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Nancy Amoury Combs

William & Mary Law School, ncombs@wm.edu

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Combs, Nancy Amoury, "Investigative Delegations: Predictable Predicaments" (2019). *Faculty Publications*. 1993.

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SYMPOSIUM ON NON-STATE ACTORS AND NEW TECHNOLOGIES IN ATROCITY PREVENTION

INVESTIGATIVE DELEGATIONS: PREDICTABLE PREDICAMENTS

*Nancy Amoury Combs**

When a Trial Chamber of the International Criminal Court (ICC) dismissed the court's very first case before trial, it made headlines worldwide. The Trial Chamber dismissed the case because the prosecutor repeatedly failed to disclose exculpatory evidence.¹ He did so because he had obtained the evidence from the UN and NGOs pursuant to confidentiality agreements that prevented disclosure without permission, which the UN and NGOs had not granted.² The prosecutor, stuck between two competing obligations—the disclosure obligation that he owed the accused and the confidentiality obligation that he owed the UN—adhered to the latter,³ a decision that the Trial Chamber deemed to “rupture” the trial process to such a degree that a fair trial was impossible.⁴

That dismissal, and the circumstances leading up to it, highlight the ethical difficulties confronting international criminal prosecutors whose investigations are often hamstrung by a variety of challenging conditions. These difficulties have generated a plethora of scholarly and popular commentary. Some commentators propose doctrinal resolutions to the conflict between the prosecution's investigative needs and the accused's fair trial rights;⁵ others criticize the ICC prosecutors' investigative failures;⁶ and still others advance practical proposals to enable prosecutors to work more effectively with third-party investigators.⁷ But whatever the specific stance, thesis, or policy proposal, the body of literature as a whole suggests that international criminal law in general, and the ICC in particular, faces a grave new threat. As Rebecca Hamilton put it, “International criminal investigations are in trouble.”⁸

Hamilton is right; international criminal investigations—at least at the ICC—are in trouble. But this essay argues that, whereas unhealthy relations between ICC prosecutors and third-party fact-finders may present a new

* Ernest W. Goodrich Professor of Law, Cabell Research Professor of Law, Director of Human Security Center, William & Mary Law School.

¹ See Prosecutor v. Lubanga, Case No ICC-01/04-01/06-1401, Decision on the Consequences of Non-Disclosure of Exculpatory Materials covered by Article 54(3)(e) Agreements (June 13, 2008).

² *Id.* at paras. 35–41, 64.

³ *Id.* at para. 44.

⁴ *Id.* at para. 93. The prosecution eventually obtained the relevant consents, and the case proceeded to trial.

⁵ Kai Ambos, *Confidential Investigations (Article 54(3)(e) ICC Statute) vs. Disclosure Obligations: The Lubanga Case and National Law*, 4 NEW CRIM. L. REV. 543, 555–56 (2009).

⁶ Heikelina Verrijn Stuart, *The ICC in Trouble*, 6 J. INT'L CRIM. JUST. 409, 414–15 (2008); Christian M. De Vos, *Investigating from Afar: The ICC's Evidence Problem*, 26 LEIDEN J. INT'L L. 1009 (2013).

⁷ Christian M. De Vos, *Prosecutor v. Lubanga - Someone Who Comes Between One Person and Another: Lubanga, Local Cooperation and the Right to a Fair Trial*, 12 MELB. J. INT'L L. 217, 229–35 (2011); De Vos, *supra* note 6.

⁸ Rebecca Hamilton, *User-Generated Evidence*, 57 COLUM. J. TRANSNAT'L L. 1, 3 (2018).

manifestation, the problem it manifests is a well-worn one. In centuries past, prosecutors relied on third parties to supplement their investigations, when their own investigative capacity was compromised or inadequate. Put simply: when criminal justice systems are tasked with missions that are incommensurate with their ability to carry them out, they cut corners and delegate tasks. This essay therefore suggests that the hand-wringing that surrounds ICC prosecutors' excessive reliance on third-party investigations, though justified, focuses only on a symptom of the disease, not the disease itself.

Third-Party Fact-Finding: Past and Present

Until recently, and in contexts outside of the ICC, third-party evidence-gathering had been an unproblematic aspect of international criminal trials. Indeed, it was a UN-established Commissions of Experts that helped launch the modern international criminal justice movement in the first place, and, once prosecutions were underway, human rights fact-finding also provided valuable support. Chadian dictator Hissène Habré would never have been brought to justice in Senegal had Human Rights Watch not devoted untold energy to gathering evidence of Habré's many crimes.⁹ Prosecutors at the Extraordinary Chambers in the Courts of Cambodia likewise have made considerable and uncontroversial use of evidence provided by the Document Center of Cambodia, an NGO.¹⁰ Finally, and most notably, prosecutors for the International Criminal Tribunal for the Former Yugoslavia (ICTY) appropriately utilized the twenty-two volumes of materials that they received from the Bassiouni Commission.¹¹ ICTY prosecutors used the materials primarily in deciding what to investigate and in generating leads for those investigations.¹² On the rare occasions when the prosecution tendered some of the Commission's fact-finding reports as evidence at trial, it was to provide background or corroborate other evidence.¹³ In this way, third-party fact-finding supported ICTY prosecutions, but it was ICTY prosecutors and investigators themselves who travelled to the former Yugoslavia, interviewed witnesses, and otherwise gathered the evidence necessary to support convictions.¹⁴

The ICC prosecution's relationship with third-party fact-finding, by contrast, has been far more robust—and far less healthy. In *Lubanga*, ICC prosecutors relied on materials provided by third parties not only to generate leads but also as evidence at trial. And not a small quantity of evidence either: approximately 50 percent of the documents that prosecutors sought to admit in *Lubanga* were provided by third parties,¹⁵ and prosecutors also relied heavily on third parties to identify and interview witnesses.¹⁶ The *Lubanga* prosecution's reliance on third-party fact-finding garnered the most publicity, but other ICC prosecution teams employed similar methods, which gave rise to similar concerns.¹⁷ Prosecutors in *Ngudjolo*, for instance, also relied heavily on third-party

⁹ See REED BRODY, *VICTIMS BRING A DICTATOR TO JUSTICE: THE CASE OF HISSÈNE HABRÉ* 14, 31 (2017).

¹⁰ See Andrew B. Mamo, *History and the Boundaries of Legality: Historical Evidence at the ECCC*, 29 COLUM. J. ASIAN L. 113, 141 (2015).

¹¹ David Re, *Fact-Finding in the Former Yugoslavia: What the Courts Did*, in *QUALITY CONTROL IN FACT-FINDING* 279, 294–96 (Morten Bergsmo ed., 2013).

¹² *Id.* at 296–97.

¹³ *Id.* at 296.

¹⁴ Morten Bergsmo & Michael Keegan, *Case Preparation for the International Criminal Tribunal for the Former Yugoslavia*, in *MANUAL ON HUMAN RIGHTS MONITORING: AN INTRODUCTION FOR HUMAN RIGHTS FIELD OFFICERS* 6 (2d ed. 2001); see also JOHN HAGAN, *JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL* 133–37 (2003).

¹⁵ Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, *Decision Regarding the Timing and Manner of Disclosure and the Date of Trial*, para. 6 (Nov. 9, 2007).

¹⁶ Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, *Redacted Decision on Intermediaries*, para. 2 (May 31, 2010).

¹⁷ See Caroline Buisman, *Delegating Investigations: Lessons to be Learned from the Lubanga Judgment*, 11 NW. J. INT'L HUM. RTS. 30, 33–61 (2013).

materials,¹⁸ and the Trial Chamber responded by acquitting the accused and highlighting a series of investigative steps that prosecutors should have taken, but did not.¹⁹ Other cases never even got to trial because prosecutors' failure to gather significant evidence beyond human rights reports led Pre-Trial Chambers to refuse to confirm charges against the accused.²⁰ And in *Gbagbo*, prosecutors' initial effort to bring charges failed because they "relied heavily on NGO reports and press articles with regard to key elements of the case,"²¹ though they eventually gathered sufficient evidence to confirm charges against the accused.

It should come as no surprise that such third-party materials often fall short of relevant evidentiary and fair-trial standards, given that human-rights and other third-party fact-finders employ different methodologies than international criminal fact-finders and often pursue different goals. The primary purpose of an international criminal trial is to determine whether there is sufficient evidence to prove beyond a reasonable doubt that a particular individual committed a particular crime.²² The primary purpose of a human rights report, by contrast, is to publicize past human rights abuses so as to prevent the commission of future abuses.²³ These differing goals lead to very different investigative methods and different final work products. Human-rights fact-finders center their attention on "the big picture of the character, scale, and entity of the violations documented,"²⁴ and their work product often consists of reports or policy papers that describe the atrocities in broad terms.

Criminal investigators, by contrast, focus much more narrowly on unearthing evidence to support or refute the specific elements of a specific accused's criminal liability. Moreover, the work of international criminal investigators is subject to far more exacting standards than the work of human-rights fact-finders. For instance, whereas human-rights fact-finders can focus single-mindedly on gathering incriminating materials, criminal investigators must search for exculpatory as well as inculpatory evidence. Criminal investigators also must comply with strict standards for gathering and preserving evidence, and they must generate an overall work product that satisfies the stringent beyond-a-reasonable-doubt standard of proof. Because human-rights fact-finders are subject to none of these strictures, it is no wonder that their work, in the eyes of international criminal investigators, often does not "advance methodologically sound criminal inquiries beyond an initial examination of the alleged underlying conduct."²⁵ ICC judges likewise have repeatedly expressed concern about relying on human rights reports because, among other things, their authorship and sources are often unclear.²⁶ As Special Court for Sierra Leone Justice Robertson warned:

Courts always must guard against allowing prosecutors to present evidence which amounts to no more than hearsay demonization of defendants by human rights groups or by the media. The right of sources to

¹⁸ *Id.* at 40–45.

¹⁹ Prosecutor v. Ngudjolo, Case No. ICC-01/04-02/12, Judgment Pursuant to Article 74 of the Statute, paras. 117–20 (Dec. 18, 2012).

²⁰ See Prosecutor v. Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, paras. 113–20 (Dec. 16, 2011).

²¹ Prosecutor v. Gbagbo, Case No. ICC-02/11-01/11, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, para. 35 (June 3, 2013).

²² Federica D'Alessandra, *The Accountability Turn in Third Wave Human Rights Fact-Finding*, UTRECHT J. INT'L & EUR. L. 59, 67 (2017).

²³ *Id.*

²⁴ *Id.* at 66.

²⁵ Morten Bergsmo & William H. Wiley, *Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes*, in *MANUAL ON HUMAN RIGHTS MONITORING: AN INTRODUCTION FOR HUMAN RIGHTS FIELD MONITORS* 1, 1 (3d ed. 2008).

²⁶ See Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Prosecutor's Bar Table Motions, paras. 29–30 (Dec. 17, 2010). See also Prosecutor v. Gbagbo, *supra* note 21, para. 29.

protection is not a charter for lazy prosecutors to make a case based on second-hand reports and human rights publications.²⁷

Third-party evidentiary materials gathered by groups other than human-rights fact-finders also give rise to difficulties. The recently created International Impartial and Independent Mechanism²⁸ is collecting evidence of Syrian atrocities from states, UN human rights bodies, regional organizations, and NGOs,²⁹ but commentators have expressed concern about whether the mechanism can adequately safeguard evidence for use at trials many years in the future.³⁰ Similar worries surround current prosecutorial reliance on open-source materials, such as photos and videos captured contemporaneously by individuals in conflict zones. To be sure, increased access to cell phones with photographic and video capabilities holds the promise of providing prosecutors with treasure troves of valuable materials,³¹ a promise on which ICC prosecutors have already begun capitalizing. In 2016, ICC defendant Ahmad Al-Mahdi pled guilty to intentionally directing attacks against religious and historic buildings, no doubt because prosecutors had obtained video footage of him personally destroying ancient mausoleums in Timbuktu.³² A year later, an ICC Pre-Trial Chamber issued an arrest warrant against Mahmoud Al-Werfalli based largely on user-generated video footage that appears to show Al-Werfalli killing individuals.³³ Al-Werfalli remains at large, so we cannot know whether the Trial Chamber will admit the video footage,³⁴ but commentators have already identified a host of concerns about user-generated evidence, including its proclivity to convey a prosecution-biased picture of the crimes and to exacerbate the inequality of arms that already disadvantages defendants in international criminal proceedings.³⁵

Looking Backward to Move Forward

Surveying the literature on prosecutorial reliance on human rights fact-finding, Carsten Stahn and Dov Jacobs classify commentators into three camps: (1) those who advocate rigorous separation between human rights fact-finding and international criminal investigating; (2) those who desire greater synergies between the international criminal justice and human rights communities; and (3) those who favor a case-by-case assessment of the optimal engagement between the two camps.³⁶ Stahn and Jacobs themselves advance a finer-grained approach that considers numerous additional factors in determining whether interactions between the two groups are desirable.³⁷ Stahn and Jacobs are unquestionably correct that different contexts give rise to greater or fewer ethical conflicts, but it likewise seems clear that criminal prosecutions are best served by investigations that are tailored to the rules governing and the goals animating those criminal prosecutions. That is, in an ideal world, virtually all international

²⁷ GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 297 (4th ed. 2012).

²⁸ GA Res. 71/248, para. 4 (Dec. 21, 2016).

²⁹ Syria Justice and Accountability Centre, *Responding to Misconceptions Regarding the IIIM* (Aug. 2, 2017).

³⁰ See Beti Hohler & Elizabeth Pederson, *The Syria Mechanism: Bridge to Prosecutions or Evidentiary Limbo?*, E-INT'L REL. (May 26, 2017).

³¹ See, e.g., Hamilton, *supra* note 8; Lindsay Freeman, *Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials*, 41 *FORDHAM INT'L L. J.* 283, 289–90 (2018); Emma Irving, *Social Media Platforms: The New Kids on the Block at the ICC* (draft on file with author).

³² Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, *Judgment and Sentence*, paras. 31–52 (Sept. 27, 2016).

³³ Prosecutor v. Al-Werfalli, Case No. ICC-01/11-01/17, *Warrant of Arrest*, paras. 11–22 (Aug. 15, 2017).

³⁴ See, e.g., Hamilton, *supra* note 8, at 8.

³⁵ *Id.* at 39–42.

³⁶ Carsten Stahn & Dov Jacobs, *The Interaction Between Human Rights Fact-Finding and International Criminal Proceedings: Toward a (New) Typology*, in *THE TRANSFORMATION OF HUMAN RIGHTS FACT-FINDING* 255, 256–57 (Philip Alston & Sarah Knuckey eds., 2016).

³⁷ *Id.* at 257.

criminal evidence would be gathered by trained criminal investigators who were knowledgeable about the conflict, the crimes, and the relevant evidentiary standards. Commentators who advocate closer relations between prosecutors and human-rights fact-finders likely do so not because they view such interactions as inherently valuable, but because they keenly recognize how far the world of international criminal justice is from “an ideal world.”

That said, some prosecutions come closer to the ideal than others. As noted above, the ICTY’s robust investigations and minimal use of third-party materials contrast sharply with the ICC’s meager investigations and far heavier reliance on such materials. This contrast mirrors the contrast in the two courts’ investigative capabilities. Specifically, the ICTY investigations have been far better resourced than ICC investigations. Early on, the international community provided the ICC a fraction of the resources that it bestowed on the ICTY, despite tasking the ICC with a far broader and more challenging mission.³⁸ Recently, the two courts’ budgets have been similar, but, as Alex Whiting observed, “the ICTY has been focused for twenty years on three related wars in one region, while the ICC is presently investigating in eight different situation countries.”³⁹ Certainly, other factors also played a role in the courts’ differing investigative practices. The ICC’s target states in general have been less stable and secure than the states of the former Yugoslavia and thus present greater investigative challenges.⁴⁰ Moreover, ICC crimes have featured less helpful documentary evidence than ICTY crimes. But these and other differences aside, the ICC prosecution’s grossly inadequate budget has substantially contributed to its excessive reliance on third-party fact-finding.⁴¹

The ICC prosecutors’ unhealthy reliance on third-party evidence might best be viewed as a symptom of a much larger disease: the international community’s failure to adequately support international criminal justice. Others have highlighted both this disease and many of its other symptoms.⁴² This particular symptom—the inappropriate delegation of prosecutorial functions—may seem new, but is anything but. Indeed, criminal justice systems of old that lacked adequate investigative capabilities engaged in similar delegations that led to similarly undesirable results. One such example comes from seventeenth- and eighteenth-century England, where there existed no regular police or detective services to investigate crimes.⁴³ Unable, therefore, to obtain the evidence necessary for convictions, prosecutors were compelled to offer generous rewards to individuals who provided incriminating information.⁴⁴ The potential for these rewards to motivate false testimony was apparent to all,⁴⁵ and prosecutors in fact proffered considerable false testimony to convict innocent defendants.⁴⁶ Yet the reward system—as problematic as it was—remained a core feature of the English criminal justice system until government authorities were willing to establish a paid professional police force that could appropriately investigate crime.⁴⁷

³⁸ See William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L. J. 53, 66–67 (2008).

³⁹ Alex Whiting, *Dynamic Investigative Practice at the International Criminal Court*, 76 LAW & CONTEMP. PROBS. 163, 174–75 (2013).

⁴⁰ Buisman, *supra* note 17, at 33–34.

⁴¹ Stuart Ford, *What Investigative Resources Does the International Criminal Court Need to Succeed?: A Gravity-Based Approach*, 16 WASH. U. GLOBAL STUD. L. REV. 1, 4, 67 (2017).

⁴² These include the failure to press for the surrender of indictees. See, e.g., David Kaye et al., *The Council and the Court: Improving Security Council Support of the International Criminal Court*, U.C. IRVINE INT’L JUST. CLINIC (May 2013).

⁴³ John Langbein, *Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 108 (1983); see generally T.A. CRITCHLEY, *A HISTORY OF POLICE IN ENGLAND AND WALES* 47–57 (1978).

⁴⁴ J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660-1800*, at 369 (1986).

⁴⁵ Langbein, *supra* note 43, at 108.

⁴⁶ *Id.* at 108–14.

⁴⁷ *Id.* at 114; see also BEATTIE, *supra* note 44, at 369.

Juxtaposed with the ICC, this simple historical example suggests that the current controversy surrounding prosecutors' use of third-party materials is not unique to contemporary times or to international criminal justice. Rather, when prosecutors—domestic or international, historical or modern—are tasked with broad missions but provided the capabilities sufficient to accomplish only narrow goals, they engage in suboptimal practices, including delegating crucial prosecutorial tasks to nonstate actors. How we should respond to this particular suboptimal practice is a matter for debate, but the predictability of the practice under these conditions is not.