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Integrity in International Justice

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E-Offprint:

William H. Wiley, “Effective Leadership, Management and Integrity in International Criminal Investigations”, in Morten Bergsmo and Viviane E. Dittrich (editors), *Integrity in International Justice*, Torkel Opsahl Academic EPublisher, Brussels, 2020 (ISBNs: 978-82-8348-190-7 (print) and 978-82-8348-191-4 (e-book)). This publication was first published on 19 November 2020.

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Front cover: Sir Thomas More (1478-1535) painted by the German artist Hans Holbein the Younger (1497-1543) in the late 1520s. Sir Thomas More is discussed extensively in this book as a symbol of integrity in justice.

Effective Leadership, Management and Integrity in International Criminal Investigations

William H. Wiley*

9.1. Introduction

The offices of the prosecutor of the international courts and tribunals¹ established since 1993 have shown wildly disparate results with respect to the number of individuals brought to trial and convicted on some or all charges. The formative institutions of the modern era – the International Criminal Tribunals for the former Yugoslavia and for Rwanda (‘ICTY’ and ‘ICTR’) – sentenced 90 and 62 persons, respectively, for the perpetration of core international crimes.² Other bodies have registered lesser numbers of convictions. For instance, the Special Court for Sierra Leone (‘SCSL’) sentenced nine persons to custodial sentences for international offences,³ and the Extraordinary Chambers in the Courts of Cambodia (‘ECCC’) have registered three convictions.⁴ The Special Tribunal for Lebanon (‘STL’) has yet to issue a single judgement, although the investigative body which gave rise to the Tribunal commenced its work in 2005.⁵ In a similar vein, the Kosovo Specialist Chambers (‘KSC’) and Specialist Prosecutor’s Office has not at the time of writing brought its first charge, even though its inves-

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¹ The use of the adjective ‘international’ in this context refers to bodies established under United Nations and international-treaty auspices as well as so-called hybrid institutions which bring together domestic and international laws and actors.

² International Residual Mechanism for Criminal Tribunals (‘IRMCT’), “Infographic: ICTY Facts & Figures” and “The ICTR in Brief” (available on its web site).

³ See the Residual Special Court for Sierra Leone’s web site.

⁴ Extraordinary Chambers in the Courts of Cambodia, “Who has been prosecuted” (available on its web site).

⁵ The United Nations International Independent Investigation Commission (‘UNIIC’) was established in April 2005 pursuant to United Nations Security Council resolution 1595.

tigations started in 2011.⁶ The International Criminal Court (‘ICC’) has registered four convictions for the perpetration of core international crimes since the establishment of its Office of the Prosecutor (‘OTP’) in mid-2003.⁷

The mandates of the international courts and tribunals established since 1993 are unique and their annual budgets differ, or have differed, considerably. What is more, the investigative arms of these institutions have found themselves confronted by quite distinct geographical contexts presenting highly dissimilar physical risks to deployed personnel. For instance, ICTY investigators faced no meaningful physical risks whilst in the field, whereas ICC-OTP investigators cannot operate with any significant effect upon Libyan territory as well as that of a number of other ICC situation countries. Additionally, the political calculations of domestic actors frequently generate drag upon investigative efforts; this would go some distance towards explaining the dearth of prosecutorial output by the STL, the ECCC and the KSC. For these and other reasons, the number of persons prosecuted successfully by any given OTP serves as a poor guide to the quality of any particular institution, its leadership and management. Notwithstanding these caveats, might the number of successful prosecutions by all of the international courts and tribunals be tallied with an eye to their collective performance over the last quarter-century? The following question should be asked: is the conviction over 25 years of fewer than 200 perpetrators of core international crimes, involving the expenditure of several billion US dollars, suggestive of a highly functioning system of international investigations and prosecutions?

One thinks not.

What lies at the root of the underperformance of the system of international criminal justice since 1993? It is most certainly not insufficient funding; and, whilst one might rightly point to a lack of politico-diplomatic will in certain instances, in and of itself policy calculation does not explain

⁶ The Special Investigative Task Force, established in 2011, evolved into the Special Prosecutor’s Office in 2016; see Kosovo Specialist Chambers and Specialist Prosecutor’s Office, “Special Investigative Task Force” (available on its web site).

⁷ The four persons convicted at trial, at the time of writing, are Thomas Lubanga Dyilo, Germain Katanga, Ahmad al-Faqi al-Mahdi, and Bosco Ntaganda. Al-Mahdi pleaded guilty; appellate proceedings remain underway in the case of Ntaganda. This tally does not include Jean-Pierre Bemba, all of whose convictions for the perpetration of core international crimes were vacated by an ICC appellate panel.

the relative dearth of successful prosecutions. Nor do the physical risks presented by certain operational areas, not least as public institutions have always had the option of circumventing physical risk through the enlistment of non-public actors. Insufficiency of successful prosecutions is, first and foremost, a reflection of the uneven performance of the various international investigations divisions which are (or were, in the case of the now-closed ICTR and ICTY) subordinate to the offices of the prosecutor of the international courts and tribunals. In particular, since 1993, the overall quality of the leadership and management of the international offices of the prosecutor and their investigations divisions has frequently fallen short of the standards required to meet the evidentiary standards necessary for successful prosecutions consistently. Put simply, in a number of instances, the people in charge have not been up to the task. In noting as much, this chapter takes as its starting point the convincing arguments advanced by Morten Bergsmo regarding the frequent failure of the international community, as well as the courts and tribunals which it establishes, to foster institutional cultures built upon professional as well as personal integrity.⁸

This chapter draws on personal observations as the author was employed by the ICTY, the ICTR and the ICC on a continuous basis from May 2000 to August 2005. It is built around six issues, which are examined in turn: (1) the roots of international criminal investigative insufficiency; (2) the crucial distinction between leadership and management in the administration of international criminal justice; (3) the importance of institutional loyalty; (4) how failures of discipline serve to undermine the proper functioning of offices of the prosecutor and, most especially, their investigations divisions; (5) examples of successful as well as insufficient leadership witnessed at the OTPs of the ICTY, the ICTR and the ICC; and (6) the necessary intersection of strong leadership and professional integrity in the execution of effective international criminal investigations. Viewed as a whole, this chapter asserts that a great many poor staffing decisions have been made by the international community as well as the international offices of the prosecutor themselves, with a negative effect upon the proper functioning of the investigations divisions, most especially during the formative phase of the post-1993 era of international courts and tribunals. More specifically, the inconsistent approach taken towards the appointment

⁸ Morten Bergsmo, "Revisiting Integrity in International Justice", FICHL Policy Brief Series No. 93 (2018), Torkel Opsahl Academic EPublisher, Brussels, 2018 (<https://www.legal-tools.org/doc/e550f7>).

of individuals to leadership and management positions has had a deleterious effect upon rank-and-file performance, integrity and, inevitably, investigative output. Whereas the overall quality of international criminal investigations has improved over the last 10 years, in a number of respects, the system of international criminal justice remains burdened by early errors as well as the lack of consensus, within the institutions and beyond, regarding their core objectives.

9.2. The Roots of International Criminal Investigative Insufficiency

Have the great and the good, in establishing the various international courts and tribunals, not least the ICC, believed themselves to be laying the legal foundations of judicial institutions with little purpose other than the investigation, prosecution and adjudication of persons suspected of having perpetrated core international crimes? Conversely, have they seen themselves as being engaged in processes of social experimentation *vis-à-vis* conflict-affected societies as well as the practice of international criminal law?

Notwithstanding their lofty preambles, the statutes which inform the relevant international bodies suggest that the international courts and tribunals have been envisioned by their politico-diplomatic authors as judicial institutions with missions not dissimilar to those of domestic justice systems. However, those tasked by the United Nations, the ICC Assembly of States Parties ('ASP'), as well as by smaller groups of States with giving concrete form to the institutions in question have often treated the building and operation of the offices of the prosecutor as a social rather than operational mission – or they have otherwise succumbed to external pressures to organize their affairs around such an understanding.

Police, prosecutors, judges and other servants of the law who ply their trades in the domestic realm might bask in the relative luxury of knowing that there exists a large degree of social consensus regarding the purpose of their respective labours. Broadly speaking, the actors in domestic criminal justice systems operate on the assumption, largely unspoken, that their work is designed to protect the citizenry from the threats posed thereto by persons who conduct themselves outside of the law. Put another way, domestic actors in the field of criminal justice see themselves as contributing to the protection of the populace through the preservation of the rule of law.

No such consensus exists in the field of international criminal justice. It is posited here that, were all of the men and women employed by the ar-

chipelago of international courts and tribunals to be canvassed regarding the purpose of their labours, a wide range of conflicting or otherwise difficult-to-reconcile priorities would be identified. Is the purpose of international criminal justice to provide a measure of redress for the victims of war and other forms of widespread or systematic violence? Conversely, is it the mission of international courts and tribunals simply to incarcerate offenders where the evidence warrants, thereby eradicating demonstrable threats to the vulnerable through the denial of freedom to the perpetrators of core international crimes? Or is the aim of international criminal justice to signal to would-be offenders that there shall be no impunity for those who violate international criminal and humanitarian law?

Perhaps international criminal justice is designed to serve all of these ends. What it manifestly cannot do is serve all of these ends in equal measure, for the budgets of the international courts and tribunals, whilst considerable, are finite. It therefore falls to the leaders of the institutions to establish priorities within the context of the available resources. Where, though, should an international chief prosecutor turn for guidance when establishing the said priorities? Quite obviously, the statutes of any given international court or tribunal would logically be the first point of reference. In the event, the lofty statements of purpose set out in the collected statutes are highly abstract; as such, they necessarily serve as an imperfect guide. External consultations are of little additional utility in this regard insofar as there exists in the wider world no international consensus – social or political – regarding the purpose or the desirability of international investigations and prosecutions. This absence of consensus might nonetheless be seen as a two-edged sword. On the one hand, the lack of agreement has generally served to create uncertainty within investigative-prosecutorial leadership cadres about how best to direct their subordinates to common ends. On the other hand, amorphous statements of purpose and the absence of wider accord regarding the objectives of international criminal justice leave considerable scope for leaders, with a clear sense of resolve as well as moral courage, to shape their missions as they see fit without having to face *well-founded* claims that they have violated the letter and spirit of the relevant statute.

The increasing and distressing tendency towards social experimentation in the field of international criminal justice is revealed in a number of practices. First and foremost, recruitment policies prioritizing gender parity and geographical representation over relevant experience and professional

competence have given rise to all manner of leadership failures, managerial insufficiency and demonstrations of rank-and-file ineptitude. More specifically, over the last 25 years, the offices of the prosecutor of international courts and tribunals have retained an unconscionable number of personnel who have shown themselves to be unfamiliar with, and unable to conform to the exacting standards required by investigative and prosecutorial processes undertaken in the context of international criminal and humanitarian law. The objective of creating familiarity with international criminal and humanitarian law beyond its Western-centric practice through the demographic engineering of offices of the prosecutor might be characterized as being admirable in principle. However, to seek to foster a truly global understanding of the merits of international criminal justice through social engineering at a pace which undermines the proper development of a given institution – and by extension, the wider system – constitutes a self-defeating move by those whose first loyalty ought to be to the principle of institutional efficiency.

Secondly, the staff-*cum*-employment rules which govern the relevant institutions tend to render it difficult for leaders and managers to purge the institutions of under-performing and otherwise unessential personnel without risk to their own positions. This problem is exacerbated by State officials, from the developed as well as the developing world, who intervene directly with international courts and tribunals where one of their nationals is threatened with dismissal or whose services have otherwise been dispensed with. The ICC-ASP granted the last Registrar of the ICC, Mr. Herman von Hebel, what he believed to be a free hand to dismiss underperforming personnel as well as others who, oftentimes through no fault of their own, were holding positions and ranks that were superfluous to the needs of the Court. In the event, once the sackings started, Mr. von Hebel began to receive communications from diplomats interceding on behalf of the individuals effected by the reorganization, whilst still other ASP members failed to signal publicly their support for the reorganization which they had already approved by less-formal means. Ultimately, the complaints by various States Parties brought to a conclusion Mr. von Hebel's career at the Court – and leaders, as well as senior managers working in the field of international criminal and humanitarian law, will not have missed this abject lesson.

Thirdly, pressures placed upon international courts and tribunals by civil society groups, both directly and through advocacy efforts directed at

the States funding these bodies, have increasingly had the effect of drawing limited resources away from the core investigative and prosecutorial functions. In turn, the resources have been spent upon relevant, albeit secondary tasks such as strategic communications, the protection (defined broadly and hopelessly imprecisely) of victims, who may or may not be witnesses, and other presumed stakeholders in the judicial process (save suspects and the accused). Under-explored to date by scholars and commentators,⁹ the redirection of resources in this manner from the core functions weighs particularly heavily upon offices of the prosecutor. This phenomenon is particularly in evidence at the ICC, which the uncharitable might assert displays, at times, a tendency to place more focus upon the needs of victims than on the evidentiary requirements for a successful prosecution.

Finally, in this context, it will be observed that the professional performance of the managerial and, most importantly, the leadership cadres of the international courts and tribunals have, since 1993, proved to be uneven. The shortcomings witnessed over the last quarter-century are inseparable from the recruitment policies of the institutions which have employed (or otherwise promoted) men and women to leadership and management positions. More specifically, the assessment of individuals for senior leadership and managerial positions have not factored the qualities of institutional loyalty and moral courage into hiring processes, thereby exacerbating the problems which arise from the continued employment of unproductive personnel at lesser ranks as well as the frequent failure of offices of the prosecutor to resist external pressures to shift finite resources away from the core investigative and prosecutorial functions. Managerial and, most especially, leadership insufficiency encourages institutional rot, too often leading to the voluntary withdrawal of the most talented personnel to other places of employment. High rates of staff turnover – which characterized most especially the ICC-OTP during the suzerainty of chief Prosecutor Luis Moreno-Ocampo – have a concomitantly negative effect upon institutional memory. In turn, the degradation of the latter has a deleterious impact upon the proper functioning of international offices of the prosecutor, given the fact that the temporal parameters which frame the opening of a given investigation and the conclusion of appellate proceedings in the event of a conviction will span several years.

⁹ The exception to this rule is Kjersti Lohne, *Advocates of Humanity: Human Rights NGOs in International Criminal Justice*, Ph.D. dissertation, Department of Criminology and Sociology of Law, University of Oslo, 2015.

As was noted at the outset of this chapter, Morten Bergsmo has distinguished himself in recent years as the most forceful advocate for the creation of a culture of integrity within the system of international criminal justice. Whilst it may be tempting for some to see his demands for uprightness and high moral character as nothing more than a rejoinder to the ethical lapses of Moreno-Ocampo, to do so would be to misconstrue the arguments advanced by Bergsmo as well as the pressing need for new approaches to personnel matters within the existing institutions charged with the application of international criminal and humanitarian law. It is the view taken here that, notwithstanding improvements witnessed over the last 10 years, there remains an urgent requirement for a root-and-branch reform of the flawed approach to leadership and management, which has been too often in evidence in the system of international criminal justice. Until such reforms are made, the overall prosecutorial record of the international courts and tribunals shall remain at levels incommensurate with their financial expenditures, thereby serving to call the entire system of international criminal justice into disrepute.

9.3. Leadership and Management in International Courts and Tribunals

Many of the problems plaguing the system of international criminal justice and the associated offices of the prosecutor can be traced to insufficient institutional leadership and management. As has been noted already, this state of affairs owes a great deal to the manner in which persons are appointed to positions of significant responsibility. Unsatisfactory leadership and management also reflect the fact that the distinction between leadership and management is poorly understood by those employed by international courts and tribunals, not least the very persons holding leadership and management appointments.

There exists a dizzying quantity of books, audio guides, seminars and the like which are designed to create effective leaders as well as managers in the world of business; these materials are mind-numbing, at least for those disinterested in matters of commerce. Highly professional military forces have their own approach to leadership and management, built respectively around the distinction between the officer and non-commissioned officer ranks, and the unique training regimens of each professional stream. In contrast, treatises which concern themselves with the practice of law are rarely, if ever, coupled with panegyrics on the im-

portance of effective leadership and management. Omissions of this nature are understandable to the extent that law is perceived by its practitioners to be, and frequently is, an individual pursuit, even where a lawyer practises within a large private firm or a public prosecutor's office. Be that as it may, it is the culture of the practice of law which most influences international criminal courts and tribunals; perhaps as a consequence, the senior most positions in these institutions – president, chief prosecutor and registrar – are by design occupied by men and women drawn from the ranks of lawyers and judges.¹⁰ In practice, this approach to the filling of senior positions within the system of international criminal justice has seen the appointment of a great many leaders and managers with an understanding of law – though not necessarily international criminal and humanitarian law – who rarely grasp the fundamentals of leadership, management and the distinction betwixt the two.

What, then, is the difference between leadership and management?

9.3.1. Leadership

The hallmark of effective leadership in an international criminal court or tribunal is – or ought to be – a capacity for long-term thinking which is woven around a clearly-defined vision which the leader is able to impart to his or her subordinates in terms which are understandable to the latter in the context of their respective professional functions. For this reason, leaders need to be effective communicators, that is, to be skilled at selling their vision on an ongoing basis to their subordinates as well as to external partners and stakeholders; in the field of international criminal justice, the gamut of stakeholders runs from international human rights organizations, through the United Nations Security Council, to key States and (in the case of the ICC) the ASP.

To ensure the effective implementation of the vision, a leader in the field of international criminal justice needs to be prepared to take risks. For the men and women leading international institutions, or component parts thereof such as the offices of the prosecutor, hazards present themselves where discipline must be imposed in order to bring recalcitrant and underperforming subordinates into line. The case of Mr. von Hebel, cited above,

¹⁰ As far as this author is aware, the only non-practitioner of law (that is, neither a licensed lawyer nor a judge) to have held a senior most leadership position in the international system of criminal justice was Mr. Robin Vincent, a brilliant court administrator from England who served as Registrar of the SCSL and, later, the STL.

is instructive insofar as an example was made of this individual by various stakeholders when he resorted to mass redundancies in an effort to restore order to an unruly arm of the ICC which he inherited from his predecessors. Stakeholders – both real and imagined – pose a genuine threat to leaders in the field of international criminal law. This is particularly the case where States, acting individually or in concert with one another, to say nothing of civil society groups, seek to push offices of the prosecutor, most especially, in directions which are inconsistent with the vision of the leader and, or in the alternative, the effective functioning of that part of the institution for which the leader is responsible. By way of example, the United States and the United Kingdom engineered the removal of Ms. Carla Del Ponte from her post as chief Prosecutor of the ICTR when she refused to cease pursuing the investigation of core international crimes allegedly perpetrated during 1994 by Rwandan President Paul Kagame and his subordinate officers.

Identifying and responding effectively to risk demands, above and beyond all else, the exercise of moral courage. The latter might be defined as preparedness to place the interests of the institution as well as its mission before those of any given individual, including the leader him- or herself. It does not follow from the requirement for moral courage that the effective leader should be inflexible. On the contrary, the effective leader must stand ready to acknowledge where the vision has become unsustainable, in whole or more likely in part, owing to external factors which the leader is unable to control, for instance, the deterioration of the politico-military situation in a given operational area or an unanticipated paucity of financial resources. Returning for a moment to the investigation of Mr. Kagame *et al.*, Ms. Del Ponte might well have continued to pursue this course of action in her capacity as ICTR chief Prosecutor had she done so without broadcasting her intentions and, had a sufficiency of evidence for one or more indictments come to light, presented the opposition to this undertaking with a *fait accompli* in the form of unsealed indictments. In so doing, she could have continued to exercise her considerable moral courage whilst retaining the position of chief Prosecutor of the ICTR.

9.3.2. Management

Leaders are not managers; the functions of leaders and managers are, in most respects, distinct. Managers are responsible for ensuring, at the working level, the execution of the vision of the leader, generally in accordance with concrete objectives – for instance, effective case-building and prose-

cutions – set out by the leader and agreed to by his or her managers. Co-ordination between leaders and managers to this end is of the utmost importance; it is correspondingly crucial that the leader ensure that his or her time not be absorbed disproportionately by dealings with external stakeholders. The leader who has insufficient contact with his or her subordinates will, invariably, exercise poor command and control over the institution which he or she leads. As such, the leader needs to communicate regularly with subordinate leaders and managers, not least to ensure the execution of the vision in accordance with the goals which afford concrete shape to that vision. Beyond such co-ordination efforts, competent managers should be free to act with a certain autonomy, that is, to be free from micro-management emanating from the leadership level. In large institutions, where the leaders and managers know their jobs and are committed to the successful execution of the agreed goals, it is incumbent upon managers to report only that such-and-such goals have been accomplished within established temporal parameters or, where the latter is proving difficult, to request further direction. In the execution of the goals assigned to them, managers may resort to innovative methods which are consistent with the vision of the leader and, in the case of an investigative body, consistent with any relevant procedural law. In this respect, innovation is a hallmark of creative leadership as well as capable management.

9.3.3. OTP Leaders, Managers and Followers

It might logically be asked at this juncture what positions in an international office of the prosecutor are held by leaders and which roles are assumed by managers.

The chief prosecutor in any given office of the prosecutor is indisputably a leader, as is his or her deputy chief prosecutor. The functionaries who surround these individuals in the immediate office of a chief prosecutor are neither managers nor leaders, though persons so employed do on occasion come to the erroneous conclusion that their proximity to the leadership lends them their own measure of executive authority.¹¹ Where mis-

¹¹ A long-ago spokesperson for chief Prosecutor Carla Del Ponte, who was situated in the immediate Office of the Prosecutor, was perceived by some within the OTP of harbouring such delusions. In 2003, the author of this chapter was told by his senior trial attorney to embark on a mission to Montenegro to speak to a valuable (in the view of the spokesperson) source. When this author protested that any such mission was likely to constitute a waste of time and money, it was explained to him that the direction had come from the said spokesperson

conceptions of this nature appear in evidence, the failure is that of the leader(s) rather than that of delusional subordinates, most especially where leaders use relatively inexperienced staff in their immediate office to give direction to senior managers. Office of the prosecutor leaders (that is, chief and deputy prosecutors) need to interact directly with their senior managers, that is, their chiefs of appeals, prosecutions¹² and investigations. Each of these senior managers will have sub-managers, most notably the senior prosecutors (in the case of a chief of prosecutions) and investigative team leaders (in the case of a chief of investigations).¹³ These sub-managers have purely management functions. The same might be said of the senior managers, although the latter may, at their discretion and in agreement with the leadership cadre, take on certain of the characteristics of the leader, for instance, where they share with the leader responsibility for the communication of the institutional vision to subordinate ranks. All other personnel employed by an office of the prosecutor are effectively followers insofar as their primary task is to conform to the institutional vision by contributing, in accordance with their function, to the successful execution of the concrete goals communicated to them by their respective managers and sub-managers.

9.4. Institutional Loyalty

Capable leadership and management alone will not ensure the success of an international criminal court or tribunal and, most especially, its office of the prosecutor; there is an additional requirement for institutional loyalty which weighs upon every leader, manager and follower. Indeed, the effectiveness of any given court or tribunal will run parallel to the degree of institutional loyalty which is in evidence throughout the ranks of those employed therein. The fostering of a culture of institutional loyalty, not least

and could not, therefore, easily be challenged. It was not; and, as expected, the mission proved to be pointless.

¹² At the ICC-OTP, what was known as the Chief of Prosecutions in the *ad hoc* Tribunals is named the Prosecutions Coordinator.

¹³ The chief of investigations at the ICC-OTP has a deputy who carries the title Investigations Coordinator. This arrangement would appear to work well, not least as the position has been held, since its creation, by a series of capable incumbents. At the ICTY-OTP, the equivalent position was known as Investigations Commander, there being four such posts when the author arrived at the OTP in 2000. Ms. Del Ponte ordered the posts to be abolished in 2001 on the grounds that they were superfluous to requirements although the incumbents ultimately retained their positions, albeit without substantial authority over investigative matters.

by example, is one of the greatest challenges facing leaders in the field of international criminal justice because (as noted earlier in this chapter) the practice of domestic law, which influences in a frequently deleterious manner the practice of international criminal law, is generally a largely individual or small-team pursuit. In contrast, successful international prosecutions and, more so, the investigative processes which lead to convictions, are built upon the work of oftentimes sizeable, interdisciplinary teams operating transnationally.

The requirement for institutional loyalty in the pursuit of international criminal justice can be identified in a number of legal instruments, regulations and rules. Admittedly, the term institutional loyalty *per se* does not appear in the collected statutes of the international courts and tribunals. However, a requirement for institutional loyalty can be inferred from certain of their provisions. For instance, at Article 44(2), the Rome Statute directs that the “Prosecutor and Registrar shall ensure the highest standards of competency, efficiency and integrity” of the Court staff. Article 36(3) (a) requires of judges “high moral character, impartiality and integrity”. Likewise, Article 42(3) demands that the chief and Deputy Prosecutors be of “high moral character”. Furthermore, the Rome Statute indicates at various points that the judges and chief Prosecutor should act independently – presumably from one another as well as external actors. For its part, the Statute of the ICTY states in Article 14 that the judges of that tribunal should be “of high moral character, impartiality and integrity”. Whereas a similar demand is not imposed upon the ICTY chief Prosecutor, Article 16 states that he or she should “act independently as a separate organ of the International Tribunal” and not “seek or receive instructions from any Government or from any other source”. Like provisions can be found in the Statute of the ICTR. The requirement that judges and prosecutors be of high moral character and independent in the execution of their professional duties is found in, amongst other statutes, those of the STL,¹⁴ the SCSL¹⁵ and the ECCC.¹⁶

¹⁴ Statute of the Special Tribunal for Lebanon, 30 May 2007, Articles 9(1), 11(2) and 11(3) (<https://legal-tools.org/doc/da0bbb>).

¹⁵ Statute for the Special Court for Sierra Leone, 29 July 2000, Articles 12(1), 13(1), 15(1) and 15(3) (<https://legal-tools.org/doc/4768bc>).

¹⁶ Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004, Articles 10, 19 and 25. Interestingly, the Statute of the ECCC requires, at Article 31, that the Chief of Administration should likewise be of “high moral character and integrity”.

It will be noted additionally that personnel employed by international courts and tribunals operating under United Nations guidelines – which constitutes the majority of the international courts and tribunals established since 1993 – are bound by the United Nations Staff Regulations and Rules. The latter set out clearly at various junctures that the “international civil servant” shall conduct his- or herself with “integrity, independence and impartiality”.¹⁷ It is here, in the said Regulations and Rules, that the requirement for integrity is brought together with the concept of institutional loyalty. In particular, at Regulation 1.2(e), staff members “pledge themselves to discharge their functions and regulate their conduct with the interests of the Organization only in view. Loyalty to the aims, principles and purposes of the United Nations [...] is a fundamental obligation of all staff members by virtue of their status as international civil servants”. What is more, the requirement for institutional loyalty is set out in a written declaration which every staff member is required to sign upon retention by any and all of the myriad United Nations bodies.¹⁸

The United Nations Staff Regulations and Rules, cited above, offer a succinct definition of institutional loyalty whilst making it clear, at least implicitly, that institutional loyalty is something quite distinct from loyalty to one’s self. The insufficiency of institutional loyalty in the international courts and tribunals, including their offices of the prosecutor, reflects the cultural influence of domestic legal practice (as has been noted already) along with the frequent failure of leaders within the relevant institutions to be seen to embody as well as demand institutional loyalty of all subordinate personnel, irrespective of rank. However, it does not follow from the requirement for institutional loyalty that individuals should not be free to pursue personal objectives such as promotion and professional development. Institutional loyalty and the pursuit of professional advancement by the individual might co-exist in a complementary manner. Such is particu-

¹⁷ Staff Regulations and Rules of the United Nations, 1 January 2018, ST/SGB/2018/1, Regulation 1.2.

¹⁸ *Ibid.*, Regulation 1.1:

I solemnly declare and promise to exercise in all loyalty, discretion and conscience the functions entrusted to me as an international civil servant of the United Nations, to discharge these functions and regulate my conduct with the interests of the United Nations only in view, and not to seek or accept instructions in regard to the performance of my duties from any Government or other source external to the Organization. I also solemnly declare and promise to respect the obligations incumbent upon me as set out in the Staff Regulations and Rules.

larly the case where the leadership of an institution demands institutional – as opposed to personal – loyalty of all subordinates whilst fostering an organizational culture which entreats with personnel on an individual basis, that is, with an eye to the proper execution of professional functions whilst recognizing the inherent desire of most professionals for recognition as well as career advancement. Where individual staff members are regarded from on high as no more than cogs in a mechanical wheel, they will tend to conform to a minimal standard of performance – or worse, where a flawed approach to the leadership and management of subordinate personnel is coupled with disciplinary procedures which are rarely enforced.

9.5. Failures of Discipline and Integrity at the ICTR, the ICTY and the ICC

The purpose of this chapter is not to recount in an exhaustive manner the disciplinary failures which have been too often in evidence in international offices of the prosecutor. However, a few examples of disciplinary failings dating from the formative years of the ICTR and the ICTY are set out in order to reinforce the broader argument – without, it is hoped, creating the impression that the majority of personnel employed by these bodies, during their youth and later, acquitted themselves in a dishonourable manner. In turn, the altogether better situation at the ICC-OTP – and some of the reasons therefore – shall be examined.

9.5.1. ICTR

At the ICTR-OTP, within which this author was employed as an investigator in Kigali, Rwanda during 2001 and 2002, all manner of grift – generally petty and sometimes more egregious – was in evidence. For instance, this author recalls with clarity his investigations team leader arriving before his desk one morning to collect monies to make good on this author's personal use of a United Nations vehicle; such use was permitted by the ICTR in exchange for a small, per-kilometre fee. As the present author had long before purchased his own car, and correspondingly did not use United Nations vehicles for personal business, he had no idea why he was being asked to pay what was, in fact, a trifling sum in relation to his income. As it turned out, another investigator – who had served in an exceedingly senior position in his national police force – had been entering this author's name into vehicle logs against what was, in fact, the personal vehicle usage of the forger. Other investigators were in the habit of returning nightly to sleep in

their own homes in Kigali when they were supposed to be working in outlying areas whilst pocketing the daily subsistence allowance ('DSA') paid by the United Nations for meals and accommodation. Although ultimately petty in nature, conduct of this nature constituted fraud in the strict sense – and in this context, it is worth recalling that the offenders of these and other indiscretions were criminal investigators employed by a law-enforcement body.

A further problem at the ICTR-OTP during its early years was that a great many of the investigators had a better grasp of the various privileges enjoyed by United Nations staff – in particular, the familial benefits to which those with dependent spouses and children were entitled – than they did of the case-files to which they had been assigned. Or such was the view formed by this author, who was on occasion called upon by fellow team members to interpret the relevant (to the latter) United Nations rules on the grounds he had studied law. Protestations by *de facto* counsel that he had studied international criminal and humanitarian law, not whatever law informed the United Nations rules, with which in any event he had no fiduciary interest as he had no dependents, fell upon deaf ears.

Far more serious offences against the integrity and proper functioning of the ICTR-OTP were perpetrated during the early life of that institution by the Deputy Prosecutor, Mr. Bernard Muna, who was likewise based in Kigali. He would arrive daily at the Investigations Division headquarters, seated in the back of a white Mercedes sedan which featured a small UN flag affixed to the bonnet. Upon exiting his vehicle at the main door of the building, whatever staff found themselves in the proximity of his arrival would engage in great displays of bowing and scraping as Mr. Muna made his way into the building and towards his office. The charitable might ascribe the waves of genuflection to social mores. A less generous interpretation of the grovelling would hold that Mr. Muna had created the impression in the minds of a great many of the personnel in the Kigali office that they served the United Nations only at his pleasure. Indeed, under the noses of chief Prosecutors Louise Arbour and, in turn, Carla Del Ponte, Mr. Muna had built an impressive patronage network which encompassed much of the Investigations Division management as well as its rank-and-file. No suggestion is made here that Mr. Muna realized fiduciary benefit from this arrangement, which is to observe that the purpose of the structure was unclear. What is certain is that its effect was to control tightly the hiring of

investigators recruited from African States as well as all decisions regarding internal promotion within the Investigations Division.

Mr. Muna was eventually sacked by Ms. Del Ponte, the latter having summoned him to the seat of the Tribunal (that is, Arusha) for this purpose, evidently without having provided Mr. Muna with any inkling of the fate which awaited him; his firing was observed, with considerable satisfaction, by several ICTR-OTP personnel.¹⁹ In the event, the damage wrought by Mr. Muna was not undone by his removal from his leadership post to the extent that the African members of his patronage network remained in their positions. Most (and some would suggest that all) of these men – at that time, there were very few female investigators at the ICTR – were unsuited to the requirements of international criminal investigations. If nothing else, the overall work ethic of the Investigations Division remained appallingly poor even following the demise of Mr. Muna, presumably because there was no evident disincentive arising, in the way of disciplinary action, where an investigator failed to perform to minimal professional standards.

9.5.2. ICTY

The level of professionalism witnessed by this author at the ICTY Investigations Division during 2000–2001 and 2002–2003 was altogether better than that seen at the ICTR; the overall situation was, however, far from ideal.

Whilst outright graft was not in evidence at the ICTY-OTP Investigations Division, until the Investigations Division leadership was restructured in 2001, travel budgets were put under constant pressure by unnecessary – and unnecessarily lengthy – investigative missions. In the aforementioned year, Ms. Del Ponte sacked the Chief of Investigations, an Australian police officer, and concomitantly neutered the so-called investigations commanders, who sat metaphorically between the Chief of Investigations and the leaders of the nine investigative teams. The Chief of Investigations was replaced by a French investigative judge, Mr. Patrick Lopes-Terres, who was evidently instructed by Ms. Del Ponte to get (amongst other things) the travel budget under control. More than one investigator was soon heard moaning at a popular Investigations Division watering hole about the disappearance of what might be termed the margin on DSA payments,²⁰ that is,

¹⁹ Or so this author was informed immediately after the fact by one of the persons present.

²⁰ The United Nations paid a fixed daily amount for accommodation, meals and incidentals for travel, in accordance with the relevant costs of temporary living at a given location; this ar-

the monies left over after one had met the actual cost of room and board whilst on mission. Plainly, a number of investigators had grown accustomed to supplementing their familial budgets by this means, which in fairness was not formally contrary to the applicable rules. It will be recalled nonetheless that these same rules afforded well-paid, lightly-taxed international public servants with all manner of education and housing grants with which to support dependent family members.

More troubling than needless mission travel was the practice, which was occasionally in evidence until the aforementioned reorganization of the Investigations Division, of exploiting the differential between the rates of DSA and mission subsistence allowance ('MSA'). DSA was paid for shorter missions, that is, for periods of travel of up to 30 continuous days. MSA was meant to cover lengthy deployments; it was paid at a lower rate on the assumption that long deployments in a fixed location would reduce accommodation costs markedly insofar as those so deployed could make longer-term housing arrangements whilst at the same time facilitating the preparation of one's own meals. The trick within the ICTY Investigations Division would see personnel deploying away from headquarters for temporal periods close to, though not exceeding the point at which DSA would become MSA. To avoid financial loss arising from the movement from DSA to MSA rates, a brief sojourn to The Hague would then be taken before DSA became MSA with, in turn, redeployment to the same location. Proceeding in this manner, DSA rates would be paid for lengthy, albeit not strictly continuous absences from The Hague.

Until the reorganization of the ICTY Investigations Division effected by Ms. Del Ponte, the more serious problem bedeviling the OTP was the tendency of Investigations Division managers to facilitate the hiring of their erstwhile colleagues in the domestic realm to rank-and-file investigator positions, without having undertaken a sufficient assessment of the suitability of each individual for the investigation of core international crimes. In this manner, the Investigations Division approach to recruitment to the

range was termed the daily subsistence allowance (or DSA, as indicated above). The production of receipts, beyond proof of presence in the given location, was not required. The DSA rates were very generous, particularly where the traveller was prepared to eschew traditional hotels for privately-hired accommodation; and, by the time this author arrived at the ICTY in 2000, a vast network of private accommodation options had been identified in the cities to which ICTY personnel travelled habitually (for instance, Sarajevo, Zagreb and later Belgrade, after the fall from power of Slobodan Milošević).

follower ranks, in a period of rapid OTP growth, served to reinforce the professional shortcomings of the Division, which were ultimately rooted in the employment at the start of a good many police officers whose investigative specialization lay in fields which did not translate readily into the building of international criminal case-files. The equivalent approach, in the hiring of trial counsel, would have seen the retention of non-litigators specializing in the fields of, say, intellectual property and contract law.

The problems created by the manner in which investigators were recruited to the OTP were compounded considerably by Investigations Division promotion practices, the tendency being to elevate internal candidates to management positions as opposed to seeking ostensible talent from outside the ICTY. Whereas certain of the investigative team leads at the ICTY-OTP were professionally suited to overseeing complex criminal investigations rooted in international criminal and humanitarian law – just as there were highly-competent, rank-and-file investigators – it is arguable that most of the managers retained were not ideally suited to the sort of investigations which the ICTY-OTP was mandated to execute. This is not to suggest that the vast majority of Investigations Division managers were not highly engaging in a social context. And indeed, ICTY Investigations Division promotion practices suggested strongly to a great many keen observers within the OTP that social adroitness – ‘clubability’, if one will – was prioritized over professional competence in the selection of individuals for management positions. In the event, just as the patronage network established by Mr. Muna survived the sacking of its patron, all of the investigative managers at the ICTY outlived the removal of the Chief of Investigations.²¹ Instead of a comprehensive house-clearing, the problems arising from poor Investigations Division recruitment and promotion practices at the *ad hoc* Tribunals were resolved – to the extent that they were – by the appointment of senior trial lawyers to manage investigations from their formative stages. This change, along with a number of related reforms ordered by Ms. Del Ponte, shall be discussed at more length, below.

²¹ It would be wholly false to assert that the Chief of Investigations oversaw patronage arrangements of the sort facilitated by Mr. Muna. The former is an honourable man whose professional capabilities were evidently deemed by Ms. Del Ponte to be incommensurate with his appointment as Chief of Investigations.

9.5.3. ICC

When this author served with the Investigations Division at the ICC during its formative period (2003–2005), rank-and-file self-discipline, as well as the quality of the Investigations Division leadership and management, were of a high order. During the said period, the ICC had two Deputy Prosecutors, one of whom, Dr. Serge Brammertz, oversaw the Investigations Division. In this role, Dr. Brammertz was assisted by a capable Chief of Investigations to whom the investigative team leaders reported. The latter oversaw the Democratic Republic of the Congo (‘DRC’) and Uganda (that is, Lord’s Resistance Army) investigations; later, a Darfur team was established to deal with that situation. Presumably by design, given widespread knowledge in the field of international criminal and humanitarian law of the managerial deficiencies plaguing the investigations divisions of the *ad hoc* Tribunals, neither Dr. Brammertz nor any of the ICC investigative managers were recruited from or had any experience of the system of international criminal justice prior to joining the ICC-OTP. Perhaps for this reason, the initial ICC Investigations Division arrangements worked well, owing to the quality of the leadership, management, and the rank-and-file personnel, many of the latter having been hand-picked from the ICTY-OTP. Or rather, the leadership and management structure of the ICC Investigations Division worked well until such time as Mr. Moreno-Ocampo – who had no discernible grasp of either investigations or international criminal and humanitarian law – began to meddle in the day-to-day investigative work, roughly one year into his tenure.

The brazen manipulation of travel allowances and the like which characterized the conduct of a minority of investigators at the *ad hoc* Tribunals was not in evidence at the ICC Investigations Division. Aside from the high levels of professional motivation and institutional loyalty which were shown by the initial intake to the OTP as a whole (those overseeing this initial intake deserve recognition), there were no additional monies to be had insofar as investigative missions were undertaken, with rare exceptions, to locations with exceedingly spartan living arrangements and the DSA rates had accordingly been set at negligible levels. Indeed, the situation was such that those whose jobs required deployment to the field had to be equipped with sleeping bags, mosquito nets, medical kits and other bits of field gear as the quality of the hotels in many of the mission areas – where there were any hotels at all – invariably offered conditions only marginally better than those of the local prisons.

Finally, it will be noted that at the ICTR and the ICTY, intelligence organs with an interest in the course of particular investigations were believed, not without a good deal of *prima facie* evidence, to have developed informants within the offices of the prosecutor of those institutions. One refers, most especially, to Rwandan and Croatian security services. Quite obviously, acting as an informant for a foreign intelligence service whilst employed by the United Nations would constitute a grievous lapse of professional ethics running manifestly contrary to the applicable regulations and rules. Where the ICC-OTP was concerned, suggestions have been made that intelligence agents loyal to the then-President of the DRC, Mr. Joseph Kabila, developed a source within the ICC DRC Team as early as 2004. However, assertions of this nature must necessarily be characterized as unproven.²²

9.6. Leadership at the OTPs of the ICTY, the ICTR and the ICC

From 2000 to 2005, as mentioned above, this author had the opportunity to observe and otherwise witness the ramifications of a range of OTP leadership styles across the ICTY, the ICTR and the ICC. The latter shall be considered here with an eye to illustrating the benefits which arise from effective leadership and the problems which invariably follow where it is insufficient.

9.6.1. ICTR

The deleterious effect upon the Investigations Division of the tenure of Mr. Muna has already been touched upon. What is left to consider, briefly, is the effect upon the Investigations Division of the ICTR-OTP of the leadership of Ms. Arbour and Ms. Del Ponte; they served as chief Prosecutor during the periods 1996–1999 and 1999–2003, respectively, with the terms of both chief Prosecutors being marked by the production of sub-standard investigative case-files.

Ms. Arbour and Ms. Del Ponte were highly-capable as well as ethical professionals who sought to execute their mandates in conformity with the ideals set out in the Statute of the ICTR. Whereas both of these chief Prosecutors were affable individuals, Ms. Arbour evidenced a clear ability to tolerate fools gladly, in marked contrast to Ms. Del Ponte, rendering the

²² International offices of the prosecutor have been consistently loath to establish counter-intelligence capabilities. This reticence has led to endless breaches of security and constitutes the Achilles' heel of all existing witness-protection arrangements.

former the more popular of the two in the eyes of the Investigations Division management as well as the rank-and-file.

The leadership of Ms. Arbour over the Investigations Division of the ICTR might be regarded as a failure. Admittedly, she was poorly served by her Deputy Prosecutor, Mr. Muna, from his appointment in April 1997. What is more, the fact that Ms. Arbour was based several-thousand kilometres away in The Hague, as she was concomitantly chief Prosecutor of the ICTR as well as the ICTY, lent Mr. Muna a freer hand to wreak havoc in Kigali. The ICTR-OTP as a whole experienced immense growth in staffing numbers under Ms. Arbour, and it was during this period that the ranks of the Investigations Division came to be filled with investigators as well as managers who were, in the main, unsuited to the investigation of breaches of international criminal and humanitarian law.

In assessing the tenure of Ms. Arbour from the perspective of the ICTR-OTP Investigations Division, there are a number of mitigating factors to be considered: first, the requirement that she was required to oversee concomitantly the ICTY-OTP, which was likewise experiencing considerable expansion in its staffing numbers; and second, the stellar work undertaken by Ms. Arbour to ensure, through relations with external actors such as the UN Security Council as well as myriad States, a future for both of the *ad hoc* Tribunals. However, responsibility for a great many of the investigative shortcomings of the ICTR-OTP, most of which long outlived Ms. Arbour's tenure as chief Prosecutor, must be laid at her feet. If nothing else, the term of Ms. Arbour illustrates the point that even the most inspirational leader will fail where he or she does not remain in constant contact with his or her leadership and management teams or otherwise fails to control them effectively.

The record of Ms. Del Ponte is altogether positive when seen from the perspective of the necessity of carrying out effective investigations. First, she sacked Mr. Muna, albeit well into her term. Second, when sacking Mr. Muna, the chief Prosecutor placed trial lawyers in charge of investigations, thereby neutering, to an extent, the fact that the removal of Mr. Muna was not coupled with changes to the ranks of the investigative management cadre. In the event, the requirement that trial counsel oversee the investigative processes from the start served to improve the quality of the investigative output somewhat less than it might have done were geography not something of Ms. Del Ponte's enemy. One refers to the fact that, like Ms. Arbour, Ms. Del Ponte was (until 2003) concomitantly chief Pros-

ecutor of the ICTY and therefore limited in the amount of time that she could spend in Arusha, never mind Kigali. A second problem was the bifurcation of the OTP between those cities, with the trial lawyers afforded responsibility for the building of individual cases (after the sacking of Mr. Muna) being based in Arusha, whilst the investigators were, logically enough, situated in Kigali. A third problem was that the quality of the trial lawyers available to Ms. Del Ponte remained uneven, despite the mass-sacking of a number of senior counsel earlier in her tenure.

In summary, Ms. Del Ponte took several (re-)organizational decisions which were badly needed, thereby laying the foundation for improvements in the quality of the ICTR investigative output. Ultimately, it was her successor, chief Prosecutor Hassan Jallow, who was left to capitalize upon these improvements. The view taken here is that Ms. Del Ponte showed considerable moral courage as well as institutional loyalty in reforming the investigative management arrangements of the ICTR, through the sackings of some and the neutering of the authority of others. For these and other reasons, based on personal observations, the leadership of Ms. Del Ponte of the ICTR-OTP can be assessed positively, not least given the highly unsuitable arrangements which had been bequeathed to her in 1999 by Ms. Arbour.

9.6.2. ICTY

During her tenure as ICTY chief Prosecutor, Ms. Del Ponte made important changes to the functioning of the Investigations Division, having inherited from Ms. Arbour a poorly functioning operation. The removal of the Chief of Investigations, with Mr. Lopez-Terres as his replacement, has already been noted. Additionally, Ms. Del Ponte would later sack her Deputy Prosecutor, Mr. Graham Blewitt, and Chief of Prosecutions, Mr. Michael Johnson, though the reason for their removal in 2004 was unrelated to the proper functioning of the Investigations Division.²³ As at the ICTR-OTP, ICTY-OTP trial counsel were placed in charge of the building of individual case-files, thereby circumventing, for the most part, the collective insufficiency of the management and rank-and-file membership of the Investigations Division.

²³ Mr. Blewitt and Mr. Johnson were removed from their posts after Ms. Del Ponte received evidence that they were advocating for the replacement of Ms. Del Ponte as ICTY chief Prosecutor.

The changes initiated in The Hague worked well for two reasons. First, the Investigations and Prosecutions Divisions were situated in the same building, not one thousand kilometres apart, as was the case with the ICTR. Second, the Investigations Division of the ICTY had at its disposal a large number of highly specialized as well as capable linkage analysts, situated within the Leadership Research and Military Analysis Teams ('LRT', 'MAT'). Analysts from these teams already worked closely and constructively with OTP trial counsel when cases came to trial. These linkage analyst–trial counsel relationships were generally predicated on the fact that, prior to the reform of the management of the investigative processes, more often than not, trial counsel found themselves commencing litigation with insufficient linkage evidence to secure a conviction on some or all of the offences alleged in any given indictment. Under the circumstances, when trial counsel assumed responsibility for case building during the investigative phase, rather than only at the start of trial – by which point investigations should, as a matter of professional ethics and procedural fairness have been all but complete – the analyst–counsel relationships of this nature served to inform positively the ICTY-OTP case-files developed from 2001.

9.6.3. ICC

The paucity of disciplinary breaches and like failures by rank-and-file personnel at the ICC-OTP witnessed by this author during 2003–2005 owed much to a strong culture of institutional loyalty, effective management and, where Dr. Brammertz was concerned, effective leadership.

The difficulties experienced by the ICC-OTP in bringing consistently credible allegations against the accused and, in turn, securing convictions where allegations have given rise to charges has been examined *ad nauseum* elsewhere and need not be recounted here. What will be observed in this chapter is the fact that the initial recruitment effort of the OTP – which was in the enviable position of poaching top-drawer talent from elsewhere in the system of international criminal justice during a period of OTP reform at the *ad hoc* Tribunals – led to the retention of a great many highly-experienced investigators, analysts and lawyers with an inherent belief in the mission of the Court as this was set out in the language of the Rome Statute and in the carefully drafted vacancy announcements and job descriptions by the Preparatory Team. Likewise, the selection of investigative managers from outside of the field of international criminal justice was undertaken with considerable care. The bulk of the credit for the positive hir-

ing practices must go to Serge Brammertz and, before he was installed, to the Senior Legal Adviser of the OTP, Morten Bergsmo, who had designed the initial system of qualification requirements – setting proper standards – already in 2002-2003.

It was not until Mr. Moreno-Ocampo began to engage personally in the hiring of OTP personnel, for the most part not until the period 2004–2005, that individuals ill-suited to employment in the field of international criminal justice began to appear at the OTP. Prior to this point, Mr. Moreno-Ocampo had not concerned himself unduly with staffing matters, particularly where the latter impacted upon the Investigations Division. For these and other reasons which have already been noted, the quality of the initial OTP staff intake gave rise to a culture of institutional loyalty and professional competence, which facilitated effective investigations centred upon the eastern DRC and northern Uganda. At the same time, Mr. Moreno-Ocampo served, in his inimitable manner, as a powerful advocate internally for the mission of the Court. Or such was the case until, in 2004, the chief Prosecutor began to micro-manage the Investigations Division personnel who, aside from their prior international service, brought a great deal of experience from their domestic military, security-intelligence, police and prosecutorial organs – and concomitantly were quick to recognize that the would-be emperor had no clothes.

Certain of the egregious ethical lapses of Mr. Moreno-Ocampo have been well documented elsewhere, not least by the erstwhile chief Prosecutor himself, however unwittingly, through the release into the public domain of a great deal of his personal and professional correspondence. His troublesome tenure as ICC chief Prosecutor was, it is here held based on personal observations, informed by three phenomena.

First, Mr. Moreno-Ocampo evinced what might be termed a Louis XIV tendency. Just as the Sun King had allegedly claimed, “l’état, c’est moi”, Moreno-Ocampo clearly believed that the Court did not, and perhaps could not exist independently of his genius. In fairness, whilst Moreno-Ocampo is not known to have proclaimed, “la cour, c’est moi”, he most certainly left his subordinates with the impression that this was his belief.

Secondly, Mr. Moreno-Ocampo displayed a self-confessed tendency to micro-manage his subordinates at all levels, which had the effect of robbing them – and by extension, the OTP as a whole – of the sort of individual initiative which is absolutely key to the resolution of complex problems, the likes of which frequently confront international investigators grappling

with the challenges of *prima facie* evidence collection in hostile environments.

Thirdly, the ICC chief Prosecutor proved to be incapable of translating his vision for the OTP into concrete objectives to be assigned, in turn, to his deputies as well as the managerial cadre to execute over the medium- and longer-term without ongoing interference (or wholesale change of plan) emanating from the chief Prosecutor.

Finally, Mr. Moreno-Ocampo, perhaps for reasons of hubris, fancied himself a savvy politico-diplomatic operator, despite having arrived at the Court with no experience in this domain. His engagement on the politico-diplomatic level, in a manner clearly not foreseen by the drafters of Rome Statute, created opportunities for more seasoned, domestic operators to run metaphorical circles around the chief Prosecutor, with the result that the OTP was occasionally instrumentalized by self-interested States. The referral of the Libya situation to the Court by the United Nations Security Council as well as the arrest of Jean-Pierre Bemba, both of which occurred with the connivance of the chief Prosecutor despite the nakedly political objectives of the external parties pushing for these courses of action, transpired notwithstanding the fact that the OTP was ill-equipped to mount an effective criminal-investigative response in either case.

Recalling the circumstances of the Libya referral, amongst other cases, constitutes a reminder that institutional loyalty requires that leaders consider at all times the long-term health of the institutions which they lead, not least, to points beyond their own tenure. In this respect, additional to others, Mr. Moreno-Ocampo failed miserably, saddling as he did his successor with a great many investigative challenges which could not easily be resolved, if they could be resolved at all. The difficulties which have been experienced in attempting to undo the disastrous legacy of Mr. Moreno-Ocampo have, in this author's personal view, served to sap OTP staff morale whilst concomitantly giving rise to questions regarding the competence of the Court as a whole. In its entire history, the field of international criminal justice has never seen the likes of Mr. Moreno-Ocampo; and, if the system is to survive in anything approximating its current form, it would do well to avoid seeing his like again.

9.7. Leadership, Professional Integrity and Their Intersection with International Investigative Processes

The offices of the prosecutor of the international courts and tribunals have two core functions: (1) the building of case-files for prosecution (that is, investigations) and (2) litigation. Legal-analysis sections, units which serve victims, public-engagement and the like, whilst all necessary functions, constitute secondary duties whose sole function is, or ought to be, the provision of support to the investigative and litigative core. The proper execution of these central tasks requires the effective input of three categories of professionals: investigators, analysts and counsel. Although it is essential to the realization of the core mission that these professionals should work in harmony with one another, their respective responsibilities are distinct.

9.7.1. Investigators

Investigators are, in the main, of little use in the office, that is, they should be deployed as often as possible by those heading investigative teams with the aim of collecting information of evidentiary value, which will ultimately withstand the scrutiny of pre-trial, trial and appellate proceedings. The successful investigator must embody a measure of cunning in his or her approach to the collection of information, particularly in the search for *prima facie* linkage evidence. This assertion follows from the fact that a linkage case which has been properly constructed will rest heavily upon documentation generated by the perpetrating institutions, the acquisition of which shall, more often than not, require the exercise of considerable creativity on the part of the investigators involved in its acquisition. Additionally, the building of linkage cases will, in almost every case, lead to the recruitment of so-called insider witnesses, in particular, individuals who have served alongside the suspects-*cum*-accused within the perpetrating structures. It is something of an understatement to observe that the co-operation of witnesses of this nature is rarely driven by a disinterested commitment to the fundamental principles of justice. As such, insider witnesses need to be handled from the start with a great deal of psychological dexterity. Finally, to ensure the effective execution of their mission, investigators will necessarily avoid dubious collection methods which involve resort to low cunning, for instance, the offering of false inducements to putative witnesses. Conduct of this nature is at all times impermissible in order to maintain the reputation of the institutions for which investigators work and, more immediately, to avoid any violation of the rules of procedure and evidence

which constitute the ultimate guide to investigative conduct insofar as inadmissible evidence is no evidence. For these reasons, investigators must excel at the art of followership whilst being carefully managed and led.

9.7.2. Analysts

Analysts tend to work from institutional headquarters, their primary function being to transform the information collected by investigators into evidence through analytical processes undertaken within the context of the applicable substantive law. As a general rule, analysts need not concern themselves with matters of procedural law, unless they suspect a violation of the same. However, it is imperative that they should remain alert at all times to any formal requirement to consider exculpatory evidence,²⁴ not least in order to ensure that any case brought to trial will withstand judicial scrutiny. The bulk of the analytical effort which goes into the case-building process is, like the work of investigators, focused upon the building of the linkage case, that is, establishing to a beyond-reasonable-doubt standard the connections between higher-level suspects and the physical authors of the underlying criminal acts. Broadly speaking, in the building of linkage cases, analysts are focused upon the command, control and communications arrangements of perpetrating structures; in this context, analysts resort to their intellect as well as an array of software which has been developed to link fact to law, for instance, CaseMap and the Case Matrix. Effective linkage analysis demands of the analyst – and, for that matter, the skilled investigator – the possession of a well-developed understanding of the modes of liability set out in international criminal and humanitarian law and the legal requirements thereof. For this reason, the profile of the average investigator and analyst has evolved markedly over the last 10 to 15 years, their ranks having come to include a substantial number of individuals with a legal education.

9.7.3. Counsel

Persons employed as counsel within international courts and tribunals tend to be, as in domestic jurisdictions, highly specialized in one of a number of

²⁴ For instance, in the Rome Statute of the International Criminal Court, 17 July 1998, Article 54(1)(a) (<https://legal-tools.org/doc/9c9fd2>), where the Prosecutor is required to “[i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally”.

sub-disciplines. The specialization of primary relevance to the case-building process is that of trial counsel.

Trial counsel prosecute cases before first-instance chambers and, as has been a general rule since the early 2000s, are integrated to a greater or lesser degree into the investigative and analytical processes. The principal role of trial counsel – acting as required with the support of appellate counsel as well as lawyers specialized in procedural law – is to ensure, as early in the case-building process as possible, that prosecution cases are (being) assembled in accordance with the applicable substantive law. As a matter of self-preservation, given that it is trial counsel who appear in court, they should be highly motivated in the use of quality-control measures geared towards the proper application of substantive and procedural law. Where evidence is insufficient or lacking, judges will – and should – hold trial counsel responsible. Lead prosecutors who blame trial judges for setbacks in court ought, as a general rule, to be encouraged by the leadership of offices of the prosecutor to seek employment elsewhere.

9.7.4. Case-Building Arrangements at the ICTY and the ICTR During Their Formative Years

When international criminal justice re-emerged in 1993 as a discipline for the first time since the late-1940s, the investigative culture of the Investigations Division stood up at the ICTY-OTP mirrored in a number of significant respects the investigative practices of several adversarial systems, in particular, those of Australia, Canada, New Zealand and the United Kingdom – the States from which the bulk of the investigators were recruited until several years after the turn of the century. What is more, only one of the many investigators employed by the ICTY-OTP during its first decade was not a police officer by profession, notwithstanding the fact that the substantive investigative work undertaken during the immediate post-1945 period was performed by military intelligence officers and lawyers.²⁵ More problematical still was the fact that until 2001, the ICTY-OTP Investigations Division management cadre had tended as a general rule to exclude counsel from the case-building process.

Whereas a great many analysts were employed by the ICTY from the 1990s, they had been used improperly by the Investigations Division man-

²⁵ Prior to joining the ICTY, the investigator in question was employed as an intelligence officer by a domestic security service.

agers and sub-managers until 2001. This was hardly surprising given that very few of the police officers employed by the ICTY during its first decade arrived at the OTP after having witnessed the sort of analytical input which informs the building of multifaceted criminal cases in which the investigative targets stand several organization layers above the physical perpetrators of the underlying criminal acts. As far as the casual observer could tell, the police officers retained by the OTP for most of its first decade hailed from the domains of routine domestic policing and (domestic) murder squads. One has no reason to doubt that the ICTY-OTP investigators had been highly proficient in these domestic realms. However, the difficulty with recruitment from these specializations was that what was needed were men and women with a grasp of complex fraud and transnational crime, insofar as the investigative methodology used in these areas approximates closely that of international criminal investigations.

The exclusion of trial counsel from investigative processes gave rise to a situation prior to 2001 in which the litigators tended to see the case-files assigned to them only on the metaphorical eve of trial, that is, after suspects had been rendered accused persons and, more often than not, already spent periods of time in pre-trial custody which would be unconscionable in the jurisdictions in which all concerned had worked domestically. Secondly, owing to the (mis-)recruitment and promotion practices within the Investigations Division, the files were invariably a mess at the outset of the trial. One erstwhile senior trial attorney likened what the trial lawyers were seeing – when they finally did see the case-files – as akin to “getting inundated with three filing cabinets full of statements and documents”, which had not been assembled in any coherent manner.²⁶ Far worse than the poor organization of the case-files was the fact that a great many trials commenced with the prosecutors possessing insufficient linkage evidence to warrant a conviction – naturally enough raising questions regarding whether the accused ought to have been indicted and detained. The action taken by the ICTY-OTP in these situations would see the senior trial attorneys responsible for a case which was in disarray initiate as well as lead a proper linkage investigation, generally with one of the LRT or MAT linkage analysts working closely to hand, whilst concurrently leading the prosecution in court. Manifestly, an approach to investigations and prosecutions of this nature would never have been tolerated in any of the

²⁶ Quoted in John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*, University of Chicago Press, 2003, p. 224.

national justice systems from which the majority of ICTY investigators, analysts and counsel had been drawn.

Similar problems were witnessed at the ICTR, albeit for slightly different reasons. As with the ICTY, the majority of the investigators were police officers. However, the ranks of the ICTR-OTP Investigations Division included a handful of individuals with legal, military and intelligence backgrounds. Additionally, owing to the requirement for French-language skills in the Rwanda of that period, the bulk of the investigators had been drawn from inquisitorial systems which followed French criminal procedure, or some variation thereupon.²⁷ It followed from this arrangement that the culture of the Investigations Division at all phases of the investigative process was not in the least hostile to the input of counsel. Indeed, during the first decade of the life of the ICTR, the OTP had anywhere from 8 to 10 counsel based in Kigali, with the bulk of OTP lawyers working from the seat of the Tribunal in Arusha. Whilst investigators were formally responsible for the building of cases, this fact alone does not – given the presence of full-time counsel in the Kigali office – explain the generally poor quality of the files with which the litigators in Arusha were presented prior to trial. The insufficiency of most case-files on the eve of trial is a phenomenon better attributed to the dearth of analysts of any kind at the ICTR as well as the unacceptable number of professional incompetents infecting the ranks of the OTP as a whole in the view of this author – notwithstanding the fact that relatively early in her term as chief Prosecutor, Ms. Del Ponte had sacked an impressive number of senior OTP counsel. A cull of incompetent personnel on this scale had not – and has not since – been witnessed at any international office of the prosecutor, although the effort made by Ms. Del Ponte clearly constituted an insufficient tonic for the overall health of that investigative and prosecutorial body.

9.7.5. Investigations Division Reforms at the *Ad Hoc* Tribunals

The problems which plagued the case-building process at the ICTR were ultimately resolved, to the extent that they were resolved, by improvements in the recruitment of trial counsel and their increasing engagement in the case-building process. As has been noted already, at the ICTY, Ms. Del Ponte sacked the police officer who was leading the Investigations Division

²⁷ There were very few French investigators at the ICTR. Rather, the OTP had a great many investigators from former French colonies that had retained variants of French procedural law following independence.

in 2001, replacing him with a French investigative judge whilst concomitantly removing the authority of the investigations commanders, who sat between the investigative team leads and the chief of investigations. In their stead, ICTY-OTP senior trial attorneys were assigned to cases early in the case-building process.

What emerged from these changes was a two-track system which, intentionally or otherwise, incorporated a number of checks and balances, which served to improve over time the quality of ICTY case-files prior to indictment and, most especially, prior to trial. On the one hand, the core of the Investigations Division remained built around investigative teams constructed upon thematic lines, for instance, Bosnian-Serb crimes, Croatian criminality and Kosovo Liberation Army misconduct. At the same time, the investigative teams began to serve little more than administrative functions, akin to home-room or registration in a secondary school, that is, the assembly point at which attendance is taken and administrative instructions imparted, with the students otherwise moving between various lessons elsewhere in accordance with individual timetables. The OTP crime-base analysts remained with the investigative teams, although the nature of their output, before and after the reforms to the Investigations Division, was never evident to the OTP personnel who understood how to assemble a prosecution case. Additionally, the specialized linkage analysis teams remained intact – the LRT and the MAT – serving the ‘home-room’ function and as centres for a great deal of peer review; as with the investigative teams, their members were farmed out to the case-building and prosecution teams, in accordance with their thematic speciality. From 2001, the linkage analysts continued to work closely with the senior (or more seasoned) trial attorneys who were responsible for the prosecutorial and, after the aforementioned changes had been made, investigative processes. In summary, then, the Prosecutions Division of the ICTY assumed effective control over OTP investigations from the Investigations Division in 2001, drawing upon individual Investigations Division personnel as required, once it had been determined by Ms. Del Ponte that the Investigations Division management was not fit for purpose. This reformed approach to case building at the ICTY-OTP worked well by breaking down the divisions which had existed prior to 2001 between the investigative, analytical and legal functions. Where problems within the case-specific teams did arise, these were invariably a reflection of the insufficient competence shown by key personnel, in particular, the senior trial attorney and, equally, the senior linkage ana-

lyst serving within the case-specific team, generally (if the senior trial attorney had any sense) at his or her right hand.

9.7.6. The Effective Management of Case-Building Processes

It should not be inferred from the improved investigative practices of the OTPs of the ICTY and the ICTR that an effective case-building effort might be achieved only where a senior trial attorney serves in the lead role. Such an arrangement is desirable, given that prosecution cases, to be effective, require a clear understanding of the substantive law. However, the increasing number of legally trained, or otherwise legally aware investigators and analysts working in the system of international criminal justice points to the potential for an investigator or analyst to serve as a case-specific team manager, prior to a given case proceeding to trial. Where an investigator or analyst is assigned to the lead role in such situations, it remains necessary for trial counsel to remain close to hand to advise the case-specific team manager on questions relating to the intersection of evidence and law. By way of example, non-lawyers have served as investigative team leaders at what remains, to date, the only non-public international criminal and humanitarian law investigative body, that is, the Commission for International Justice and Accountability ('CIJA'). In particular, CIJA has, on occasion, appointed non-lawyers to the head of investigative teams, with a lawyer acting as the *de facto* second in command, generally where the day-to-day challenges of *prima facie* evidence collection in high-physical-risk environments exceed those posed in meeting the legal requirements of effective case building.²⁸ In a similar vein, the longstanding ICC-OTP Chief of Investigations is a former police officer, though his deputy (that is, the Investigations Coordinator) is a Portuguese prosecutor and the case-by-case investigations at the ICC-OTP are overseen for all intents and purposes by Prosecutions Division counsel.

9.8. Conclusion

It is the duty of States as well as the supranational institutions which support international criminal justice to ensure that qualified personnel are appointed to leadership positions within offices of the prosecutor and, equally, to engineer their prompt removal where their professional competence or

²⁸ For instance, the CIJA Da'esh Crimes Team has seen three team leaders since January 2014, each of whom brought to the position significant field experience in a military and intelligence capacity *vis-à-vis* non-State actors operating in areas of high-intensity armed conflict.

personal conduct falls below minimally-acceptable standards. If nothing else, this is a central point that informs this volume, in accordance with the concept note which serves as its foundation.²⁹ It is likewise the responsibility of those leading offices of the prosecutor to ensure that their prosecutions and investigations divisions are properly managed, with the goals established by the leaders being executed in a timely manner by the management cadre. Concomitantly, it falls to these leaders to foster organizational cultures which are characterized by, above all, professional competence and institutional loyalty. Personal and professional integrity – which are inseparable concepts – will follow naturally where the standards of conduct applicable to all personnel, not least chief and deputy prosecutors, are clear; and, where there is misconduct of any sort, leaders must ensure that disciplinary systems are in place and brought to bear. Where standards are permitted to slip, institutional rot shall set in quickly; and, where there is institutional rot, the investigative and prosecutorial output of the institution will be poor, not least because many of the high-performing personnel are likely to seek employment elsewhere.

Since 1993, international courts and tribunals have shown only a limited collective awareness of the simple prescription set out in the preceding paragraph; this fact is all the more shocking, because the core principles of leadership, management and followership are central to the proper performance of any institution, be it a commercial firm or a public-sector institution. It is appreciated here that there are unique pressures, political as well as social, frequently weighing heavily upon those bodies raised to deliver international criminal justice, not least their investigative and prosecutorial arms. However, the quality of office of the prosecutor leadership at any of the international courts and tribunals, particularly during the formative years of the post-1993 era, has proved itself to be uneven in a number of important respects. In part, these shortcomings have arisen from the monumental challenges inherent in the process of institution-building whilst under pressure. However, certain of the more egregious failings – those of Mr. Moreno-Ocampo and Mr. Muna, most especially – must be ascribed to personal unsuitability for international leadership appointments and insufficient professional competence for the task at hand.

A number of the chief and deputy prosecutors appointed since 1993 have absorbed, perhaps unconsciously, certain of the core principles of

²⁹ Bergsmo, 2018, see above note 8.

leadership identified in this chapter and, in turn, applied them to the offices of the prosecutor for which they have been entrusted with responsibility. The examples of Ms. Del Ponte and Dr. Brammertz have been cited in this chapter, though one hastens to add that there have been others. What has ultimately set apart the successful leaders from those who have come up short is their willingness to sack non-performing managers as well as rank-and-file personnel who ought never to have been retained – conduct which reflects, amongst other considerations, their understanding of the importance of ensuring excellence in the execution of the investigative and prosecutorial functions (that is, the core tasks) of an office of the prosecutor. However, until the principles of effective leadership and management in (most especially) the area of international criminal investigations are more widely discussed, the overall prosecutorial output of the system of international criminal justice shall continue to fall short of what might be expected as a reasonable return on the monies which are poured annually into this endeavour.

Nuremberg Academy Series No. 4 (2020):

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This is the first book to comprehensively analyse integrity in international justice. Thirty-three chapters discuss in-depth the meaning of integrity, awareness and culture of integrity, the roles of international organizations and states as well as international courts in enhancing integrity, integrity as seen through the lens of cases, and the relationship between the principles of independence and integrity. The book considers integrity as a legally binding standard in international courts, while including perspectives from other disciplines such as philosophy, history, psychology and religion. It argues that respect for integrity among high officials and staff members is a prerequisite for international courts and other international organizations to fulfil their mandates.

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ISBNs: 978-82-8348-190-7 (print) and 978-82-8348-191-4 (e-book).



Torkel Opsahl Academic EPublisher

Via San Gallo 135r

50129 Florence

Italy

URL: www.toaep.org



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