTP employs fewer than 100 investigators and analysts, ostensibly tasked with covering the globe; and in 2018, the Division expended approximately EUR 20,000,000 – an impressive figure until one considers that this budget constituted slightly less than 14 per cent of the overall projected cost of maintaining the Court as a whole during the course of the same year.[17] For their part, the IIIM, UNITAD and the IIMM can soon be expected to have similar annual budgets, if they do not already, with which to address relatively narrowly-defined situations, although only the IIMM has been afforded temporal and geographical jurisdiction which overlaps with that of the ICC-OTP. Whereas the ICC and the United Nations criminal-investigative mechanisms are all positioned to support national war-crimes programmes, informed observers can only question the mid-term tolerance of the international community for *investigations* expenditures by the four bodies (that is, the ICC, the IIIM, UNITAD and the IIMM) which are likely to total USD 80,000,000 annually by 2020 or 2021. The problem facing the institutions and their donors is that affording more money to public investigations may not translate readily into more or stronger cases when the public bodies find themselves unable to secure

[15] By way of one example, see Physician for Human Rights, "PHR Joins Call for Myanmar Referral to ICC", 8 May 2018 (available on its web site).

[16] ICC, Pre-Trial Chamber I, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"*, 6 September 2018, ICC-RoC46(3)-01/18-37 (https://www.legal-tools.org/doc/73aeb4).

[17] ICC Assembly of States Parties ('ASP'), "Proposed Programme Budget for 2018 of the International Criminal Court, 11 September 2018", ICC-ASP/16/10 (https://www.legal-tools.org/doc/ac4e16).

ready access to evidence situated in locations to which access by public-sector investigators is complicated greatly by politico-diplomatic challenges as well as considerations of physical risk.

To what extent more (or otherwise higher-quality) evidence might be secured by public institutions, acting singly or in concert with one another, is a question which lies at the heart of this chapter and it shall be addressed below at some length. It has already been posited, as part of the introduction to this chapter, that the public sector needs to collaborate with private partners such as CIJA if it is to secure, in a timely manner, evidence sufficient to facilitate successful criminal prosecutions. As such, NGO demands for more money to be shovelled towards public-sector investigative bodies do not constitute a rational response to otherwise well-placed concerns that the overwhelming majority of perpetrators of core international crimes enjoy *de facto* immunity from prosecution, not least where they find discreet sanctuary in Western States.

What the system of international(ised) criminal justice requires is a tangible contribution from the whole NGO community to the *criminal* investigation of core international crimes. International human rights groups, geared as they are towards advocacy rather than criminal-investigative ends, have proven themselves, with occasional exceptions, to be unable or otherwise unwilling to make any substantial input to prosecution case-building processes. This State of affairs is unconscionable to the extent that it is inconsistent with the important contribution made in other respects by international human rights organisations concerned with questions of international(ised) criminal justice. In particular, human rights groups were instrumental in facilitating the re-emergence of international criminal justice from 1993 after its long, post-Nuremberg slumber; this contribution arguably reached its zenith through the advocacy efforts which gave rise to the Rome Statute of the ICC, followed by its remarkably-swift operationalisation. [18] Unsurprisingly, human rights groups consider themselves to be key stakeholders in the system of international criminal justice. However, as it stands, the relative dearth of concrete evidentiary support provided by NGOs to public criminal-investigative bodies serves only to perpetuate the so-called impunity gap which continues to bedevil the system of international(ised) criminal jus-

[18] Marlies Glasius, *The International Criminal Court: A Global Civil Society Achievement*, Routledge Taylor & Francis Group, 2006.

tice. What international civil society needs to do with its stake in this field of law is to recognise that successful investors seek constantly to facilitate improvement at those points of a given venture where underperformance threatens the efficiency of the enterprise as a whole. The difficulties plaguing international(ised) criminal justice, which has shifted its focus markedly to ongoing armed conflicts from more accessible post-conflict situations such as Rwanda and the former Yugoslavia, are rooted almost entirely in the challenges arising when seeking to secure evidence sufficient to inform successful prosecutions; the sort of victim participation and witness protection questions so highly valued by international NGOs, whilst of indisputable moral significance, are secondary to the core requirements of successful prosecutions. All this is to argue that until civil society mobilises itself to engage effectively at this core, in a manner and to a degree which has not heretofore been witnessed, the prevalence of *de facto* impunity for the perpetrators of core international crimes, which human rights organisations rightly regret, shall remain unchanged.

19.4. Challenges Confronting Public Institutions Operating in the Domain of International(ised) Criminal Justice

If international(ised) criminal justice is to constitute a truly effective response to the prevailing climate of impunity, four interrelated challenges must be addressed: (1) the insufficient evidential quality which has characterised a substantial number of those international investigations that have been subjected to judicial scrutiny; (2) the general absence of any meaningful contribution by civil society to the criminal investigation of core international crimes; (3) the perceived inadequacy of international(ised) criminal justice in the collective minds of conflict-affected societies; and (4) State-donor fatigue, which has its roots in what interested public officials have increasingly come to see as the exorbitant cost relative to output of the international institutions charged with the investigation of core international crimes. Each of these phenomena will be examined in turn.

19.4.1. International Criminal Investigations and Physical Risk

From 2003, when the ICC-OTP became operationalised, through 2015, the ICC issued arrest warrants or summonses to appear for 39 individuals. Thirty-two of these suspects were alleged by the chief Prosecutor to have perpetrated core international crimes; the remaining seven suspects were

accused of offences against the administration of justice (effectively, witness tampering). Of those persons alleged to have perpetrated core international crimes, at the conclusion of 2015, 18 had appeared voluntarily or otherwise before the Court. Of this number, committal proceedings were concluded in 17 cases during the aforementioned period. In four of those cases,[19] the pre-trial chambers refused to confirm any of the prosecution charges. In five additional cases, pre-trial chambers confirmed some of the prosecution charges, although in two instances[20] the prosecution subsequently withdrew all allegations on the grounds that the OTP lacked sufficient evidence to secure a conviction. In a further eight cases, the pre-trial chambers confirmed all of the charges. In those instances where some or all of the charges were confirmed, leading to the accused being committed to trial, trials were concluded in three instances, resulting in two convictions and one acquittal. Convictions in two cases have been registered since 2018 – in *Al-Mahdi* as a result of a guilty plea and in *Bemba* followed a full trial – although all of the convictions in *Bemba* were subsequently vacated in 2018 by an ICC appellate chamber.[21] In early-2019,

[19] ICC, Situation in Darfur, *The Prosecutor v. Bahr Idriss Abu Garda*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red (https://www.legal-tools.org/doc/cb3614); ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465-Red (https://www.legal-tools.org/doc/63028f); ICC, Situation in the Republic of Kenya, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red (https://www.legal-tools.org/doc/4972c0); ICC, Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Pre-Trial Chamber II, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373 (https://www.legal-tools.org/doc/96c3c2).

[20] ICC, Situation in the Republic of Kenya, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Trial Chamber, Decision on the withdrawal of charges against Mr. Muthaura, 18 March 2013 (https://www.legal-tools.org/doc/44ecc9); ICC, Situation in the Republic of Kenya, *The Prosecutor v. Uhuru Muigui Kenyatta*, Trial Chamber V(B), Notice of the withdrawal of charges against Uhuru Muigai Kenyatta, 5 December 2014, ICC-01/09-02/11 (https://www.legal-tools.org/doc/b57a97).

[21] ICC, Situation in the Republic of Mali, *The Prosecutor* v. *Ahmad Al Faqi Al Mahdi*, Trial Chamber VIII, Judgment and Sentence, 27 September 2016, ICC-01/12-01/15-171 (https://www.legal-tools.org/doc/042397) ; ICC, Situation in the Central African Republic, *The Prosecutor* v. *Jean-Pierre Bemba Gombo*, Trial Chamber III, Judgement pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08 (https://www.legal-tools.org/doc/edb0cf); ICC, Situation in the Central African Republic, *The Prosecutor* v.

the OTP found itself confronted with a debacle of arguably greater significance than that presented to it by the appellate judgement in *Bemba*: the collapse mid-trial – on the grounds of insufficient prosecution evidence – of the prosecution of Charles Blé Goudé and his co-defendant, Laurent Gbagbo, the former President of Côte d'Ivoire.

In summary, of the 17 OTP cases that made it through the pre-trial and trial phases by 2015, in four instances the prosecution lacked sufficient evidence to warrant the suspects being committed to trial; in two additional cases, the OTP found itself compelled by a lack of evidence to withdraw the allegations, after the accused had been committed to trial. In a seventh case, the accused was acquitted of all charges following a trial. During the period in which these 17 cases were seen through the pre-trial stage, leading to seven of the accused being set free without judicial sanction of any sort, the ICC-OTP expended in excess of EUR 310,000,000. Looking at the 2003-2015 figures, and the trial as well as appellate proceedings since, persons well disposed towards the ICC-OTP might conclude that OTP investigations take some time, incur considerable financial expenditure, and not infrequently experience difficulty in securing sufficient evidence to meet the "substantial grounds to believe" threshold for the committal of accused persons to trial, as well as the "beyond a reasonable doubt" standard set out in the Rome Statute for a conviction of sufficient strength to survive appellate proceedings.[22]

There is widespread consensus amongst practitioners of international criminal and humanitarian law that the performance of the first ICC chief Prosecutor, Mr. Luis Moreno-Ocampo was inadequate in a number of important respects and has caused lasting damage to the Court.[23] His

Jean-Pierre *Bemba Gombo*, Appeals Chamber, Judgment on the appeal of Mr Jean Pierre Bemba Gombo against Trial Chamber III's Judgement pursuant to Article 74 of the Statute, 8 June 2018, ICC-01/05-01/08-3636-Red (https://www.legal-tools.org/doc/40d35b).

22 Rome Statute of the International Criminal Court, 17 July 1998, Articles 61(7), 66(3) ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

23 The best overview of OTP investigative practices can be found in War Crimes Research Office, American University College of Law, "Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor", October 2012; On Mr. Moreno-Ocampo, see Julie Flint and Alex de Waal, "Case Closed: A Prosecutor without Borders", in *World Affairs Journal*, 2009, vol. 171, no. 4; and Morten Bergsmo, Wolfgang Kaleck, Sam Muller and William H. Wiley, "A Prosecutor Falls, Time for the Court to Rise", FICHL Policy Brief Series No. 86 (2017), Torkel Opsahl Academic EPublisher, Brussels, 2017 (http://www.toaep.org/pbs-pdf/86-four-directors/).

replacement is a very experienced international jurist and her leadership team, much of which was inherited from the Moreno-Ocampo era (which concluded in 2012), is on the whole strong. However, the post-Moreno-Ocampo record of the ICC-OTP suggests that there remain challenges inherent in seeing suspects committed to trial on a consistent basis and, in turn, prosecuted successfully. It would follow from these observations that the issue bedevilling the ICC-OTP is the collective inability of its relevant staff to secure sufficient evidence and to do so in a timely manner in order to maintain a pace of case-building and successful prosecutions in accordance with the budgetary provisions as well as expectations of the Assembly of States Parties ('ASP'), professional peers around the world, and more widely. Similar challenges plague the Special Tribunal for Lebanon ('STL') and the Kosovo Specialist Chambers and Special Prosecutor's Office (Kosovo Tribunal), neither of which has secured a single conviction, despite having commenced their investigative work, in earlier institutional iterations, a good many years ago. In light of the foregoing, it can be concluded that the key challenge facing public, criminal-investigative bodies – such as the amply-staffed institutions cited here by name – is how they might extend their evidence-gathering reach to areas which pose physical dangers to staff which are not commensurate with the modest risk tolerance of public institutions charged with the investigation of core international crimes.

The general willingness of private bodies such as human rights groups to engage physically in dangerous or otherwise unstable environments for prolonged periods renders such groups potentially valuable partners in criminal-investigative processes. There are two reasons therefore, both of them to be understood in the context of the structural handicaps which justice actors employed by public institutions have a great deal of difficulty transcending. First, public-sector investigative bodies charged with responding to offences perpetrated in a wide array of disparate conflicts will frequently find it difficult to develop sufficient in-house expertise, most especially on the analytical side of their operations, to deal in a nuanced manner with the large volumes of linkage evidence which must be collected in order to tie high-level perpetrators to the underlying criminal acts authored physically by their subordinates. This is particularly the case where relatively small, national war-crimes programmes are concerned. The skill set required to build complex criminal cases in response to core international crimes might be generic, but this generic ex-

pertise, if it is to be applied effectively, must be coupled with the sort of situation-specific knowledge which tends to emerge only where investigators, analysts and ideally counsel are assigned to a particular situation over a prolonged time. Such were the staffing practices of the ICTY and the ICTR; both of these institutions, whose investigators operated in post-conflict situations armed with Chapter VII mandates, brought – however slowly and at immense expense – a great number of successful prosecutions. Secondly, the collection of high-quality information which might be transformed into evidence through analytical processes undertaken in the context of the substantive law (for instance, international criminal and humanitarian law), invariably necessitates a degree of physical-risk tolerance. Hazards of this nature are most especially present where investigations are (or ought to be, under ideal circumstances) undertaken in the midst of an ongoing war or otherwise unstable environment. As was noted earlier in this chapter, the prevailing trend in international(ised) criminal justice has seen the investigative focus of the public institutions shift from post-conflict situations to active war zones and other environments unwelcoming to criminal investigators.

Public-international and national institutions charged with the investigation of core international crimes are not structured to engage effectively in geographical locations where there is anything more than a minimal level of physical risk to the public servants whose investigative deployment is ultimately necessary to ensure successful prosecutions in a timely manner. Whilst *domestic* law-enforcement personnel run all manner of physical risks to uphold the law within national borders, and are correspondingly killed on occasion, no such risk tolerance is in evidence where core international crimes have been perpetrated abroad. Less explicably, this aversion to physical risk during the investigation of international criminal and humanitarian law offences has been central to the culture of the international criminal-investigative bodies established since 1993. The upshot of the low physical-risk tolerance evinced by public bodies charged with the investigation of core international crimes is that investigative and prosecutorial organs seeking to build cases against high-level suspects frequently find themselves with a paucity of information of evidential value. In turn, this challenge is coupled frequently with insufficient institutional, conflict-specific expertise of the sort required to analyse whatever information can be acquired within the physical-risk pa-

rameters set by the public institutions.[24] The uneven prosecutorial record of the ICC, the STL and the Kosovo Tribunal is not a function of allegedly insufficient budgetary resources nor the quality of their personnel; rather, it reflects a collective inability on the part of these institutions to operate effectively on the ground in their respective situation countries. At the ICC, difficulties arising from the general lack of effective access to situation countries are compounded by uneven levels of situation-specific expertise within an investigation division which is ostensibly responsible for the entire world.

19.4.2. Donor Fatigue[25]

International(ised) judicial institutions cost enormous sums of money to establish and maintain. The United Nations *ad hoc* Tribunals for Rwanda and the former Yugoslavia, which have now been rolled into the MICT, expended roughly USD 1,000,000,000 and USD 2,000,000,000 during their respective lifespans.[26] What is more, the States Parties to the Rome Statute have contributed in excess of EUR 1,300,000,000 to the ICC since 2002. The 2018 budget of the STL was set at EUR 58,800,000, with substantial annual expenditures having been witnessed since 2009 – with (as noted above) no convictions having yet been registered; the 2017-2018 budget of the Kosovo Tribunal, which has not issued a single indictment, accounted for EUR 41,314,000.[27] Whether expenditures of this magnitude constitute – in the parlance of modern governmental bureaucracy – value for money, is a question about which reasonable persons might disagree.

Interviewed by a Canadian journalist in early-2015, the ICC chief Prosecutor, Ms. Fatou Bensouda, was adamant that the OTP annual budget, which then stood at EUR 39,612,600, was insufficient. For the same

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[24] A third challenge, specific to the ICC, is that the Rules of Procedure and Evidence create considerable difficulties for investigators seeking to entreat effectively with insider witnesses who, whilst not targets for prosecution, are likely to have themselves perpetrated offences enumerated in the Rome Statute.

[25] For an examination of the link between State donors and international courts and tribunals, see Sara Kendall, "Donors' Justice: Recasting International Criminal Accountability", in *Leiden Journal of International* Law, 2011, vol. 24, no. 3, pp. 585–606.

[26] These figures are taken from Gordon N. Bardos, "Trials and Tribulations: Politics as Justice at the ICTY", in *World Affairs Journal*, 2013, vol. 179, no. 3.

[27] Special Tribunal for Lebanon, Ninth Annual Report (2017-2018) (https://www.legal-tools.org/doc/1a1fad); Kosovo Specialist Chambers and Specialist Prosecutor's Office, "First Report", 2018 (https://legal-tools.org/doc/wpvp2r).

story in which Ms. Bensouda was cited, the Canadian Department of Foreign Affairs issued a statement noting that "Canada is concerned about the rate of growth of the ICC budget and […] continue[s] to monitor the finances of the ICC".[28] In private conversations, at least with the author of this chapter, public servants in States which have proffered enormous financial as well as moral support to international(ised) criminal justice since 1993 have been scathing in their criticism of the financial cost of both the ICC and the MICT. These same public servants have noted, in more than one instance, that the appetite for the provision of monetary support to new courts and tribunals – including those for which formal provision has already been made (that is, in the Central African Republic and South Sudan) – will remain severely limited for the foreseeable future. It has already been noted elsewhere in this chapter that States well disposed towards the IIIM began to express concerns as early as late-2018 regarding the output of that body relative to its rapidly growing budgetary projections.

Donor fatigue cannot be measured quantitatively until funding to a given institution is cut – although, as noted above, donor-State disquiet with the overall spending levels of the ICC, the MICT and other public-international organisations is becoming more vocal. However, it must be conceded that where there are calls for the establishment of new institutions to uphold international criminal and humanitarian law, the financial cost of such bodies is rarely the only consideration informing decisions regarding the provision of State support. For instance, the insufficiency of State backing for, say, the establishment of a hybrid body to address the egregious core international crimes being perpetrated in Syria must be seen in part in the context of ongoing diplomatic discussions in which peace and justice are not infrequently perceived to be mutually exclusive objectives. What, though, of the proposed judicial institutions to deal with international offences allegedly perpetrated in South Sudan and the Central African Republic during the ongoing conflicts in those States, where the geo-political stakes are minimal from the perspective of Western self-interest? Both of these institutions are largely bereft of funding.

Whilst national interests have always informed the willingness of States to contribute to international(ised) judicial mechanisms, only the

[28] Mark MacKinnon, "ICC chief prosecutor fights to prove the institution's worth", in *The Globe and Mail*, 6 February 2015 (available on its web site).

most cynical would claim that generous donations to such bodies from, for instance, the Netherlands, Canada, Germany, Japan and Sweden have been driven purely by Machiavellian considerations. The financial support of these particular donors, and a great many others, has clearly been influenced at least in part by a belief in governing circles in the benefits of the rule of international law. That faith is certainly still in evidence if the creation of the IIIM is indicative, if one considers the considerable number of politico-diplomatic reservations wholly unrelated to Syria which were expressed privately by Western diplomats in New York when the idea of establishing a criminal-investigative body through the UNGA was first mooted.[29] Adherence to the principles of international law and international criminal justice remains strong within (most) States, though there are increasing limits to that for which the international community is prepared to pay in light of what is widely perceived by diplomats as excessive spending relative to output by the judicial institutions established since 1993. What the States covering the bulk of the international justice-sector budgets are demanding is not less international(ised) justice. What they want to see is more value for money; and, if the system of international(ised) criminal justice is to survive and concomitantly make a meaningful contribution to the fight against impunity, those charged with the practice and – if one will – management of international criminal and humanitarian law, would do well to grasp with alacrity any and all means of assuaging donor-State financial concerns before international(ised) criminal justice erodes further in the face of donor fatigue.

It is currently fashionable for the friends of international criminal justice to blame certain States (for example, Russia) for the weakening of the mechanisms of accountability for those alleged to have perpetrated core international crimes. Such criticisms are not misplaced. However, it is likewise time that those charged with the day-to-day care of international criminal justice give a good deal more thought to their own role in calling its future into question after a quarter century of profligate spending which has been coupled frequently with an insufficiency of creative thinking by international investigations and prosecutors.

[29] See *supra* note 6.

19.4.3. The Impatience of Conflict-Affected Societies

Domestic as well as international prosecutions of alleged perpetrators of core international crimes follow what are invariably drawn-out investigations. The length of international(ised) criminal investigations is invariably a function of resource limitations, the complexity of cases involving high-level suspects and the difficulties which arise where evidence must be secured within physically-dangerous (to the investigators) environments. At the same time, conflict-affected societies show a marked preference for cases to be brought with a despatch that is arguably unrealistic, most especially given the current configuration and practices of the international(ised) criminal-investigative system. In the event, the pace of prosecution case-building must be enhanced significantly, not least to avoid the increasing risk that conflict-affected societies will withdraw their consent for international(ised) criminal justice. On the face of it, such consent is irrelevant to criminal justice where the latter is viewed through a narrow, legal-positivist lens. However, the voices of victim groups have an important bearing upon the policy and funding decisions of the States which push and finance the prosecution of core international crimes. A recent case in point is the exercise of ICC jurisdiction in Myanmar along with the establishment of the IIMM.

Whilst ascertaining the needs of conflict-affected societies, and victims in particular, is a notoriously difficult task – not least as the hopes invested in (and understanding of) criminal justice mechanisms will invariably differ between individuals – there is a growing body of literature which argues that international(ised) criminal justice constitutes a highly-imperfect vehicle for anything beyond the determination of the culpability in law of the accused.[30] To take but one example, the scholarship assessing societal attitudes to international(ised) criminal justice arising out of the conflict in Bosnia-Herzegovina is particularly voluminous. This literature is likewise homogeneous in its finding that Bosnian society, irrespective of the side of the conflict with which any given sub-group identifies, has been disappointed with the outcome of the relevant criminal justice processes, in no small measure because the societal expectations invested in the ICTY, the MICT and the relevant domestic courts have

[30] See, for instance, Mina Rauschenbach and Damien Scalia, "Victims and International Criminal Justice: A Vexed Question?", in *International Review of the Red Cross*, 2008, vol. 90, no. 870, pp. 441–459.

proven to be wholly inconsistent with the restorative capability of criminal justice mechanisms.[31]

One of the principal changes in international criminal justice between its post-Second World War and modern (that is, from 1993) applications is the manner in which the emergence of human rights advocacy has sought to place victimisation at the centre of international(ised) criminal justice processes. The place afforded to self-identified victims and their representatives stands in marked contrast to the more immediate post-1945 phase of international criminal justice. More specifically, the post-war experiment focused upon the criminal culpability of individuals accused within the broader context of a principle, held by the States which had prevailed militarily over Germany and Japan, that there should be no impunity for those most responsible for the heinous offences which had offended the conscience of humanity. The belief that the fight against impunity lies at the centre of international(ised) criminal justice in the post-1993 era remains, though in practice a great deal of difficulty has been experienced in reconciling this objective with the desire, championed in the main by civil society groups which profess to speak for wider conflict-affected constituencies, that international(ised) criminal courts should concomitantly afford a voice to the *prima facie* victims of whatever allegations are being considered.

The wisdom and practicality of putting something as difficult to define as the interests of victims at the centre of complex trials concerned with the criminal culpability of alleged high-level perpetrators is best considered in a different forum. The salient point to be made here is that, at the ICC and elsewhere, efforts to incorporate victims into criminal justice processes, in the belief that harnessing criminal justice to these ends will serve broad transitional-justice objectives geared towards the amelioration of social tensions, have proved to be unsatisfactory for a critical majority of victims as well as international criminal and humanitarian law practitioners.[32] In and of itself, victim representation in criminal trials, as it has been exercised to date, would presumably not be a concern were it possi-

[31] See, for instance, Diane Orentlicher, *That Someone Guilty be Punished: The Impact of the ICTY in Bosnia*, Open Society Institute, New York, 2010.

[32] For a critical study of victim participation at the ICC, see Stephen Smith Cody, Eric Stover, Mychelle Balthazard and Alexa Koenig, *The Victims' Court? A study of 622 Victim Participants at the International Criminal Court*, Human Rights Center, University of California, Berkeley School of Law, 2015.

ble to characterise the attempts to meld restorative and criminal justice as well-meaning experiments which have come up short. In the event, international-criminal and restorative justice has become confused in the popular mind, not least in conflict-affected societies, thanks in no small measure to human rights advocacy efforts. Civil society arguments to the effect that conflict-affected populations enjoy 'ownership' of, in particular, the ICC – a conceit encouraged by elements of the Court – are ubiquitous. The alleged failure of public institutions to incorporate victim concerns into prosecutorial processes to the satisfaction of victim constituencies is, despite enormous expenditures of resources to this end, serving to call into question the efficient functioning of international(ised) criminal justice as a whole; what ought to be the core purpose of criminal justice – symbolic prosecutions in accordance with the highest standards of due process in order to signal the absence of impunity – is being lost in a cacophony which holds that the system of international(ised) criminal justice is failing because the voices of victims are not being heard. The latter assertion may or may not be true. The problem facing international criminal justice at the present time is that this charge is perceived to be factually correct within important donor States; and, until such time as criminal justice is brought into harmony with broader transitional-justice mechanisms, one of the key (and perfectly legitimate) complaints of victims and their representatives – that the pace at which international criminal justice runs its course is too slow – needs to be addressed. The view taken here that the engagement of civil society in investigative (rather than prosecutorial) processes, through the devolution to the private domain where possible of certain evidence-collection activities, can only help to ameliorate certain of the complaints made by conflict-affected societies to the effect that their voices are not being heard within the criminal justice realm.

19.4.4. The Contribution of Civil Society to International Criminal Investigations[33]

The ICC-OTP started to build the Investigations Division in 2003; the first investigator commenced work in October of that year.[34] As hiring continued apace through 2004, Human Rights First, a civil society group based in New York, prepared a discussion paper for the ICC-ASP which examined the contribution which human rights NGOs might make to ICC-OTP investigations.[35] The paper was bold in asserting that there was a role which civil society groups could play in ICC investigations. Particularly novel was the suggestion, advanced somewhat tentatively, that each investigation might see one OTP official designated as a NGO liaison officer, tasked with responsibility for communicating with civil society groups which "have already documented violations". At the same time, the document evinced a degree of naivety with respect to the structure of international criminal investigations and prosecutions, in particular insofar as it focussed exclusively upon how NGOs might assist the OTP in developing crime bases. Nowhere in the paper was there recognition of the fact that the overwhelming bulk of investigative resources available to international criminal and humanitarian law investigations need to be put into the development of linkage evidence with an eye to establishing the individual criminal responsibility of high-level perpetrators.

Crime base and *linkage* are terms of art used by investigators and analysts to identify what those with a legal education would term (i) the physical elements of the offences (that is, crime base) and (ii) the mental elements of the offences along with the mental and material elements of the modes of liability (that is, linkage). Owing to the fact that international-criminal investigations rarely concern themselves with the physical au-

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[33] The first scholarly considerations of the possibility that civil society groups might contribute to international criminal investigations took the form of Morten Bergsmo and William H. Wiley, "Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes", in Siri Skåre, Ingvild Burkey and Hege Mørk (eds.), *Manual on Human Rights Monitoring: An Introduction for Human Rights Field Officers*, Norwegian Centre for Human Rights, 2008 (First Edition, 1997); Elena Baylis, "Outsourcing investigations", in *UCLA Journal of International Law and Foreign Affairs*, 2009, vol. 14, pp. 121–149.

[34] The author of this chapter.

[35] "The Role of Human Rights NGOs in Relation to ICC Investigations, Discussion Paper for the Third Session of the ICC Assembly of States Parties", Human Rights First, September 2004.

thors of crime bases, the collection of linkage information, and its transformation into evidence through analytical processes undertaken in the context of the applicable substantive law, will invariably consume upwards of 90 per cent of the human and material resources expended during a properly-conducted, complex investigation. The principal sources of linkage information of evidential quality are not victims and others drawn from the social milieu of such unfortunates; to suggest otherwise, as remains too often the case in the reports of human rights defenders, is to display considerable ignorance of international-criminal, investigative practice which is rooted in the legal requirements of the modes of liability set out in international criminal and humanitarian law. Far and away the most important form of information and evidence in a complex international case is documentation generated contemporaneously by the party (or parties) to the offences, for instance, the reports, returns and directives of armed groups, security-intelligence agencies and the like. Where witness testimony is required, it ought to be collected to fill gaps in the documentary record – and only after careful analysis of the latter. To build a linkage case upon oral testimony, in particular that taken from crime-base witnesses, is the insufficient response of the inexperienced and unimaginative to the necessity of establishing individual criminal responsibility. Rather, linkage witnesses are invariably drawn from perpetrating organisations and the ranks of the fellow travellers of suspected perpetrators. Unsurprisingly, individuals of such pedigree are almost without exception of the view that there is no benefit to them in offering prosecution investigators full or otherwise truthful disclosure. For these and other reasons, the effective handling of linkage witnesses is a matter of considerable learned skill rarely acquired during the course of a career by anyone save a minority of police and intelligence officers. Unsurprisingly, given their focus on the human rights of victims, expressed through oftentimes very skilful public advocacy, human rights NGOs are not well equipped to deal with the legal requirements of building linkage cases.

Civil society groups made no discernible contribution to the investigations undertaken by the United Nations *ad hoc* tribunals, save where the forensic sciences were applied, although human rights advocates did, on occasion, testify at trial. Likewise, during the formative years of the ICC-OTP, the practical contribution of human rights groups to the building of prosecution cases was limited. Individual (that is, unaffiliated) activists were certainly utilised from time to time with positive effect, most

especially in the eastern Democratic Republic of the Congo, where in several cases free agents of this nature, working under the *de facto* direction of experienced ICC investigators who covered out-of-pocket expenses, found caches of documentation generated by individuals and organisations which proved to be of particular lead and, later, evidentiary value. The practical contribution, if any, of international NGOs as well as local groups – the latter being very often regarded by OTP investigators as little more than proxies of the international organisations – did not extend beyond the provision of assistance in establishing *prima facie* crime bases. The view in some quarters of the ICC-OTP Investigation Division – or at any rate, the view of the author of this chapter – was that several international NGOs were demanding swift criminal justice in the service of their fund-raising strategies. In practice, these same groups were providing the OTP with little if anything in the way of useful information, evidently for fear of compromising their neutrality as advocacy groups. A notable exception to the aforementioned approach was that of the International Federation for Human Rights which sought, within the limits of its resources, to provide such crime base support as it could to OTP personnel engaged in a variety of investigations.

The early-DRC and Uganda files were mainly developed during the short tenure of Deputy Prosecutor Dr. Serge Brammertz, who oversaw the ICC Investigations Division until January 2006. They were built in keeping with best investigative practices developed, most especially, at the ICTY, but without meaningful assistance from human rights NGOs. Increasingly from 2006, the then chief Prosecutor sought arrest warrants and the confirmation of charges not on the basis of sound OTP investigative output, but on the basis of inquiries undertaken quite independently of the OTP by third parties, principally NGOs and institutional actors, with the latter generally being linked to the United Nations human-rights infrastructure. The problem with this approach, which has been much remarked upon unfavourably by various chambers of the ICC – and for which the third-party actors were in no way themselves responsible – is that the investigative work of NGOs and UN human-rights offices is undertaken for reasons of advocacy rather than with an eye to the evidentiary standards which inform criminal courts.

It cannot be stated with absolute certainty what motivated Mr. Moreno-Ocampo, given the strength of his Investigations Division, to put his prosecutors at the mercy of the findings of non-criminal investigators

working to standards of proof quite different from those of criminal courts. His objective would appear to have been to secure arrest warrants with minimal effort in the belief that, once a suspect had been arrested, sufficient time would become available to the OTP to prepare properly for committal proceedings. In practice, upon the appearance of a given suspect in The Hague, the OTP proved itself to be unable to prepare properly (or at any rate, efficiently) for committal proceedings – let alone trial – owing to the growing cadre of investigators, analysts and prosecutors who were compelled by the then-chief Prosecutor to employ, invariably with considerable professional unease, investigative *modus operandi* and accompanying legal arguments which could be foreseen as being unlikely to produce the sort of evidence and well-reasoned pleadings expected by the ICC pre-trial and trial chambers. Whatever the motivation of the first chief Prosecutor, the vacuity of the arrest-now-investigate-later approach reached its nadir in *Mbarushimana*, where the pre-trial chamber observed, among other things, that certain OTP allegations were unaccompanied by any evidence whatsoever, despite the accused having languished in pre-trial detention for roughly one year.[36] The earlier pre-trial chamber decision in *Abu Garda*, which likewise rejected all of the prosecution charges against the accused, ought to have served notice to the OTP that its reliance upon third-party materials was inadequate for the purposes of committing suspects to trial. Particularly telling in *Abu Garda* was a remark made by Judge Tarfusser in a concurring opinion which noted "the Prosecutor's failure to establish a proper connection between a given event and a given individual".[37] Rephrased using international-investigative vernacular, the case against *Abu Garda* collapsed because the prosecution had failed to present sufficient linkage evidence, that is, evidence tying the accused to the underlying criminal acts. In other cases – most notably *Kenyatta* – the second chief Prosecutor, Ms. Bensouda, took the decision to withdraw all of the OTP allegations at the pre-trial stage, perhaps in part to avoid further humiliation at the hands of ICC judges. One can sympathise with the position in which she found herself placed by her predecessor.

[36] *Prosecutor v. Callixte Mbarushimana*, see *supra* note 19.

[37] *Prosecutor v. Bahr Idriss Abu Garda*, p. 101, see *supra* note 19.

19.5. A Way Forward for International(ised) Criminal Investigations: The CIJA Model

There are a number of challenges facing public-sector institutions charged with the investigation of core international crimes. Frequently, these obstacles prove to be intractable where public organs are left to rely solely upon their own resources, most especially where there is a need to secure evidence in conflict zones or from otherwise highly-unstable environments. Politico-diplomatic, physical-risk and resource limitations invariably bedevil case building efforts and, where arrests are nonetheless effected, successful prosecutions. CIJA was founded with an intimate understanding of such problems and designed, from the start, to support public authorities in their resolution.

Given that CIJA and its public partners are guided equally by substantive and procedural law, the approach of CIJA to its field collection, analytical and legal work is not extensively different from that which public institutions would take, were they to enjoy the sort of freedom of action available to CIJA. Whilst necessarily adjusted to account for the prevailing logistical and security conditions in any given field environment, CIJA investigations conform to a certain generic standard. Guided by substantive and procedural law, this standard has been designed with an eye to simplicity as well as the prospects for its replication by organisations possessed of limited financial resources though otherwise equipped with the necessary degree of technical expertise and physical-risk tolerance. This methodology is characterised as the CIJA model.

19.5.1. Origins and Operational Areas

CIJA was founded in May 2012 as the Syrian Commission for Justice and Accountability ('SCJA'). The SCJA itself grew out of a small project, funded by the United Kingdom Foreign and Commonwealth Office during 2011-2012, in which several dozen Syrian activists were sensitised to the types of information and evidence which inform international-criminal investigations. The undertaking was executed under the tutelage of a handful of mentors with long service in various international prosecution and investigation divisions who would later form the initial international nucleus of the SCJA. Notwithstanding the fact that the personnel receiving the aforementioned training were operating in the midst of a high-intensity armed conflict, they straightaway showed promise as collectors of information with *prima facie* evidentiary value. The recognition by the

international mentors of the Syrian potential, coupled with their conclusion that the engagement of an international court or tribunal was unrealistic at that juncture for a range of politico-diplomatic reasons, gave rise to thinking on the part of the project lead – the author of this chapter – that criminal investigations to the highest standards might nonetheless be launched *vis-à-vis* the Syrian regime through a non-public vehicle. This line of thinking gave rise to the SCJA/CIJA in its initial incarnation and built upon an idea explored in a scholarly paper co-authored by the project leader several years earlier.[38]

The initial SCJA concept paper envisioned the establishment of the individual criminal responsibility of high-level perpetrators, the deferral of most crime-base building to a later date and the passage of the resulting case briefs as well as supporting evidence to investigative and prosecutorial authorities in the public domain at such time as the latter found themselves in a position to exercise jurisdiction over persons alleged to have perpetrated offences of international criminal and humanitarian law in Syria. The only checks on the transfer of data from the SCJA to public authorities envisioned at the start were that (i) the justice systems in question would need to offer accused persons due-process guarantees which met international human rights standards and (ii) the SCJA would at no time support criminal prosecutions which might lead to the award of capital sentences. Eight years later, these objectives and principles remain the foundation upon which CIJA stands, notwithstanding the subsequent engagement of CIJA in several conflicts other than the war in Syria and some expansion of what might be termed the service offerings of the organisation.

SCJA fundraising efforts commenced in early-2012; and, whilst donors other than the United Kingdom were initially cool to the concept of a private (albeit not-for-profit) criminal-investigative body (despite the enthusiast support of Mr. Stephen Rapp, the then-United States Ambassador for Global Criminal Justice), from mid-2013 the SCJA started to receive substantial financial support from several Western States, along with the European Union. The SCJA grew quickly from 2013 and, within two years, the SCJA-*cum*-CIJA found itself operating in the midst of two armed conflicts with an annual budget of roughly EUR 6,000,000 – monies sufficient to retain (from 2015) roughly 150 analysts, counsel and field

[38] Bergsmo and Wiley, 2008, see *supra* note 33.

investigators to handle all CIJA operations in Syria and Iraq. With the emergence of the IIIM and UNITAD, CIJA envisions scaling down its operations in and around these States as it gravitates towards new situations in North Africa, sub-Saharan Africa and South Asia. As the public-sector response to the perpetration of core international crimes in Syria and Iraq assumes a certain efficiency, CIJA shall redirect its expertise towards new (to CIJA) wars, to which the system of international(ised) criminal justice is not yet sufficiently structured to respond. Indeed, this evolution of the CIJA focus commenced during 2018.

19.5.2. Mandate, Objectives and Operational Partners

CIJA undertakes its work independently of the sectarian, ethnic and confessional prejudices which invariably serve to fuel the sorts of conflicts amidst which CIJA engages. Operating as it does with public monies, CIJA sees itself as a servant of those domestic as well as international institutions which, properly and in law, are ultimately responsible for fighting impunity through criminal-prosecutorial processes. The mandate of CIJA is derived from, and its operational plans are agreed annually with, the CIJA donors.[39] Simply, CIJA puts forth a workplan every 12 months and the donors decide, individually, whether they wish to support it. Whereas by convention the donors cannot and do not interfere in either operational or staffing matters, they are perfectly free to cease funding CIJA as they see fit, not least in response to CIJA ineptitude or irrelevance.

The CIJA leadership is aware that it is vulnerable to reproach, which has very occasionally been directed at it by international human rights groups, that it might undertake only the investigations targeting structures (for instance, the Syrian regime) to which its donor States and the European Union are opposed as a matter of policy or otherwise find distasteful. There is certainly some truth to such arguments to the extent that it is inconceivable that CIJA would be funded by a donor to investigate, say, allegations that its State forces, or those of an ally, perpetrated offences of international criminal and humanitarian law during a given military campaign; and, as CIJA does not have a trust fund upon which to draw, nor private monies save, on occasion, a relatively small outlay of Open Society Justice Initiative (that is, Soros) funding, CIJA donors could effectively block any CIJA initiative of which they do not approve simply

[39] CIJA has received funding over the years from Canada, Denmark, the European Union, Germany, Norway, Switzerland, the United Kingdom and the United States.

by declining to fund it. The ethical salvation for CIJA, in recognising as much, is that it is committed to never being instrumentalised by donors, that is, taking instruction from a donor or donors regarding which individuals or groups to investigate.[40]

It must also be observed that it is not for CIJA, as but one civil society actor, to take it upon itself to investigate every alleged instance of egregious criminal wrongdoing by the agents of a given State or non-State actor. Where CIJA has not engaged in a particular situation or investigated a given group, for whatever reason, there is nothing stopping an NGO from so doing *to criminal-prosecutorial standards*, where it has the financial means secured from public or non-public sources. For instance, CIJA has never made any secret of the fact that it collaborates to criminal-investigative ends with a number of armed opposition groups in Syria as well as with federal and Kurdistan Region forces in Iraq. The collection in the field of *prima facie* evidence in quantities sufficient to support criminal investigations demands as much. Put another way, these relationships are driven by a pragmatic acceptance on the part of CIJA that, without these partnerships, the investigation of Da'esh and Syrian regime criminality would scarcely be feasible by CIJA or any other body, public or private. However, there is nothing stopping, by way of example, Human Rights Watch or Amnesty International from applying their considerable financial resources to the investigation of these belligerent parties, or any other, in accordance with evidentiary standards consistent with the needs of international(ised) criminal justice. The fact of the matter is that no criminal-investigative body, public or private, is going to find itself in a position to work effectively in the midst of conflict zones where it attempts to take on all, or most, of the belligerent parties. Such an approach is feasible, if only just, where a public institution, ideally armed with a Chapter VII mandate, engages in a post-conflict situation.

Donor criticisms of the performance of CIJA have not been witnessed to date and are not anticipated. There are more checks and balances weighing upon CIJA – not least where the quality of its output is concerned – than there are constraining the senior leadership of an international court or tribunal. That noted, donors do not in every case renew

[40] CIJA has never opened an investigation at the bequest of a State or the European Union; rather, it is CIJA practice to identify situations in which CIJA engagement would be useful to law-enforcement and prosecutorial authorities with, in turn, CIJA approaching donors for the necessary funds.

their support for CIJA. For instance, in 2016 a theretofore generous donor to CIJA determined – or rather, the then foreign minister decided – that CIJA-led criminal investigations, which by then had come to encompass the uppermost leadership of the Syrian regime, constituted a threat to ongoing peace negotiations, taking place in Geneva and elsewhere. CIJA was duly informed that no more monies would be forthcoming from the State in question. As it turned out, a cacophony of media and political protest was engendered by this pronouncement – somewhat to the surprise of CIJA, which had made no complaint regarding the political decision – leading to a renewal of the earlier funding arrangement. Similarly, Switzerland withdrew its financial support to CIJA several years ago on the grounds that the provision of Swiss public monies to criminal investigations in Syria was incompatible with the role played by Switzerland as a host of the aforementioned peace talks.

Despite the ebb and flow of specific-donor support, CIJA has not to date (that is, early-2019) found itself with insufficient monies to execute its annual operational plans. The initial and overriding objective of CIJA field operations remains the securing of sufficient evidence upon which its analysts and counsel might build case-files for international prosecution. Taking international criminal and humanitarian law as its starting point, CIJA cases are summarised in textual form, encompassing both factual and legal analyses. These documents are known internally as pre-trial briefs and conform, in practice, to the format which prevails in international offices of the prosecutor. The first CIJA investigative cycle in Syria ran for slightly in excess of one year, leading to the completion of three case files, encompassing 24 high level accused, principally security-intelligence officers and members of the *de facto* Syrian regime war cabinet, including the President of Syria, Bashar Al Assad. The second Syrian regime investigative cycle, which lasted one year, produced multiple accused cases built upon the conduct of hostilities by the regime in Homs Governorate as well as a file examining the role of economic actors in providing support of a criminal nature to the regime. The Homs investigation served as the foundation for the provision of CIJA evidentiary support to a civil case brought in United States Federal Court by the family of the Anglo-American journalist, Marie Colvin, killed in a targeted rocket attack in Homs in February 2012. The CIJA submissions, including an expert-witness brief, proved decisive in the decision of the presiding judge to award the family of Ms. Colvin in excess of USD 300,000,000 to

be recovered from the Syrian State as well as President Al Assad and his brother Maher.[41]

CIJA operations *vis-à-vis* the Islamic State commenced in Syria in early-2014 and were extended to Iraqi territory roughly one year later. Several substantial Da'esh-specific prosecution briefs have been completed in the interim. Since being afforded sufficient monies in mid-2013 to build an analytical capacity atop the field collection operations which commenced in 2011, CIJA has produced a total of 16 substantial cases – 10 Syrian regime and 6 Islamic State files – which, to the extent possible in the absence of a court or tribunal to submit them to, are prosecution-ready. In terms of total volume, the briefs taken together run to several thousand closely-argued pages with supporting evidence and jurisprudence referenced in extensive footnotes. Additionally, the briefs set out the individual criminal responsibility of several dozen members of the high- and highest-ranking Syrian regime and Islamic State political, military and security-intelligence leadership. Overall, CIJA expenditures from 2011 through 2018, during which the aforementioned cases were built and a great deal other work undertaken besides, were roughly EUR 24,000,000. Although this figure constitutes a significant sum in the view of CIJA, its advisors and its donors, it can be viewed favourably in the context of the volume, quality and speed of the output of CIJA.

Whilst to date CIJA has engaged in conflicts where there is an international-jurisdictional vacuum – to whit, neither the ICC nor any other international court or tribunal has yet been afforded jurisdiction over the ongoing perpetration of core international crimes in Syria and Iraq – CIJA began to work closely with a host of domestic law-enforcement institutions from 2015. The logic informing the provision of support to domestic actors was and remains tied to the continuing absence of any near-term prospect for international trials relating to the perpetration of core international crimes in Syria, since 2011, and in Iraq, since 2014. A further explanation for CIJA engagement with domestic authorities has been the significant number of persons of interest who have fled westwards from Iraq and indeed Syria during recent years, for the most part hidden amongst the ranks of asylum seekers moving into the European Union from Turkey.

[41] United States District Court for the District of Columbia, *Cathleen Colvin, et al., v. Syrian Arab Republic*, Amended Memorandum Opinion, 30 January 2019.

Domestic actors warmed quickly to the CIJA model, not least because of the high quality of the CIJA evidence holdings but also given the resource and physical-risk limitations faced by national authorities confronted with the need to secure evidence from Syria and Iraq. Likewise, attractive to the domestic partners, was and remains the fact that CIJA, as a non-profit, supports all public authorities at no cost, to the extent that it is funded by its donors sufficiently to do so. What is more, CIJA proffers assistance to public institutions without reference to whether or not those institutions fall under the authority of a State which is providing monies to CIJA.

Since 2014, CIJA has worked with officials in a total of 13 States, principally European and North American; the domestic partners have, for the most part, been national war-crimes programmes and asylum-screening offices. During 2018, domestic law-enforcement partners submitted 128 requests for assistance ('RFAs') to CIJA, involving more than 500 suspects.[42] During the period of October 2016 (when CIJA first began to compile RFA-related statistics) through February 2019, CIJA received a total of 221 RFAs. Further growth in this respect is expected, with delegations of domestic police officers and prosecutors finding their way to CIJA headquarters, on average, every second week. By way of contrast, since its formal establishment in December 2016, the IIIM has received 14 RFAs.[43]

Whilst the number of arrests effected by domestic authorities on the basis, for the most part, of CIJA evidence is not yet commensurate with the volume of RFAs received from its national partners, there have to date been several successes of note. For instance, during 2018 a group of Syrian nationals who had served with Da'esh and were suspected by CIJA of remaining on an operational footing in Europe, were detained by German authorities on the basis of CIJA information and evidence, which the Germans were no doubt careful to corroborate to the greatest extent pos-

[42] Of the 128 RFAs received by CIJA from domestic authorities during 2018, 87 constituted new requests and 41 followed upon RFAs submitted (and responded to) prior to that year. Forty of the 2018 requests concerned Islamic State structures and individuals; eighty-eight focused upon the Syrian regime and its alleged adherents.

[43] Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, UNGA, seventy-third session, 13 February 2019, para. 6 (https://legal-tools.org/doc/8fgco9).

sible before executing the warrants of arrest. In this particular case, a CIJA field investigator was identified by the relevant public authorities as the star witness and this individual has correspondingly been taken into a witness-protection programme. The testimony of the said star witness, along with that of the CIJA Executive Director, contributed to a finding of criminal culpability and the award of a custodial sentence of eight years for the only accused brought to trial, to date.[44] In a different case supported heavily by CIJA, three Syrian regime security-intelligence officers, including one of particularly senior rank, were detained during a joint Franco-German operation executed in February 2019.[45] The increasingly-focused nature of certain of the RFAs which CIJA is receiving from European authorities as a whole, suggests strongly that additional arrests in unrelated cases should be anticipated during 2019 and beyond.

Operational relationships have likewise been established with Europol and Interpol, the objectives of these organisations being, broadly speaking, to populate their systems with primary-source data, most especially those relating to Islamic State structures and personnel. CIJA engagement with the federal authorities in Iraq, which is concerned solely with the digitalisation and collation of the large volumes of captured Da'esh materials held in various security-intelligence repositories in Baghdad, is predicated in the first instance upon the objective of ensuring the transmission of relevant data to the police-intelligence databases maintained by these institutions. Secondly, the Baghdad initiative is designed to facilitate the prosecution of Da'esh personnel apprehended in Europe and North America for (where the evidence warrants) the perpetration of core international crimes. At the present time, there is no jurisdiction anywhere in the world prosecuting Da'esh personnel for anything other than the provision of material support to a terrorist organisation, generally for lack of evidence to pursue any other prosecutorial course of action. It is the view of CIJA that the prosecution of a selection of Da'esh suspects for core international crimes would serve broader transitional-justice objectives of interest to victims and, concomitantly, support indi-

[44] As of March 2019, the other suspects remain in custody, awaiting trial.

[45] Two of the three suspects in this particular case were known to CIJA, which had tracked them to Europe from Syria, prior to the receipt of national RFAs concerning the individuals as well as the units in which they served. The Franco-German arrests following closely upon CIJA disclosure of documentary evidence as well as witness testimony to the requesting authorities.

rectly counter-Da'esh recruitment initiatives by illustrating, through the introduction of crime base evidence, that the overwhelming majority of the victims of Da'esh criminality, most especially in Syria, have been Sunni Muslims. This truism, which is not brought to light through material-support prosecutions, insofar as the latter do not require crime-base evidence, is contrary to the Islamic State narrative that its victims are, in every case, non-believers.

CIJA entered into a Memorandum of Understanding with the IIIM in 2017 in order to facilitate the transfer of completed CIJA case files as well as the relevant CIJA evidentiary holdings to that body. Should it be desirous of so doing, the IIIM shall supplant nearly all CIJA functions relating to the war in Syria. The exception to this handover of responsibility shall be evidence collection in the field which, for politico-diplomatic reasons and owing to the intolerable levels of physical risk involved, the IIIM (nor any other public body) cannot take over. In light of the operationalisation of the IIIM, CIJA ceased case-building activities in Syria relating to the Syrian regime on 31 March 2019, with CIJA to maintain its field-collection capability, as just noted, as well as its ability to answer RFAs into the year 2020, by which time the IIIM should have sufficient analytical strength to handle such requests on its own. UNITAD, which for its part does not expect to be fully operational until the second half of 2019, shall continue to receive case-building and all other forms of CIJA support which it desires for the foreseeable future. Owing to the fact that UNITAD and the IIIM are determining how to divide responsibility for Da'esh criminality, CIJA shall continue to build Islamic State-specific case files relating to Da'esh criminality in Iraq as well as Syria through the first quarter of 2020.

In light of the fact that the international and domestic public sectors are coming to grips with the wars in Syria and Iraq as law-enforcement problems, CIJA has been free for some time to commence engagement in new conflicts where CIJA and its partners concur that the application of its model would be of use, that is, in North Africa, sub-Saharan Africa and South Asia. This evolution of the CIJA focus towards new (to CIJA) wars reflects the fact that the organisation is built upon highly-adaptable staffing and leadership structures; these are designed in no small part to ensure that CIJA engagement in any particular situation shall be of optimal service to the public-sector consumers of the CIJA product. In other words, CIJA is concerned with outcomes. It is the belief of the leadership that

placing the emphasis of the organisation upon the efficient provision of services to its public-sector partners shall ensure the perpetuation of the model as long as there is a demonstrable need for the provision of support to public law-enforcement institutions through private means.

19.5.3. Investigative *Modus Operandi* and Evidentiary Base

The investigative *modus operandi* of CIJA, directed as it is towards the establishment of the individual criminal responsibility of higher- and highest-level perpetrators in the context of international criminal and humanitarian law, does not differ from the best practices established, through sometimes painful processes of trial and error, by the public institutions within which the senior CIJA leadership served for prolonged periods.[46]

The one area where CIJA investigations tend to differ from those undertaken by international(ised) courts and tribunals is in the width and depth of the crime base. Typically, international investigations, most especially those of the *ad hoc* tribunals, have been characterised by extremely wide crime bases, with a great many distinct incidences of criminality informing most prosecution indictments. If the crime base and linkage components of a typical ICTY case were put into graphic form, the shape would be something akin to a pyramid. For its part, CIJA starts from the premise that accused persons, if convicted at trial, will receive effectively the same sentence for the murder of 20 persons or two thousand. The organisation has always assessed that international as well as domestic prosecutors will, in due course, likely seek to expand the crime base in any given prosecution, where they assume control of a given CIJA case file. For this reason, and cognisant of its resource limitations as well as the need to complete prosecutable cases with relative despatch, CIJA seeks to build the widest possible linkage cases upon very narrow crime bases. Rendered in graphic form, the structure of a CIJA investigation would be something akin to a rhombus: the narrow point at the bottom constituting the crime base, moving upwards to the widest point, this representing

[46] Senior CIJA staff have been employed in, amongst other international(ised) institutions, national war-crimes units, the ICTY, the ICTR, the ICC, the UNIIIC-STL, the State Court in Sarajevo, the Special Court for Sierra Leone, the Extraordinary Chambers of the Courts of Cambodia, and the Iraqi High Tribunal. Most of the senior CIJA personnel started their careers in the field of international criminal and humanitarian law in the 1990s or early-2000s.

mid-level perpetrators whose criminal responsibility has been (or can be readily) demonstrated with the available evidence, to the peak of the rhombus, representing those most responsible for the offences. It is the latter category of suspects who receive the most attention from CIJA, once they have been identified through the careful analysis of the command, control and communications arrangements of the units and formations acting under their authority. That is to say, CIJA does not, as a matter of policy, undertake target-driven investigations on the grounds that such an approach raises considerable risks that exculpatory evidence will be overlooked. For their part, mid-level perpetrators are generally ignored by CIJA, save where information presents itself that they have made their way to Europe. In the event, the heavy emphasis which CIJA places upon the building of linkage cases renders the organisation particularly well suited to react quickly when mid-level perpetrators come onto its radar.

The principal form of evidence secured by CIJA constitutes materials – in the main, documentation – generated contemporaneously by the suspected perpetrating institutions, most especially, military and security-intelligence forces, be they allied with State or non-State bodies. Securing such information, rather than the establishment to criminal-law standards of a crime base, is the first priority in every CIJA investigation. For this reason, amongst others, CIJA has extracted from Syria roughly eight hundred thousand original pages of Syrian regime documentation – military, security-intelligence and Ba'ath Party records – through myriad acquisition and movement operations of considerable complexity and concomitant expense, owing not least to the fluidity of the confrontation lines in Syria and the need to move the paper, which together weighs in excess of three metric tons, across international borders. As noted above, CIJA has more recently started a process of digitalisation of what is expected to run to several million pages of Islamic State documents, held by various belligerent parties to the wars in Syria and Iraq. What CIJA will not do, where the Da'esh documentation is concerned, is take ownership of the same, though the organisation has long had its own so-called battlefield evidence collection capability within the Da'esh investigative team. This effort has borne considerable fruit since 2014.

Other forms of information of evidential value collected in large quantities by CIJA include open-source materials generated by perpetrators as well as the organisations in which they serve. Modern social media

is a particularly rich seam for exploitation, for instance, YouTube, Twitter, Facebook, and Instagram. CIJA employs several open-source analysts who focus entirely on these platforms; the CIJA cyber team also oversees the extraction of data from captured computer hard drives and smartphones. Whilst information of this nature gives rise to unique authentication challenges, the multi-source collection and analysis effort which the Commission brings to bear when building its case files enables CIJA to authenticate cyber product through comparison with more traditional forms of information-*cum*-evidence, for instance, the several thousand witness interviews recorded to date by CIJA personnel – with a heavy focus upon insider witnesses – and documentation generated by perpetrating institutions.

19.5.4. Leadership and Oversight

The CIJA leadership is advised by a panel of independent professionals – the *ad hoc* Advisory Panel – who support CIJA on a *pro bono* basis, in particular, through the undertaking of periodical case-file reviews. Every Advisory Panel member has held a senior position in one or more of the international(ised) courts or tribunals as an investigator, analyst, trial lawyer, clerk in chambers or as defence counsel. Additionally, there is a Board of Commissioners, the establishment of which is mandated by the Dutch law which governs CIJA; it is chaired by Mr. Stephen Rapp, the long-time United States Ambassador for Global Criminal Justice and former chief Prosecutor of the Special Court for Sierra Leone. Additionally, the ranks of this board include Professor Alex Whiting, a former senior official at the ICC-OTP, and Professor Larry Johnson, erstwhile UN Assistant Secretary-General for Legal Affairs who also served as *Chef de cabinet* at the ICTY. Dr. Nawaf Obaid, an Adjunct Professor at Harvard with a specialisation in Middle East matters, and concomitant connections of importance to CIJA garnered during his own service as a diplomat, joined the board in 2018. Similarly serving *pro bono*, the Board of Commissioners along with the Advisory Panel members are the only persons not retained by CIJA, other than law-enforcement and prosecutorial authorities, with access to CIJA pre-trial briefs and related materials, including evidence.

Finally, CIJA has a Board of Directors. Likewise a legal requirement pursuant to Dutch law, this board is chaired by the CIJA Executive Director (the author of this chapter), who takes most decisions on a con-

sensus basis with the two CIJA Directors, Ms. Nerma Jelačić (Management and External Relations) and Mr. Chris Engels (Operations and Investigations), both of whom have brought to CIJA substantial experience of international public service, not least secured through international courts and tribunals. Other senior CIJA personnel are, as noted above, drawn from the ranks of men and women who have served with distinction in the system of international criminal justice.[47]

19.5.5. Staffing and Professional Development

The salaries paid to CIJA international staff – analysts and counsel, in particular – are set by the foundation at competitive levels relative to public institutions whilst costing the organisation a fraction of the overall amounts afforded to international public servants of comparable rank and seniority. Cost savings are realised by CIJA through modest administration overheads, amounting to nine per cent of the annual budgets, and the absence of fringe benefits such as education grants for dependent children and pension credits. Field-investigator salaries vary between countries, in accordance with what we might refer to as market conditions, which they anyhow exceed; by way of a guide, Syria-based investigators are paid roughly USD 1,000 per month.[48] Iraqi salaries are somewhat higher, at approximately USD 2,000 per month for each investigator. It is the field-based investigators who absorb the considerable physical risks inherent in securing high-quality information of evidential value, and it hardly needs stating that the success of the CIJA model is, in the first instance, entirely dependent upon the capacity and work ethic of the deployed personnel. As such, a considerable investment is made in training, mentoring and equipping the field-investigative cadres; CIJA having spent several million USD to such ends since 2011.[49] The work of the men and women in Syria

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[47] See *ibid*.

[48] At February 2018, CIJA retained roughly 40 investigators inside Syria, a number that was more or less consistent with the field complement first reached in 2012. These personnel are divided between a number of operational teams. A further 20 investigators have been operational in Iraq since early-2015.

[49] CIJA is well aware of its considerable moral and ethical responsibilities to its field personnel, most especially at the point that CIJA ceases to engage in a situation in which its investigators, who frequently become politically exposed by virtue of their work, are confronted by an intolerable level of physical risk, such that they cannot realistically be left at the mercy of a deteriorating political-military situation. This has been a recurring problem in Syria since 2014, and CIJA has long had contingency plans for the movement of its personnel out of harm's way in that State, which have been triggered regularly and with suc-

and Iraq is guided by headquarters-based analysts working seamlessly with legal counsel, with forward-deployed teams operating in States bordering Syria under the direction of internationals providing logistical, security and other forms of support. Whereas CIJA senior personnel have in every instance served in one or more of the international courts and tribunals (from which unsolicited *curricula vitae* are received routinely by the CIJA leadership), analysts (save those of more senior rank) are invariably selected on the basis of fluency in both Arabic and English, whereupon they are put through an intensive programme of on-the-job training. The result of this in-house, professional development programme is that the only concentration of Arabic-fluent, war-crimes analysts in the world is retained by CIJA. The language profile of the organisation will evolve as CIJA engages in additional conflicts, although a requirement for a high degree of Arabic fluency within the organisation is likely to last until 2023, if not beyond.

It is the experience of CIJA that it takes approximately one year of intensive training and mentoring to raise a new investigator and inexperienced analyst to a reasonable level of competence. Whilst the junior analysts have the benefit of working alongside senior counsel and seasoned analysts at CIJA headquarters, the field investigators are necessarily controlled from a distance. As such, still more time is generally required to reach the point at which newly-retained investigators can be relied upon to undertake consistently the competent interviewing of crime base and linkage witnesses. Within this context, significant financial and temporal investment has been made by CIJA in preparing, within the broader investigative ranks, specialists who deal with males and females who are believed to have been subjected to sexual offences. All CIJA interviews, whether they are led by Syrians, Iraqis or international personnel, are recorded in the third person, in order not to undermine unwittingly later prosecutorial efforts.[50]

cess since 2017. With respect to the broader discussion of the responsibility of international organisations to their local staff in a humanitarian-aid context, see Jonathan Corpus Ong and Pamela Combinido, "Local Aid Workers in the Digital Humanitarian Project: Between 'Second Class Citizens' and 'Entrepreneurial Survivors'", in *Critical Asian Studies*, 2018, vol. 50, no. 1, pp. 86–102.

50 Recording interviews in the third person will render far more difficult future defence counsel efforts to find inconsistencies between statements taken by public officials and the reports compiled by CIJA personnel. Put another way, inconsistencies between formal state-

19.6. Concluding Remarks

International(ised) criminal justice is at a critical juncture: notwithstanding enormous financial expenditures, successful prosecutions are being brought at a pace which is regarded as deleterious by both donor States as well as conflict-affected communities. Whilst the leadership cadres of the remaining international offices of the prosecutor are arguably stronger than they have ever been, and a number of national war-crimes units have been significantly reinforced (for example, in Germany and France), there are limits to what the public institutions can achieve with the resources on hand, not least as these resources are often of limited use where an operational area presents a physical-risk profile to which public institutions alone cannot conform.

Surmounting these inevitable financial and physical-risk limitations requires creative approaches on the part of the public bodies – first and foremost, a willingness to work with private institutions which are agile, cost effective, marked by a high tolerance of physical risk and willing as well as sufficiently skilled to work to strict criminal-evidentiary standards. CIJA is the first (and still the only) organisation to structure itself with the sole objective of closing the gap between the evidence required for successful criminal prosecutions and the limitations weighing upon even the best-resourced public institutions where the latter set out to acquire such evidence without the assistance of external parties. It should be noted in this context that CIJA has not set out to monopolise the private, criminal-investigative sphere and, what is more, its structure and *modus operandi* are not regarded by CIJA as intellectual property. The CIJA model is there for public authorities to draw upon as they see fit and for non-governmental actors to replicate.

It is the experience of the CIJA, based upon its engagement over several years with a wide array of international(ised) law-enforcement and prosecutorial authorities, that its public sector partners are untroubled by the partial shift of responsibility for criminal justice to the private sector which is implied by the CIJA model. The public-sector partners of CIJA have put investigative and prosecutorial pragmatism ahead of the sort of reservations expressed occasionally by international human rights defend-

ments taken by public authorities and earlier interview reports compiled in the third person by CIJA personnel can always be ascribed by prosecutors to errors on the part of the CIJA personnel.

ers about such arrangements. It is the expectation of CIJA that these concerns will be voiced still less frequently as civil society engagement in the international(ised) criminal-investigative domain becomes more common – giving rise, in turn, to more international(ised) criminal justice. The alternative to private-sector participation is a further loss of the hard-won progress made since 1993 in the fight against impunity for core international crimes as a result of donor concerns regarding allegedly profligate public spending and the disquiet of civil societies with the slow pace of justice.

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Quality Control in Fact-Finding

Morten Bergsmo and Carsten Stahn (editors)

This book discusses how fact-finding mechanisms for alleged violations of international human rights, humanitarian and criminal law can be improved. There has been a significant increase in the use of international(ised) and domestic fact-finding mechanisms since 1992, including by the United Nations human rights system, international commissions of inquiry, truth and reconciliation commissions, and NGO fact-finding. They are analysed and assessed in detail by 22 authors under the common theme 'Quality Control in Fact-Finding'. The authors include Richard J. Goldstone, Martin Scheinin, LIU Daqun, Charles Garraway, David Re, Simon De Smet, FAN Yuwen, Isabelle Lassée, WU Xiaodan, Dan Saxon, Christopher B. Mahony, Dov Jacobs, Catherine Harwood, Lyal S. Sunga, Wolfgang Kaleck, Carolijn Terwindt, Ilia Utmelidze and Marina Aksenova. This Second Edition includes new chapters by Geoffrey Robertson QC, Emma Irving and William H. Wiley, as well as a new foreword by Mads Andenæs QC.

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