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Front cover: *Master carpenter Lorenzo Corti fine-tuning a piece of European cherrywood in the CILRAP Bottega (office) in Florence. Recognized for the high quality of his work, he has restored churches and monasteries in Tuscany for many years. The books in CILRAP's Quality Control Project display contemporary Florentine artisans as symbols of the mindset of quality control which they seek to inspire. Photograph: © CILRAP 2020.*

Back cover: *Segment of the steps at the entrance of the San Miniato al Monte Basilica, a Romanesque church (from 1013 AD) on a hill-top in southern Florence. The surface of each stone is carefully carved by a mason's hand for water to run off and for better grip. Photograph: © CILRAP 2020.*

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International Criminal Investigative Collection Planning, Collection Management and Evidence Review

Ewan Brown and William H. Wiley*

8.1. Introduction

The January 2019 collapse of the prosecution cases against Mr. Laurent Gbagbo, the erstwhile President of Côte d'Ivoire, and his co-accused, Mr. Charles Blé Goudé, constituted the latest in a series of debacles befalling the Office of the Prosecutor ('OTP') of the International Criminal Court ('ICC'). In looking at the rather thin docket compiled since the establishment of the Court in 2003, even the casual observer will note the substantial number of ignominious OTP breakdowns. In four instances to date, ICC pre-trial chambers have refused to confirm *any* of the prosecution charges.[1] In two further instances, pre-trial chambers confirmed some of

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1 ICC, Situation in Darfur, Sudan, *The Prosecutor v. Bahr Idriss Abu Garda*, Pre-Trial Chamber, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red (https://legal-tools.org/doc/cb3614); ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Callixte Mbarushimana*, Pre-Trial Chamber, Decision on the confirmation of charges, 16 December 2011, ICC-01/04-01/10-465-Red (https://legal-tools.org/doc/63028f); ICC, Situation in the Republic of Kenya, *The Prosecutor v. Mohammed Hussein Ali*, Pre-Trial Chamber, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red (https://legal-tools.org/doc/4972c0); ICC, Situation in the Republic of Kenya, *The Prosecutor v. Henry Kiprono Kosgey*, Pre-Trial Chamber, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373 (https://legal-tools.org/doc/96c3c2).

the OTP charges, only to see the Prosecutor formally withdraw the cases – including that brought against the President of Kenya – on the grounds that the OTP lacked sufficient evidence to secure a conviction.[2] In another case, Mr. Mathieu Ngudjolo was acquitted of all charges by Trial Chamber II at the conclusion of his trial,[3] after he had spent nearly five years in custody; and, it will be recalled, in mid-2018 the ICC Appeals Chamber vacated the conviction of Mr. Jean-Pierre Bemba on all charges arising from his alleged perpetration of core international crimes, after Mr. Bemba had spent ten years in custody.[4] Against this record, the OTP has successfully prosecuted only four individuals for war crimes and crimes against humanity, one of whom pleaded guilty.[5] Similarly, the Extraordinary Chambers in the Courts of Cambodia ('ECCC') have registered just three convictions since the first judges were sworn in during July 2006.[6] For its part, the Special Tribunal for Lebanon ('STL') has not (at January 2020) issued a single judgement on a criminal charge; the investigative body which gave rise to the Tribunal commenced its work in 2005.[7] In a similar vein, the Kosovo Specialist Chambers and Specialist Prosecutor's Office ('KSC') have not brought any charges, the investigations informing that body having commenced in 2011.[8]

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2 ICC, Situation in the Republic of Kenya, *The Prosecutor v. Francis Kirimi Muthaura*, OTP, Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, 11 March 2013, ICC-01/09-02/11-687 (https://legal-tools.org/doc/4786c1); ICC, Situation in the Republic of Kenya, *The Prosecutor v. Uhuru Muigai Kenyatta*, OTP, Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, 5 December 2014, ICC-01/09-02/11-983 (https://legal-tools.org/doc/b57a97).

3 ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Mathieu Ngudjolo Chui*, Trial Chamber, Judgement pursuant to Article 74 of the Statute, 18 December 2012, ICC-01/04-02/12-3-tENG (https://legal-tools.org/doc/2c2cde).

4 ICC, Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Appeals Chamber, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", 8 June 2018, ICC-01/05-01/08-3636-Red (https://legal-tools.org/doc/40d35b).

5 Thomas Lubanga Dyilo, Germain Katanga, Ahmad Al Faqi Al Mahdi and Bosco Ntaganda.

6 See ECCC's web site.

7 The United Nations International Independent Investigation Commission ('UNIIIC') was established in April 2005 pursuant to United Nations Security Council Resolution 1595 (2005), UN Doc. S/RES/1595 (2005), 7 April 2005 (https://legal-tools.org/doc/4a0623).

8 The Special Investigative Task Force ('SITF'), established in 2011, evolved into the Special Prosecutor's Office in 2016; see KSC's web site.

Factors unique to any given casefile will explain why (i) an investigation does not give rise to a prosecution and, where allegations are brought before a panel of judges, (ii) the prosecution fails to secure a conviction. This chapter is concerned primarily with the second phenomenon; and it will be noted that a consistent set of shortcomings invariably informs unsuccessful prosecutions. The principal problems identified by pre-trial (at the ICC) and trial chambers more generally are summarised here as being an insufficiency of evidence as well as the failure of prosecutors to assess properly such *prima facie* evidence which an OTP chooses to adduce. By way of example, the reasons given by ICC Trial Chamber I for the dismissal of the charges against Messrs. Blé Goudé and Gbagbo are representative. In the relevant decision, the trial panel noted the lack of evidence supporting the contextual narrative advanced by the prosecution as well as the paucity of evidentiary support for many of the key assertions made by the OTP. In particular, the trial chamber pointed to insufficiently-supported OTP allegations concerning, *inter alia*, the development of a common plan, the existence of an inner circle and the shared intent underlying the alleged common plan formulated by the ostensible members of the said inner circle.[9] Taken as a whole, the written reasons offered by the majority of the trial panel for the dismissal of the charges against both accused were withering – and justifiably so, given the palpable weakness of the prosecution case as well as the fact that Mr. Blé Goudé and Mr. Gbagbo had spent, respectively, roughly five and seven years in custody. As things stand, it is difficult to rebut the arguments of those who hold that ICC-OTP expenditures since 2003, along with the paucity of convictions relative to collapsed cases, together point to a record of prosecutorial failure.

It is undoubtedly the case that the underlying reasons for the undesirable state of affairs set out in the prior paragraph do not all lie with the ICC-OTP. For instance, any international chief prosecutor charged with the investigation of complex crimes in politically unstable environments which present significant physical-security challenges will encounter difficulties in securing sufficient evidence to warrant formal allegations of individual criminal responsibility for the perpetration of core international

[9] ICC, Situation in the Republic of Côte d'Ivoire, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Trial Chamber, Reasons of Judge Geoffrey Henderson, 16 July 2019, ICC-02/11-01/15-1263-AnxB-Red, paras. 66–77 (https://legal-tools.org/doc/j0v5qx).

crimes. Transcending the obstacles posed by political instability and physical risk will always prove to be especially difficult where an international court or tribunal lacks a United Nations Security Council Chapter VII mandate. These mitigating factors having been noted, it is nonetheless to be recalled that it is the ethical obligation of prosecutors – domestic and international – to refrain from bringing to trial any suspect where there is not a reasonable prospect of conviction. The limited collective caseload of the ECCC, STL and KSC would suggest that the chief prosecutors who have served in those institutions understand this ethical requirement. Ms. Fatou Bensouda, the ICC chief Prosecutor, presumably does as well, insofar as most of the cases which have collapsed on her watch were initiated by her predecessor, Mr. Luis Moreno Ocampo.

Given the wide-ranging responsibilities of any chief prosecutor charged with overseeing operations of significant scope, it follows that he or she will only be effective where subordinate investigators, analysts and counsel conform collectively to the highest standards of evidence collection, analysis and case management. Indisputably, it is the first duty of a chief prosecutor to ensure that such standards are upheld by his or her subordinates. This truism aside, the fact that the ICC-OTP has lost (or otherwise seen collapse) more cases than it has won would suggest to some that there is disconnect between the threshold for a conviction set by the ICC judges and the standard prevailing within the OTP. What is more likely is that the OTP grasps in theory the burden of proof established by the judicial chambers of the Court whereas in practice the OTP is, as a body, unable to determine consistently whether it holds sufficient evidence to meet the requisite evidentiary standards for a conviction on a particular charge.

If the latter assertion is correct – and the litany of OTP failures at the pre-trial, trial and appellate levels would suggest that it is – this deleterious situation points to three overlapping sets of problems. First, the OTP has experienced difficulties on a consistent basis in collecting information of *prima facie* evidentiary value which, in turn, might be transformed into relevant evidence through analytical processes. The suspicion of the authors of this chapter is that, more often than not, the obstacles encountered by the OTP where it has sought to collect high-quality *prima facie* evidence have led, in a misguided attempt to demonstrate internal progress, to the over-collection of more easily accessible forms of information, in particular, crime base testimony. Secondly, there is apparently an inability

on the part of a plurality of OTP investigators, analysts and lawyers to grasp fully the depth, quality and quantities of evidence required to ensure a reasonable prospect of conviction where a decision is taken to send a case to trial. Thirdly, the evidence-review processes of the ICC-OTP are often not functioning properly. Were this not the case, convictions rather than prosecutorial failure would be the norm. Absent these three considerations, there is no logical explanation for the fact that the OTP chief and senior prosecutors have so often found themselves buried in the rubble of cases which have collapsed atop them.

Notwithstanding these introductory remarks, this chapter should not be seen as an indictment of the ICC-OTP, the evidence collection efforts of which have been undermined not infrequently by political chicanery and seemingly insurmountable physical risk. Rather, it takes certain of the shortcomings of that institution only as its starting point, offering, as the ICC-OTP performance does, an object lesson in the fate which awaits any prosecutor, appearing before an independent judiciary, where he or she proceeds to trial in a complex case armed with insufficient evidence. The policy brief of Mr. Morten Bergsmo, which informs this entire volume, serves as an important guide, not least through its reference to the indispensability of effective evidence collection and review as well as the pitfalls of collecting too much evidence – or, rather, the wrong sorts of evidence.[10] To these ends, what follows places particular emphasis upon planning for the collection of crime base as well as linkage evidence whilst making a case for innovation in the gathering of contextual evidence. The substantive discussion closes with a call for more robust evidence review processes.

8.2. Evidentiary Challenges

The building of prosecution cases against senior leadership personnel within the framework of international criminal and humanitarian law ('ICHL'), or domestic variants thereof, is time consuming, resource intensive and requires considerable attention to detail on the part of the investigators, analysts and counsel assigned to a given file. It is worth recalling that the focus of ICHL investigations and prosecutions frequently falls

[10] Morten Bergsmo, "Towards a Culture of Quality Control in Criminal Investigations", FICHL Policy Brief Series No. 94 (2019), Torkel Opsahl Academic EPublisher, Brussels, 2019 (https://www.toaep.org/pbs-pdf/94-bergsmo/).

upon individuals well removed from the underlying physical acts of a criminal nature; and, whether the suspects are of low or high rank, they will invariably be operating (or have operated) in the midst of military conflicts which often give rise to extreme levels of societal breakdown. The presence of an array of belligerent parties, including those foreign to the territory on which a conflict takes place, further complicates the challenges facing those tasked with the building of prosecution cases.

As a rule, investigative and prosecutorial bodies – particularly those operating internationally – find themselves grappling with an array of perpetrating structures of a political, military, police, security-intelligence, paramilitary and, occasionally, commercial nature. In the post-*ad hoc* Tribunal era, domestic and international investigations are in the main undertaken in and around ongoing armed conflicts; this reality complicates significantly the challenges inherent in the collection of high-quality, *prima facie* evidence, most especially by public authorities with their necessarily limited capacity to adapt to the physical risks presented by theatres of war. What is more, international criminal investigative teams are invariably compelled to take into account broad temporal parameters and wide geographical areas, within which multiple offences have taken place. Notwithstanding these challenges, there is (and can be) no lessoning of the requirement that, where a case is brought to trial, the prosecutor must demonstrate beyond a reasonable doubt that all of the elements of the crimes alleged as well as the legal requirements of the modes of liability alleged in the prosecution complaint.

It was the early practice of the OTPs of the International Criminal Tribunals for Rwanda ('ICTR') and the former Yugoslavia ('ICTY') to collect key evidence during trial; that is, after the accused had habitually spent significant periods of time in pre-trial custody and hard-pressed senior trial attorneys came to realise, time and again, that they were arguing cases which, absent significant additional evidence collection, would collapse. For the most part, both OTPs got away with this risky approach to case building insofar as the number of acquittals witnessed at the ICTY and the ICTR was remarkably few. At these institutions, prosecutorial disaster was consistently averted only because they both operated with Chapter VII mandates in secure, post-conflict environments characterised by levels of domestic-political interference which, in the main, did not present competent investigative efforts with insurmountable difficulties. These relative advantages have rarely made themselves available in such

abundance to the OTPs established since 2000 – and, most especially, not to the ICC-OTP. Given the ethical requirement to investigate incriminating and exonerating evidence related to all the elements of every offence and mode of liability alleged *prior* to trial, investigators, analysts and counsel are today routinely confronted with potentially overwhelming evidentiary challenges.

During the investigative phase of ICHL cases, it has become commonplace for investigative and prosecutorial authorities to distinguish between crime base and linkage evidence. While there is at times a degree of important overlap between these categories, the distinction, which has gained traction in the practice of ICHL over the last 15 years, serves to focus the minds of investigators, analysts and counsel upon the relevance and value of every specific piece of evidence as well as its place within the overall case. The authors of this chapter suggest that the time has come to add a third category of evidence to those of crime base and linkage – that of contextual evidence. These three classifications of evidence shall now be considered in turn.

8.2.1. Crime Base Evidence

Defined in purely legal terms, crime base evidence is used to satisfy the physical elements of the offences alleged; as such, it does not concern itself with the mental elements of crimes nor the mental and material legal requirements of the modes of liability set out in ICHL. The collection of crime base information is designed to establish that acts of a criminal nature have been perpetrated and the context in which they were committed; to this end, crime base collection generally involves the identification of victims, eyewitnesses to physical acts and the institutional affiliation of the physical perpetrators of those acts. Additionally, crime base inquiries will frequently address the broader actions of perpetrating structures, not least prior to and following key incidents.

The focus of crime base inquiries upon the details pertaining to underlying physical acts of a potentially criminal nature, gleaned principally from witnesses to such events (that is, crime base witnesses), has come to be well understood by the investigators, analysts and counsel employed by national as well as international investigative bodies. However, individual investigative teams demonstrate at times an insufficient grasp of the multiple sub-themes of crime base collection – that is, the finding of material pertaining to selected incidents, including that which pre- and

post-dates the key events – all of which require highly detailed, unique and demanding collection activities. For instance, it is invariably advisable that investigative teams secure location and geospatial data; identify all targets attacked during the key incident(s); obtain details regarding the weapons (or weapon systems) employed during the perpetration of offences; prepare a detailed account – including the full biographical details – of casualties and bystanders; establish the wider patterns of combat activity at the time of the relevant incident(s); secure information regarding the presence in the vicinity, if any, of armed groups hostile to the suspected perpetrating structures; determine whether ranking personnel were present at the incident location(s) prior to, during or after the key event(s); establish whether any threats or warnings were issued by the suspected perpetrating structure(s) prior to the incident(s); and identify any post-incident inquiries undertaken by officials associated with the said perpetrating structure(s).

These and other questions need to be explored systematically and exhaustively in order to arrive at a comprehensive and objective account of any suspected criminality. At times, it is relatively easy to establish, at least to a *prima facie* standard of evidence, that criminal acts were perpetrated, for example, in instances where military forces appeared in a village and, in the absence of armed opposition, proceeded to execute some or all of the civilians found in the settlement. However, in other instances the loss of civilian life, in and of itself, cannot reasonably give rise to a working hypothesis that one or another party to the fighting perpetrated criminal acts. This is most especially the case where sizeable opposing forces engaged one another in built-up areas in which large numbers of civilians were present. To conclude solely upon the basis of the loss of civilian life in the midst of battle that a criminal offence was perpetrated is to forget that international humanitarian law makes considerable allowance for such losses where civilians have not been targeted directly.

8.2.1.1. Crime Base Collection Planning

It is essential that crime base information-*cum*-evidence should be sought in accordance with a properly prepared and detailed collection plan. The undertaking of crime base collection activities in the absence of such a plan – which was almost uniformly the practice at the *ad hoc* Tribunals and remains a distressingly common practice – will invariably lead to the diversion of finite investigative resources from more pressing evidentiary

requirements whilst serving to bury an investigative team in superfluous information. Material collected in the field is not, strictly speaking, evidence or even *prima facie* evidence; rather, what is collected is information which becomes evidence only after it has been analysed in the context of the applicable substantive law. What is more, analytical resources are invariably limited within investigative teams, which is to note that they should not be redirected from significant evidentiary questions towards the assessment of mountains of information which may, upon analysis, turn out to have the evidentiary value of mattress stuffing.

There is no fixed format for a crime base collection plan; such documents are organic in nature in that they are subject to ongoing amendment in accordance with the findings of the investigation as the latter evolves. In producing the first iteration of a collection plan, the investigative team will invariably turn to reports coming from the human rights world, for instance, those issued by non-governmental organisations and United Nations fact-finding missions. Although human rights reports are habitually produced for advocacy purposes – and conform to standards of evidence falling well below those demanded by criminal courts – they nonetheless tend to identify with reasonable accuracy the simple fact of critical incidents. As such, human rights reports offer something in the way of initial guidance to a criminal investigation at its outset. That noted, criminal investigative teams should look to open sources of this nature as guides rather than as gospel. For this reason, the leads taken from human rights reports will, in the first draft of a collection plan, be supplemented by lengthy lists of questions appropriate to the likely challenges identified at the outset by properly led investigative teams.

It is critical that such questions are posed *from the outset* of an investigation where, amended as necessary, they must remain at the heart of the collection plan, not least in order to focus the minds of investigators, analysts and counsel on to the key evidentiary requirements. Each theme and sub-theme in a crime base collection plan should generate detailed questions which, as they are answered, will facilitate the building of an objective as well as complete picture of what might be termed the what, where, when and how of an incident or incidences. For instance, an investigation concerned with one or more security-intelligence structures suspected of perpetrating ICHL offences in static locations (for instance, detention facilities) will pose to an extent different questions than an inquiry focused upon ground forces suspected of having violated the principles of

distinction and the law of proportionality in the context of otherwise lawful military operations. Nonetheless, every crime base collection plan will set out clearly a number of key themes, not least: the identification of the chronology of the key incident(s); the establishment of the pertinent actions, along with the details of the physical perpetrators of the incident(s) as well as the units, formations and organisations with which the suspected physical authors of the *prima facie* criminal acts served; the material elements of the suspected *prima facie* offences; and the identification of a comprehensive contextual narrative taking into account key events which occurred prior to, during and following the relevant incident(s).

It is worth reiterating that collection plans take the form of a large number of specific questions to be answered with critical detachment; concomitantly, these questions are matched with potential sources – human and material – which are to be exploited to this end. This practice might be illustrated with reference to a single example, in particular, torture as a crime against humanity as this is set out in the Rome Statute at Article 7(1)(f) and, more specifically, the physical element of the offence which requires proof that the person was in the custody of the perpetrator. The questions arising during any effort to satisfy what is only one of the numerous elements of this offence necessarily revolve around when, where and how the person was taken into custody; an extremely detailed physical description of the relevant holding, detention and interrogation facilities used for the duration of the detention; the feeding, sanitary and medical arrangements; the allowance (if any) for prison visits, not least by international monitors such as representatives of the International Committee of the Red Cross; the nature of the prisoner routine, if a routine of sorts was imposed upon the detainees by the administration of the facility; the precise process of interrogation, questioning and detainee processing; the questions put to person(s) during interrogation sessions and the nature of any physical as well as mental suasion brought to bear during these sessions or at any other time; and the more general conduct and routines of the facility staff, whether guards, interrogators or persons in positions of higher authority. Each one of these themes and sub-themes demands a set of detailed (and different) questions to be asked if the whole story is to be ascertained. The potential sources of answers to these and other pertinent questions should be identified alongside each query and might include other persons incarcerated in the relevant facilities; persons who served in any capacity in the facilities; imagery (in all its forms); electron-

ic and primary documentation, particularly that generated contemporaneously to the key incident(s) by the institution(s) and organisation(s) ultimately responsible for the detention of the person(s) subjected to *prima facie* acts of torture.

The aforementioned – though by no means complete – selection of questions to be answered in order to satisfy only one of the elements of a commonly perpetrated offence points to the complexity and indeed the typical length of crime base collection plans. Under the circumstances, the drafting and maintenance of collection plans is very time consuming given the demand for forensic attention to detail in a situation where investigators, analysts and counsel must collaborate closely. As such, an investigation manager who fails to ensure the utmost rigour in collection planning is remiss in the execution of one of his or her core duties and correspondingly runs the risk of failing to meet detailed collection requirements.

8.2.1.2. Excessive Crime Base Collection

It is the experience of the authors of this chapter that ICHL investigations have, on various grounds, oftentimes been blighted by the serious over-collection of crime base evidence. The reasons for this tendency reflect the relative (to linkage evidence collection) ease of securing crime base evidence; the generally emotive nature of crime base materials; a belief that any form of evidence collection constitutes a demonstration of progress; the widespread understanding of basic crime base collection requirements combined with a lack of awareness of the varied nature and critical importance of linkage evidence; and the mistaken belief that cases must necessarily be built from the ground up, that is, from crime scene to perpetrator. As a rule of thumb, properly conducted international-criminal investigations ultimately giving rise to the prosecution of high-level accused need to invest only a small amount (for instance, 10 per cent) of their resources to the establishment of the crime base. The investigation of lower-ranking suspects is principally the domain of national war-crimes units which invariably find themselves dealing with suspects who are alleged to have been the physical perpetrators of criminal acts. It logically follows that during the investigation of low-ranking perpetrators within domestic jurisdictions a great deal more emphasis is placed upon the establishment of the crime base, given the general absence of a requirement to collect linkage evidence.

The establishment of crime bases is very much the forte of police officers who have developed their skills in a non-international setting; this observation reflects the fact that the investigation of serious domestic criminality – most especially, murders and physical assaults where the perpetrator and victim had a relationship of some sort – place a great deal of emphasis upon the satisfaction of the physical elements of the offences. As such, when domestic police officers migrate to the international, criminal-investigative domain, their existing skills are, in the main, well suited to crime base work, where these investigators are managed properly in accordance with a detailed collection plan. More specifically, domestic practitioners are skilled at identifying, and interviewing with considerable attention to detail, the victims, eyewitnesses and the perpetrators of physical acts of a criminal nature. Police officers likewise tend to be adept at exploiting photographic and other forms of imagery as well as handling forensic, medical and other technical sources. Whereas these same people are generally unfamiliar with documentary analysis, unless they have worked domestically within specialised teams addressing allegations of complex fraud and transnational crime, this shortcoming can (or ought to) be addressed by investigative team analysts.

The system of international-criminal justice has learned through trial and a great deal of error that it is likely that difficulties will arise where police officers with insufficient international experience seek to execute complex international-criminal investigations without substantial input or management from analysts and trial counsel. Such is the lesson drawn by a great many informed observers who have engaged in the dissection of the formative investigations undertaken by the OTPs of the ICTY and ICTR. The majority of these early investigations were characterised by the massive over-collection of crime base information-*cum*-evidence – and little, if any, corresponding collection of the sort of linkage evidence required to secure the conviction of persons alleged to share criminal responsibility for offences perpetrated at oftentimes considerable physical and temporal distances from the headquarters and offices from which they directed their subordinates.

On the face of it, such over collection of crime base materials might be characterised as largely harmless – if, and only if, investigative team resources were not finite and the challenges posed by linkage evidence collection not a great deal more complicated than those presented when seeking to establish a crime base. In the event, the over-collection of

crime base witness testimony will frequently serve to create witness-protection issues to a degree incommensurate with institutional capacity. Furthermore, the excessive collection of crime base witness evidence tends to raise the expectations of the victims of war that the sort of justice they seek will be realised, with concomitant reputational damage to the judicial institution concerned where such expectations are not met – which is generally the case. More immediately, excessive crime base collection will tend to overwhelm team analysts and counsel with large volumes of information which, even where it has evidentiary value, is superfluous to requirements. If the failings of the ICC-OTP are indicative, what is still more certain is that international judges are sufficiently savvy that they cannot be tricked into registering a conviction where an OTP adduces, in the hope of securing a conviction, a tsunami of crime base material as an alternative to linkage evidence specific to the accused. Given the foregoing, it must be reiterated that careful collection planning throughout the course of an investigation is the key to avoiding any tendency towards crime base over-collection.

8.2.2. Linkage Evidence

Linkage evidence can be defined in legal terms as that which is required to meet the mental and material elements of the alleged modes of liability as well as the mental elements of the offences. Put in layman's terms, linkage evidence collection seeks to connect acts of a criminal nature to individuals operating as part of institutions and like structures; this objective is realised through the analysis of the actions as well as inactions of the suspects and their subordinates in the context of their formal (that is, institutional) responsibilities. Given that international criminal investigations are not (or ought not to be) individual-target driven, the bulk of the collection and analytical effort within a given investigative team must necessarily be assigned to ensuring a comprehensive understanding of key linkage themes, including: the relevant military, security, political and paramilitary structures and their activities; the commanders, staff officers and other key personalities operating within these structures; the command, control and communications ('C3') apparatus linking command and staff headquarters to deployed units; and the disciplinary procedures at the disposal of the command, both *de jure* and *de facto*. As might be imagined, the building of linkage cases against high-ranking suspects requires considerable collection and analytical capacity. However, once the functioning of the relevant structures has been understood in signifi-

cant detail – an effort which should absorb the overwhelming majority of the resources assigned to a complex criminal investigation – it is a relatively straightforward matter to identify the top leaders of the said structures and, in turn, link them through the C3 arrangements to the underlying criminal acts.

Whereas the crime base of any given case is invariably established to the requisite standard, notwithstanding the previously discussed tendency towards over-collection of crime base information, the same cannot often be said of the linkage component of international investigations. The problems which OTPs have experienced (and continue to experience) in establishing effective linkage cases would appear to stem from an insufficient understanding by many within the profession of ICHL investigations of: (i) the legal requirements of the modes of liability; (ii) how political, military, security-intelligence and paramilitary bodies function during operations; and, in particular, (iii) the detailed and oftentimes technical nature of the evidence needed to satisfy the legal requirements of a winning case. It is very difficult to understand – at least for the authors of this chapter – why international-criminal investigators, analysts and counsel, taken together, remain so deficient in these crucial respects. Redressing this shortcoming once and for all is a matter of the utmost urgency if the international practice of ICHL is not to be called into further and ultimately irreparable disrepute.

8.2.2.1. Linkage Case Collection Planning

As the above legal definition of linkage evidence would suggest, the starting point for all linkage collection efforts must be a consideration of the legal requirements of the modes of liability which are most likely to be alleged at the juncture that one or more suspects is identified. The collection planning process should be built around the relevant legal requirements, ideally with reference to the commentary built into easily accessible platforms such as the Case Matrix, where the legal requirements as well as a great many sub-themes of the legal requirements are hyperlinked in a user-friendly manner to relevant international jurisprudence. Armed with an understanding of how evidence and law have come together in prior litigation, investigators, analysts, counsel and investigations managers should be able at once to formulate and amend detailed collection plans whilst seeing to their proper execution. Why such practice has not emerged as a profession-wide standard operating procedure constitutes yet

another mystery of the study of the practice of ICHL – albeit one in which the ramifications of failure could not be clearer.

Just as with crime base collection, the core linkage themes (for instance, structures, chains of command, commanders, communications systems and disciplinary processes) will each generate detailed lists of questions which need to be answered if a complete picture of the institutional context, and ultimately the actions of key actors, is to be built. By way of an example designed to illustrate the complexity of linkage collection planning, one might consider a single legal requirement relevant to Article 28(a) of the Rome Statute, which is concerned with command and superior responsibility, that is, the requirement that the prosecution demonstrate that an alleged perpetrator had effective command and control, or effective authority and control, over the forces which committed the crime. A review of the wealth of jurisprudence addressing the evidence which supports allegations of effective command and control makes it clear that this element might be demonstrated in numerous ways; and, if the requisite evidence is to be collected, it is essential that an investigative team grasp fully the approaches which have worked in the past. It follows that where such an understanding is absent, so too will be the ability of the team to generate the necessary questions during the collection-planning process; in turn, critical linkage evidence pertaining to the legal requirement shall not be gathered, leading to prosecutorial claims with respect to effective command and control remaining unproven.

Efforts to establish the existence of effective command and control should at the outset seek evidence concerning, amongst other matters: the identity of all relevant commanders and staff; the superior as well as subordinate structures; the types and functioning of the communications systems used by these structures; the operational as well as administrative relationships between the superior and subordinate structures; and the operational, administrative, disciplinary and logistical activity of the relevant structures. Each of the foregoing themes should be explored through the identification of several sub-themes, each of which require detailed questioning. For instance, the issue of discipline can be broken down into questions regarding contemporaneous notice of alleged criminal activity within one or more subordinate units, the investigation of the latter and the punishment (if any) of miscreants. In looking at the matter of communications, the investigative team should consider the communication systems and processes of every subordinate formation and unit within a given

chain of command as well as that of the higher headquarters. These collection questions should encompass, not least: an examination of the communications procedures and their form (for instance, radio, e-mail, hard-copy documentation, meetings and briefings); a consideration of which key personnel utilised which systems; the capability and limitations of the communications systems; the frequency of communications and their formal regulation; a consideration of any redundancies built into the systems; and the security features of the latter, including callsigns and codewords. As with crime base collection planning, the various themes and sub-themes should be linked to potential sources of information and evidence which, in the assessment of the investigative team, might be exploited by OTP analysts.

Collection and analysis during the investigative phase should target as much primary source documentation as exists, specifically documentation generated by the structures suspected of having engaged in the perpetration of the core international crimes which constitute the crime base. Such materials can take the form of hard-copy documents or, as is increasingly common, materials in electronic form, such as email and databases. In this context, it will be recalled that the sources of crime base evidence are rarely of any use to efforts to establish individual criminal responsibility. The sort of witness testimony which is sought to establish a linkage case is that of insiders (one category of linkage witness), these being individuals who themselves served in some capacity within the perpetrating structures, ideally at the same time as the targets of the investigation. As individual investigative targets of higher rank are identified only relatively late in the investigative cycle – at least where an investigative team knows what it is doing and is consequently keen not to overlook exculpatory information and evidence – linkage witnesses of any sort should be interviewed only following the careful study of the primary documentation and well into the life of an investigation, in particular, once suspects have been identified, however tentatively, with an eye to their prosecution.

8.2.2.2. Linkage Collection Staffing in the Context of Evidentiary Requirements

The collapse of the ICC-OTP cases against Messrs. Gbagbo and Kenyatta, amongst others, suggests that (i) the accused were not criminally culpable, in which case these investigations should not have given rise to prosecutions or (ii) the OTP did (and does) not possess sufficient numbers of

skilled personnel to build solid prosecution files against high-ranking suspects. The investigation of top-level suspects is best approached with humility as well as a realisation that the volume and variety of linkage factors to be considered in building cases rooted in ICHL shall invariably render daunting any given collection effort even before it has commenced. As *Gbagbo* and *Kenyatta* have shown, this is most especially the case where it is envisioned that an investigation shall ultimately lead to charges being brought against senior leaders operating at considerable physical and temporal distance from the underlying criminal acts, that is, suspects controlling numerous subordinate entities which, for senior most leaders, will frequently encompass military, security-intelligence, police and political structures.

Securing enough inculpatory evidence to warrant the prosecution of high-level suspects is highly challenging, even where an institution is adequately skilled to commence an investigation on the basis of a properly-structured collection plan – particularly where the investigative body is confronted with a need to operate in and around an ongoing armed conflict whilst dealing additionally (or alternatively) with substantial political-diplomatic resistance. Challenges of this nature constitute a chronic problem for public-sector authorities, not least the ICC-OTP. Recent non-public sector initiatives, especially the CIJA, are designed to execute successful criminal investigations rooted in ICHL and domestic variants thereof by overcoming the obstacles presented by physical risk as well as political difficulties. However, the private criminal-investigative sector remains very much in its infancy. As such, it is necessary to ask what the public sector might do on its own to strengthen its ability to build effective linkage cases in a timely as well as cost-effective manner. Answering this question is an exceptionally pressing matter for international criminal-investigative bodies such as the ICC-OTP, given the demands being placed upon them by Western donors who are anxious to see more cost-effective investigations and successful prosecutorial output.

The position taken here is that public-sector, international criminal-investigative bodies would do well to look at their current approach to recruitment. First, it will be observed that, as a rule, the relevant international institutions employ too many investigators and too few analysts. While the distinction between these two disciplines has, over the last 15 years, improved to the extent that investigators are often trained to engage in analytical work and vice-versa, a great many investigators and analysts

continue to enter the international system (or otherwise move between international bodies) with a mind-set which holds that investigators ought to do little more than collect *prima facie* evidence in the field whilst analysts should remain chained to their computers collating material at headquarters. Analysts have the critical function of giving meaning to the material collected, although this primary purpose is frequently inappropriately subordinated to information-management tasks assigned by more senior personnel. When it comes to linkage evidence collection, it is essential that investigators and analysts have a detailed understanding of the entire case file, with analysts needing to be prepared to deploy alongside investigators to participate in, amongst other activities, the interviewing of insider witnesses and the exploitation at the point of acquisition of physical materials. In order to break down further the distinction between the investigator-collector and analysis roles, it is recommended in the strongest possible terms that investigator recruitment should in every case target the ranks of police officers with backgrounds in the fields of serious fraud and transnational crime. Bearing in mind the thematic core of most ICHL investigations, it remains surprising to the authors of this chapter just how few ICHL practitioners are possessed of prior military experience. Stated simply, more investigators as well as analysts with military- and security-intelligence backgrounds need to be taken into the international OTPs.

Secondly, it is the assessment of the authors of this chapter that the ranks of international trial counsel have come to be filled to an unhealthy degree with lawyers who have a brilliant understanding of ICHL which is not accompanied by a corresponding degree of excellence when it comes to matters of evidence. Whereas the ranks of international investigators and analysts do include the occasional professional with a legal education, it is rare that any of the people with such qualifications have practiced law, either domestically or internationally. As such, it falls to trial counsel – for reasons of crucial quality control – to take ultimate responsibility for the marrying of fact to law, that is, to ensure that the elements of the offences as well as the legal requirements of the modes of liability alleged are always properly supported by sufficient evidence. The lead trial attorneys employed at the remaining international bodies are, with very few exceptions, highly skilled in this respect. However, the complexity of any investigation and prosecution which encompasses a substantial linkage component is such that lead trial counsel are necessarily dependent upon subordinate attorneys in determining whether the marriage of fact to law is suf-

ficient in every respect. The international OTPs have come to employ substantial numbers of counsel who have never practiced law outside of the international domain and, as a result, are unfamiliar with the culture of domestic criminal practice, where immense attention must be paid to questions of evidence, with legal niceties constituting a relevant, albeit secondary, matter. Finally, it will be noted that whilst there is absolutely no requirement for the hiring of more lawyers to international OTPs, the preponderance of international investigations involving military and paramilitary actors generates an immense need within these institutions for more counsel with military experience, secured as legal officers or through other military occupations.

8.2.3. Contextual Evidence

Crime base and, most especially, linkage evidence together rest at the heart of all international criminal cases brought against suspects of any substantive rank. However, the view taken here is that the field of international-criminal investigations and prosecutions – and, more to the point, the demands which trial judges now place upon prosecutors – has evolved to the point that it is necessary to consider a third category of evidence, that being of a contextual nature. Whereas contextual evidence has long been collected in the course of international-criminal inquiries, it has tended to be afforded insufficient priority by investigative teams and prosecutors. This absence of prioritisation reflects their general failure to grasp its relevance or, more simply, the tendency to fold the collection of contextual evidence into the building of the crime base and linkage cases.

8.2.3.1. The Dual Importance of Detailed Case Narratives

Contextual evidence collection can be used to formulate and inform detailed case narratives, in particular, prosecutorial narratives setting out the wider background, development and description of events within which the criminality and more general conduct of the alleged perpetrator(s) is assessed as having taken place. In formal allegations (for instance, indictments) as well as trial briefs, it is the practice of prosecutors to offer trial panels, by way of introduction to core prosecutorial arguments, what are purported to be comprehensive contextual narratives touching upon, as prosecutors deem relevant, questions of ethnicity, religion, political-geography and military matters. Such narratives will invariably (or ought to) address matters relating to the general context within which a conflict or crisis unfolded, and the relevant organisational structures involved, for

instance, political parties as well as military, security-intelligence, paramilitary and police organs.

Notwithstanding the importance of this contextual argumentation, it is the practice of investigative-*cum*-prosecutorial teams to prepare only at the last minute those aspects of the case narrative which stand metaphorically furthest from the alleged misconduct of the accused. Often, the drafting of these components of formal allegations and trial briefs comes to rely upon secondary-source information collected haphazardly from the public domain, with a correspondingly slipshod critical engagement by the trial team with much of the source material. Equally problematic is the oft-seen folly which involves the building of contextual narratives from what is termed (by those engaging in such practices) the victim perspective. In international cases replete with highly charged political, ethnic, religious and historical elements, this flawed approach can (and frequently does) give rise to highly subjective contextual narratives. To cite a single example, it was the practice of the ICTR-OTP to allege in the preamble to its indictments that a pre-planned genocide was triggered when Hutu extremists shot down the aircraft carrying the then-President of Rwanda, killing all aboard. Incredibly, this feature of the standard OTP case narrative persisted well after elements of the OTP had collected substantial evidence which pointed to the killing of the said President by Tutsi-led, armed-opposition forces. Likewise, to be noted in this context is the fact that at no time did the OTP possess convincing evidence that the genocide had been pre-planned. The latter canard featured prominently in the then-available secondary literature concerning the Rwandan genocide, one piece of which was regarded widely as being sacrosanct and correspondingly not engaged with critically by the OTP as a whole.[11]

International trial panels – or at any rate, the ICC trial chamber which heard *Gbagbo and Blé Goudé* – are a good deal less tolerant than those of the ICTR when presented with shoddy or otherwise misleading contextual narratives. In *Gbagbo and Blé Goudé*, one of the majority on the trial panel was withering in his critique of the flawed OTP contextual narrative in his written reasons for ordering the acquittals of the ac-

[11] Alison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, Human Rights Watch, New York, 1999.

cused.[12] This critique begs the question of whether the OTP viewed and packaged its core information-*cum*-evidence in the context of a flawed narrative developed at the commencement of the investigation. More likely, the narrative was cobbled together at the eleventh hour, on the basis of long-held, team-wide assumptions, in a manner designed to lend weight to assertions more immediately germane to the alleged criminal culpability of the accused. In either event, there is a high probability that the flawed narrative had been dictated, at least in part, to OTP personnel by partial witnesses without sufficient (or any) objective scrutiny on the part of those taking the said testimony. The more important assertion, which transcends the *Gbagbo and Blé Goudé* debacle, is this: there is metaphorical profit to be made where, at the outset of an inquiry, the investigative team commences the process of crafting a contextual narrative supported by properly analysed evidence.

8.2.3.2. Contextual Evidence Collection Planning

For the reasons above, contextual evidence which supports the prosecution narrative matters a great deal; it needs to be collected, rigorously analysed and presented in a thoroughly objective manner, that is, in the same way as *prima facie* crime base and linkage evidence. Contextual evidence should be collected from the outset of an investigation, not least for reasons of quality control within the investigative team. In particular, it is imperative that a team committed to a criminal investigation for a prolonged temporal period avoid backing itself into a conceptual corner. It is

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[12] ICC, Situation in the Republic of Côte d'Ivoire, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Trial Chamber, Opinion of Judge Cuno Tarfusser, 16 July 2019, ICC-02/11-01/15-1263-AnxA, noted how the "level of 'overall disconnect' […] between the Prosecutor's narrative and the facts as progressively emerging from the evidence, kept increasing", para. 5. Judge Tarfusser added that:

> Day after day, document by document, witness after witness, the 'Prosecutor's case' has been revealed and exposed as a fragile, implausible theorem relying on shaky and doubtful bases, inspired by a Manichean and simplistic narrative of an Ivory Coast depicted as a 'polarised' society where one could draw a clear-cut line between the 'pro-Gbagbo', on the one hand, and the 'pro-Ouattara', on the other hand, the former from the South and of Christian faith, the latter from the North and of Muslim faith; a caricatured, 'one-sided' narrative, 'built around a unidimensional conception of the role of nationality, ethnicity, and religion (in the broadest sense) in Côte d'Ivoire in general and during the post-electoral crisis in particular', progressively destroyed by the innumerable elements to the contrary emerging from the testimonies.

Ibid., para. 12 (https://legal-tools.org/doc/f6c6f3).

the experience of the authors of this chapter that investigative teams, working from the outset of an investigation on the basis of flawed assumptions (that is, those unsupported by evidence) with respect to the overall context will, after a prolonged period, find themselves trapped by these same assumptions because *prima facie* crime base and linkage evidence has been gathered in accordance with insufficient (or no) regard to exculpatory materials – to the point that an accused has been indicted or, worse, the trial has commenced. To cite a single example, such a situation was witnessed within the investigative-*cum*-prosecutorial team assembled to handle the Croatia phase of *Milošević* at the ICTY. In this instance, the team in question built its case upon the unsupported conclusion that military operations launched by federal forces from Serbia and Montenegro into Dalmatia during 1992 did so in the context of a grand strategic plan, formulated in Belgrade, to annex large chunks of the Croatian coast to what remained at that time of the Federal Socialist Republic of Yugoslavia. Concomitantly, the investigative-*cum*-prosecutorial team dealing with *Jokić*, *et al*., which was concerned with the siege of Dubrovnik by these same federal forces, rejected this contextual narrative. As might be imagined, the ICTY-OTP leadership concluded that it was inadvisable for the OTP to present conflicting contextual narratives in distinct cases which nonetheless were concerned in large part with the same underlying event (that is, Yugoslavian military operations in Dalmatia during 1992). The situation was ultimately resolved at the OTP leadership level through the negotiation of a plea deal with *Jokić* and the timely (from an OTP perspective) death of Milošević during the trial of the latter.

As far as the authors of this chapter are aware, no international institution has yet formulated a contextual evidence collection plan at the outset (or near to the outset) of an investigation. Precisely how this might be done effectively must, therefore, be a matter of some speculation. That noted, it can be stated with confidence that the elements of offences and the legal requirements of modes of liability which lend backbone to crime base and linkage collection planning are not going to be as immediately relevant to contextual evidence collection plans. Indeed, the collection of contextual evidence will, at least at the outset, be approached from the perspectives of a criminal investigation as well as scholarly inquiry. By way of a start, investigative teams building a contextual evidence collection plan would do well to study previous prosecutions – be they successful or, most especially, where they were not – to get a sense of how trial

panels have responded to *prima facie* contextual evidence adduced by both prosecution and defence advocates. This has been the approach taken by students of ICHL in order to understand how crime base and, most especially, linkage cases should best be constructed.

Whereas analysts working in the field of ICHL usually possess graduate degrees in the humanities which at one time exposed these personnel to academic research on matters of politics, military affairs, anthropology, sociology or comparative religion, academic backgrounds of this nature are less often seen within the ranks of investigators and trial counsel. What is more, analysts employed by international institutions are often possessed of a great deal of specialised knowledge regarding the States upon whose territory an investigation is concentrated. It logically follows that the crafting of contextual narratives should, at least in the first instance, be left to analysts rather than investigators and counsel. What is more, there is no reason that the *modus operandi* of criminal investigations and scholarly inquiry should not be reconciled. For instance, where at the outset of an investigation the *prima facie* crime base is suggestive of the mass killing of members of one ethnic group by another, the contextual evidence collection plan would logically seek (i) to document to a high standard previous outbreaks of inter-ethnic violence of a like nature and (ii) to identify lingering societal tensions following earlier pogroms which may have persisted until the point of the perpetration of the *prima facie* offences more immediately relevant to the investigative team. In a similar vein, if an investigation is centred at the start upon the conduct of security-intelligence structures during, for instance, the period since 2011, the investigative team would do well to examine the professional culture of those same structures during the decade or more preceding 2011. In taking contextual questions of this nature as a starting point, a skilled and well-led investigative team will, not least through reference to whatever secondary sources are found, identify with relative ease a wide range of sub-questions, the answers to which must ultimately be secured from primary sources.

8.3. Collection Management

The size of international criminal-investigative teams dealing with cases involving complex linkage components can be considerable. In the experience of the authors of this chapter, such teams will range in size from eight to ten persons, not all of whom might be assigned full-time to the

team (for instance, in the case of early ICC-OTP investigation of Mr. Thomas Lubanga and his associates), to several dozen personnel (for example, during the prosecution of Mr. Slobodan Milošević, when a great deal of investigative work was undertaken in the midst of trial). Within even small investigative teams, there tends to be a great deal of division of labour, for instance, between those assigned to crime base work and the personnel dealing with building the linkage case. From the point at which suspects are identified during an investigation, counsel will frequently find their attention diverted from evidentiary to procedural matters, even where there remain significant evidentiary gaps in the casefile. For various reasons, the explanation of which lies beyond the scope of this chapter, effective command and control over complex international-criminal investigations was frequently lacking at the *ad hoc* Tribunals and, in the main, uneven levels of investigative management remain a problem within the international OTPs operating at the present time. Investigative management practices are altogether better within domestic war-crimes units, principally owing to the relative simplicity of building prosecutable cases against low-level perpetrators insofar as such cases are invariably characterised by the absence of a linkage component.

The sheer volume of crime base, contextual and, most especially linkage evidence required to mount a successful prosecution against a high-level suspect constitutes an immense challenge which the majority of those employed within international OTPs as investigators, analysts and counsel – assigned as most are only to specific parts of a casefile – would appear to fail to recognise. For this reason, investigative team managers, be they formally employed as counsel or in another capacity, would do well to remind themselves as well as their charges of the high stakes involved for an OTP where insufficient evidence is collected in support of a given prosecution – or, indeed, the negative ramifications for an OTP where there is a paucity of prosecutions notwithstanding tens of millions of dollars in annual investigative expenditures. It is here held that the addition of collection managers, seated metaphorically at the right hand of investigative team leads, would go a considerable way towards keeping investigative teams abreast of their shared progress whilst at the same time rectifying the twin problems of unfocussed as well as superfluous information-*cum*-evidence collection.

8.3.1. Defining Collection Management

Collection management is not to be confused with investigative management. Investigative management has a far wider scope than collection management. The former is concerned with, amongst other matters, the establishment of the overall direction of a case; the tasking of investigators; the work of team analysts, language and support staff; the general monitoring and direction of the collection effort; mission planning and execution; security and witness-protection issues; the production of reports and updates for higher OTP management and leadership cadres; and personnel-management issues. Collection management has a far narrower focus. More specifically, collection management deals with the production and maintenance of detailed collection plans, including the generation of key themes and questions, and the matching of these collection requirements to potential sources of information and evidence. Most critically, collection management involves responsibility for monitoring the overall collection effort through an ongoing review of whether the themes, issues, elements of offences and the legal requirements of the modes of liability set out in the collection plan are being addressed adequately in evidentiary terms. In this regard, effective collection management will identify (i) what precisely needs to be collected; (ii) how these needs might best be met in a timely manner; (iii) the remaining evidentiary gaps as they appear during the course of an investigation; and (iv) the filling of these gaps. In realising these objectives, effective collection management will concomitantly ensure the avoidance of over-collection.

Notwithstanding the foregoing, the establishment of collection management as an explicit, stand-alone function within investigative teams in not currently a feature of complex international-criminal investigations. This is not to say that collection management within investigative teams does not exist. Manifestly, such practice does exist to some degree; were this not the case, no investigative dossier would ever reach a courtroom. The problem at the present time is that professional, centralised collection management arrangements have not been put into place – or, where an OTP convinces itself that such arrangements do exist, they are patently ineffective. The fact of the matter is that, as a general rule, collection management has been approached as an afterthought by international OTPs, that is, as something to be taken seriously only where suspects have been taken into custody and the awareness dawns upon senior prosecutors that they are about to proceed to trial armed with a great many alle-

gations for which they possess insufficient evidence. What is more, international OTPs frequently confuse collection management with data (or evidence) management; the latter has been fetishised within OTPs for roughly twenty years, which explains their tendency to purchase ever-more-expensive software systems whilst improperly using relatively simple platforms such as CaseMap – where CaseMap is used at all. To take but one example, collection management at the ICTY-OTP was so deleterious during the first decade or more of the life of the ICTY that, when a chief of Prosecutions sought to redress this shortcoming by decreeing that all open files should be put into CaseMap, this task was assigned by investigative and trial teams to the most junior personnel available, including a great many interns. What was and remains required is a disciplined approach to collection management which is rooted in a systematic and professional consideration of this key function.

8.3.2. The Role of Collection Managers and Their Subordinates

Whilst the position of a dedicated collection manager remains unknown in the field of ICHL, professionalised collection management is a well-recognised and respected endeavour in many other professions. For instance, civilian as well as military security-intelligence organisations in Western States have, for a generation, routinely employed specialised collection managers during the course of large-scale collection operations.[13] This practice is instructive insofar as a good many security-intelligence operations seek to address questions of a nature very similar to those which confront international-criminal investigative teams, not least, those concerned with collecting large and diverse amounts of information on the command and control of political, military, security-intelligence, paramilitary and police structures. To this end, security-intelligence services seek, in a manner not dissimilar to complex criminal-investigative teams, to collect, collate, analyse and disseminate high-quality information. Within security-intelligence services, raw information is collected and, in turn, transformed by analytical processes into intelligence product. An investigative team, where it is working effectively, follows similar processes designed to transform information into admissi-

[13] See, for instance, Major Carl Grebe, "Intelligence Collection Management Process", in *ARRC Journal*, 2003, vol. 7, no. 1, pp. 16–17; Clyde R. Heffter, "A Fresh Look at Collection Requirements", in *Studies in Intelligence*, 1960, vol. 4, no. 4, pp. 43–61; US Department of the Army, *Human Intelligence Collector Operations*, Washington, 2006.

ble evidence. Indeed, analytical training within international OTPs has, for a decade and more, been based upon the intelligence cycle, the latter expression characterising the process by which information is rendered as intelligence product.

Since the 1980s, Western military and security-intelligence organs have developed, refined and professionalised the function of collection management in accordance with their specific needs. This evolution has seen the training and deployment of specialised personnel, known as collection managers. The focus of the latter falls upon the three distinct components of collection management: (i) requirements management, (ii) mission management and (iii) asset management. During larger collection operations, each of these three areas will have its own manager.

Requirements management is the most important of the three subfields of collection management and, arguably, that which is most relevant to international-criminal investigations. In particular, the requirements manager determines which information needs to be acquired by what temporal juncture. To cite one example, in a military context specific information and intelligence needs are generated by a military commander in accordance with the operational orders which he has received from higher echelons. In turn, the said requirements are assessed within an intelligence cell in the context of what is known as the commander's intent. Priority information and intelligence requirements (in the form of questions which require answering) are identified during this process and these requirements are updated and amended during the ongoing collection and analysis operations. At the outset of an intelligence operation, requirements managers disseminate internally the information-*cum*-intelligence requirements to analytical staff and database managers in order to determine what information is already in their custody. This step reduces the likelihood that sources will be tasked with the collection of information which is already to hand. Additionally – and indeed, critically – requirements managers draft, maintain and amend collection plans. That noted, it is military or intelligence commanders who approve collection plans before they are implemented in the first instance; commanders initiate collection processes and assume something akin to ownership over same. In so doing, commanders take responsibility, just as would an investigative team leader, for any failure of an operation. Once a collection plan has been formulated, it falls to a given requirements manager to task the mission manager (see below), receiving in due course confirmation that a

particular source has been activated and, in turn, product produced. However, it does not fall to the requirements manager to analyse or action the information which comes back. These functions are performed elsewhere, although evaluation reports concerning source product make their way to the requirements manager in order that he might update and amend the collection plan.

For their part, mission managers set out plans for the direct tasking of sources and asset managers, the latter being responsible for the execution of specific collection and exploitation tasks. In a nutshell, collection management as it is implemented by Western security-intelligence organs fosters a comprehensive identification of requirements; the matching of these requirements to clearly identified sources; the tasking as well as exploitation of these sources; the ongoing amendment of the collection plan; the tracking of what has been collected (that is, the questions answered that no longer need additional collection); and the identification of remaining or newly-identified gaps during the collection process.

One is left to wonder why the approach to collection management which has long been employed by Western military and security-intelligence organs has never been adopted by OTPs in order to lend structure and coherency to the collection of *prima facie* evidence during complex criminal investigations. The absence of any such initiative in the field of ICHL is presumably a function of the fact that lawyers and to a lesser degree police officers – rather than erstwhile intelligence officers – have without exception controlled the investigative arms of all the OTPs established since 1993. Whilst the engagement of counsel in investigative processes is to be welcomed, given the debacles that were witnessed at the ICTY and ICTR OTPs during their formative years when counsel were kept at arm's length from case files until the eve of trial by former police officers, it must be recalled that very few international lawyers are possessed of experience in the realm of field collection. Put another way, (good) lawyers understand evidence; it does not follow from this truism that they are particularly skilled in its collection. As such, the leader of any investigative team, and counsel most especially, would benefit from having situated at their right hand a collection specialist whose sole mission is to manage (as opposed to lead) the collection effort. Where there is no specialist to design a collection plan and monitor the execution of the same in a holistic manner, it follows that gaps in the evidentiary record,

over-collection and the inefficient tasking of collection resources are sure to follow.

8.4. Evidence Review

The authors of this chapter commenced their careers in the field of ICHL in 1997 (Wiley) and 1999 (Brown); one, the other or both have served with the Canadian war-crimes programme, the ICTY, the ICTR, the ICC, the Iraqi High Tribunal and the CIJA. Of these institutions, only the CIJA has ever implemented – in accordance with standing policy – a robust process of evidence review commencing at an early phase of every investigation. Where there was any evidence review of which to speak at the other bodies named here, this invariably took place after it was deemed – by whom, it was never quite clear – that the investigation was concluded and indictments (or a like instrument) were warranted. Such reviews were left to the team which had assembled the file, perhaps encompassing the briefing of more senior managers and leaders; in other cases (for instance, at the ICTY-OTP), a general invitation was sent around the OTP inviting personnel from other teams to wade through voluminous case files and, were individuals so inclined, to comment thereupon at something akin to a public meeting. Unsurprisingly, few took up these offers, engaged as they were with their own investigations and prosecutions. The sort of imperfect (or non-existent) evidence review procedures cited here have had two principle effects upon most of the OTPs established from 1993: (i) the initiation of a great deal of investigative work during trial, that is, once trial counsel have become aware of the paucity of linkage evidence relevant to the accused; and (ii) the dismissal of cases, or findings of criminal non-culpability, by pre-trial, trial and appellate chambers. The first of these problems bedevilled the ICTY and the ICTR; the second phenomenon has proved to be distressingly commonplace at the ICC.

It is essential that evidence review procedures should be put into place OTP wide and applied from the commencement of any given investigation. By way of a start, it would be immensely helpful if individual investigative teams encouraged devil's advocacy, that is, a culture where ostensible *prima facie* evidence was subjected to ongoing challenge by all team personnel, without regard to professional rank. What is more, the sort of robust collection planning and management which has formed the core of the foregoing discussion would, if implemented as a matter of course during complex criminal investigations, lay the groundwork for

effective review within investigative teams as well as by external experts. The latter could be assigned from within OTPs themselves, albeit from ranks external to the investigative team whose evidence is being reviewed. Conversely, outside parties subjected to standard non-disclosure agreements and possessed of the requisite experience of complex ICHL investigations and prosecutions, could be retained for this purpose. On the question of outside expertise, it will be recalled that there are a great many highly-skilled, erstwhile investigators, analysts, prosecutors, trial clerks and judges languishing in semi-retirement, having been determined by the international system to be, in their early sixties, no longer fit for full-time work. This pool of immense talent is drawn upon by the CIJA as part of its evidence review arrangements; international OTPs would do well to proceed in a like manner.

8.5. Concluding Remarks

International OTP investigative practices remain insufficient, despite several important methodological advances made since the establishment of the ICTY in 1993. The strong prosecutorial records of the ICTY and the ICTR have served to hide from the casual ICHL observer a great many of the investigative shortcomings witnessed at those institutions, not least, shoddy investigative management leading to the over-collection of crime-base materials at the expense of linkage evidence gathering. In the event, the OTPs of both *ad hoc* Tribunals proved sufficiently resilient – if only just – to address evidentiary imbalances when these were identified by senior trial counsel on the eve of trial owing to the Chapter VII mandates which these institutions enjoyed along with the fact that what might be termed emergency investigative activities could be undertaken in physically-secure, post-conflict environments.

The prosecutorial records of the courts and tribunals established from 2002 relative to financial expenditure and prosecutorial output, with the arguable exception of the Special Court for Sierra Leone ('SCSL'), have proven to be altogether less admirable. By way of example, the investigative cadres of the ICC, ECCC, STL and KSC have had to contend with not-insignificant levels of political-diplomatic resistance to their work, this obstacle being compounded in certain instances by the presence of physical risk in the respective operational areas far and away higher than that faced by the ICTY and the ICTR. Necessarily, challenges beyond the control of international OTPs have served to retard the quality

and quantity of investigative output. The post-2002 institutions – again, with the arguable exception of the SCSL – have compounded the difficulties faced by their investigative teams through a collective failure to implement consistently several sorely-lacking yet fundamental improvements to their *modus operandi*. Put another way, various investigative divisions have replicated many of the most serious deficiencies witnessed at the OTPs of the *ad hoc* Tribunals. One refers here, most especially, to persistent failings in the areas of collection planning, collection management and evidence review. Until these long-term shortcomings are resolved, the practice of ICHL shall continue to fall into disrepute in the eyes of conflict-affected societies, the victims of armed conflict, the States which fund the relevant international bodies and a great many of those employed by these institutions.

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Quality Control in Criminal Investigation

Xabier Agirre, Morten Bergsmo, Simon De Smet and Carsten Stahn (editors)

This book offers detailed analyses on how the investigation and preparation of fact-rich cases can be improved, both in national and international jurisdictions. Twenty-four chapters organized in five parts address, *inter alia*, evidence and analysis, systemic challenges in case-preparation, investigation plans as instruments of quality control, and judicial and prosecutorial participation in investigation and case-preparation. The authors include Antonio Angotti, Devasheesh Bais, Olympia Bekou, Gilbert Bitti, Leïla Bourguiba, Thijs B. Bouwknegt, Ewan Brown, Eleni Chaitidou, Cale Davis, Markus Eikel, Shreeyash Uday Lalit, Moa Lidén, Tor-Geir Myhrer, Trond Myklebust, Matthias Neuner, Christian Axboe Nielsen, Gilad Noam, Gavin Oxburgh, David Re, Alf Butenschøn Skre, Usha Tandon, William Webster and William H. Wiley, in addition to the four co-editors. There are also forewords by Fatou Bensouda and Manoj Kumar Sinha, and a prologue by Gregory S. Gordon.

The book follows from a conference at the Indian Law Institute, and is the main outcome of the third leg of a research project of the Centre for International Law Research and Policy (CILRAP) – the Quality Control Project. Other books produced by the project are *Quality Control in Fact-Finding* (Second Edition, 2020) and *Quality Control in Preliminary Examination: Volumes 1 and 2* (2018). Covering three distinct phases – documentation, preliminary examination, and investigation – the volumes consider how the quality of each phase can be improved. Emphasis is placed on the nourishment of an individual mindset and institutional culture of quality control.

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