

# Private International Criminal Investigations

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## I. Introduction

The recipe for a successful crime novel or TV-series is: Take an average police detective and give him or her a private detective, who really solves the case, as a partner. Thus, Inspector Lestrade has Sherlock Holmes, Leland Stottmeyer has Adrian Monk, Inspector Reynolds/Cotta have the Three Investigators (better known as Die Drei Fragezeichen in Germany). There are, of course, also private investigators who generally assist the local police, such as Jane Marple and Hercule Poirot. And then there are those who investigate but it seems counter-intuitive to classify them as private investigators: Bruce Wayne aka Batman; John Shaft; the A-Team; Christian Wolff aka "The Accountant"; Tintin, the young Belgian reporter; Mikael Blomkvist, journalist and main character in Stieg Larsson's Millennium series; April O'Neil, anchorwoman for Channel 6 News in the 1987–1996 animated Teenage Mutant Ninja Turtles series.

The appeal of private investigations has now reached the level of International Criminal Justice, with the establishment of the Commission for International Justice and Accountability (CIJA). Of course, investigatory work done by private non-state agencies is not novel, considering that there are countless Non-Governmental Organisations (NGOs) and Inter-Governmental Organisations (IGOs) who interview witnesses and collect documents. The aim is that this material may be used in International(ised) Criminal Tribunals (ICTs) or before a national court trying international crimes.

Investigative staff at the International Criminal Court (ICC) and other ICTs are dependent on the work undertaken in the field by human rights monitors as factfinders, employed by IGOs, NGOs, and, in some cases, by governmental agencies.<sup>1</sup> Especially personnel "not serving with a belligerent party" proved valuable to investigative staff of ICTs and were sometimes later called to testify at trial.<sup>2</sup> Private investigations are indispensable on the international level, and privately funded international human rights organisations have been crucial to hold perpetrators of international crimes accountable.<sup>3</sup>

This article provides an overview of the work of IGOs, NGOs and other entities that assist international criminal investigations. After a descriptive account of that work in the past, the article especially focuses on Syria and the work of CIJA. It addresses advantages and disadvantages of these

sorts of investigations and names three challenges CIJA might encounter: First, a definitional problem; second, an ethical problem; third, an evidentiary problem. Needless to say that this list is not exhaustive. It rather strives to filter the still embryonic debate about private international criminal investigations.

## II. History of Private Investigations in International Criminal Justice

Both the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) relied heavily upon materials published by IGOs and NGOs.<sup>4</sup> They have provided the prosecutors' offices with "background information" on the commission of international crimes, and on the willingness of states to investigate or prosecute alleged crimes.<sup>5</sup>

### 1. The Former Yugoslavia and Rwanda

More concretely, Human Rights Watch (HRW) placed a "permanent representative" in the Former Yugoslavia during the conflict,<sup>6</sup> and reported human rights abuses in the region by conducting investigations and interviewing witnesses.<sup>7</sup> In 1992, Human Rights Watch published "War Crimes in Bosnia-Herzegovina," its first report on violations of the laws of war<sup>8</sup> and a "call for action, for accountability",<sup>9</sup> followed by a second report that was used by the ICTY.<sup>10</sup> HRW's investigatory agenda was certainly underlined by its report "Prosecute Now!", where Helsinki Watch, a division of Human Rights Watch, presented "summaries of eight cases that, with immediate investigation, will be strong candidates for prosecution".<sup>11</sup>

<sup>4</sup> *Bergsmo/Wiley* (fn. 1), p. 9.

<sup>5</sup> *Ellis*, in: Brown (ed.), *Research Handbook on International Criminal Law*, 2011, p. 143 (156).

<sup>6</sup> *Ellis* (fn. 5), p. 143. See also *Korey*, *NGOs and the Universal Declaration of Human Rights*, 1998, p. 320: "[HRW] had at least one or more staffers present in Bosnia and other parts of Former Yugoslavia throughout all of 1992 and 1993. These virtually full-time representatives of the New York-based NGO had maintained contacts with local human rights activists and a variety of sources within the various levels of governments and media in the area".

<sup>7</sup> *Daly*, *Beyond Justice: How the Yugoslav Tribunal Made History*, 19.12.2017, available at

<https://www.hrw.org/news/2017/12/19/beyond-justice-how-yugoslav-tribunal-made-history> (6.2.2019). See also *Ellis* (fn. 5), p. 143.

<sup>8</sup> Human Rights Watch, *War Crimes in Bosnia-Herzegovina*, August 1992.

<sup>9</sup> *Daly* (fn. 7).

<sup>10</sup> *Ellis* (fn. 5), p. 143; *Korey* (fn. 6), p. 322.

<sup>11</sup> Human Rights Watch, *Prosecute Now!*, available at <https://www.hrw.org/reports/1993/yugoslavia/> (6.2.2019).

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<sup>1</sup> *Bergsmo/Wiley*, in: Norwegian Centre for Human Rights (ed.), *Manual on Human Rights Monitoring – An Introduction for Human Rights Field Officers*, 2008, p. 1, available at <https://www.jus.uio.no/smr/english/about/programmes/nordegm/publications/manual/current/kap10.pdf> (6.2.2019).

<sup>2</sup> *Bergsmo/Wiley* (fn. 1), p.12.

<sup>3</sup> *Stephens*, *Wisconsin International Law Journal* 21 (2003), 527 (528).

The report provided the “legal basis and potential evidence necessary to prosecute those first cases before the Tribunal”.<sup>12</sup> And indeed, despite separate investigations by the ICTY-Prosecution, the eight cases selected by Human Rights Watch/Helsinki were among the very first cases the Tribunal's prosecution would investigate.<sup>13</sup>

Apart from HRW, Physicians for Human Rights (PHR) conducted “multiple mass grave investigations across the former Yugoslavia in the 1990s for the Tribunal”,<sup>14</sup> which provided important assistance for the Tribunal. PHR investigators “exhumed and identified remains in several large mass graves and gathered evidence showing the victims were executed, many with their hands tied behind their backs, and dumped into shallow graves”.<sup>15</sup> Former director of the PHR's International Forensic Program, William Haglund, testified in the trial of Radovan Karadzic.<sup>16</sup>

NGOs, the media, IGOs etc. played also an important part in the initial investigations into the genocide that occurred in Rwanda in 1994 and it is no exaggeration to contend that the creation of the ICTR was also – amongst other factors – the result of their work on the ground.<sup>17</sup> As Jallow states: “Reports from NGOs proved very helpful in enabling the OTP to gather pertinent, substantiated data. Though NGOs are not in essence investigatory bodies the extent of the investigations underlying these reports and the level of analysis they achieved indicated a true effort and genuine commitment by many such organizations to produce verifiable facts. Witness interviews, for instance, were very useful not only for learning about the incidents they described but also for corroborating other events and reports”.<sup>18</sup>

## 2. Kosovo

In Kosovo, too, evidence about the forced expulsion, arbitrary killings, torture and sexual assault of the Albanians was

gathered by NGOs.<sup>19</sup> Journalists and human rights researchers have investigated, documented and reported many individual accounts of human rights violations taking place in Kosovo.<sup>20</sup>

Physicians for Human Rights (PHR) and the Program on Forced Migration and Health of Columbia University's Joseph L. Mailman School of Public Health designed a study to “establish patterns of human rights violations among Kosovar refugees by Serb forces using a population-based approach”.<sup>21</sup> The study “randomly sampled 1,209 Kosovar refugees in 31 refugee camps and collective centers in Albania and Macedonia between April 19, 1999 and May 3, 1999. The survey assessed human rights abuses among 11,458 household members while living in Kosovo”.<sup>22</sup> Furthermore, The Independent Law Commission asked the American Bar Association's Central European and Eurasia Initiative (ABA/CEELI) to “establish a team of experts to review this information and compile data from other NGOs concerning the human rights violations in Kosovo”.<sup>23</sup> ABA/CEELI conducted comprehensive statistical studies to add clarity and precision to the potential evidence.<sup>24</sup> ABA/CEELI established the Kosovo War Crimes Documentation Project (Executive Director Mark Ellis)<sup>25</sup> to interview refugees and provide victim statements to the ICTY and collaborated with a coalition of Albanian NGOs called the Center for Peace Through Justice (CPTJ) to gather critical refugee interviews.<sup>26</sup> Between April and October 1999, ABA/CEELI volunteers in Albania, Macedonia, Kosovo, Poland, and Ft. Dix, New Jersey, worked with translators and local investigators to assemble accounts of Kosovar refugees.<sup>27</sup> Apart from NGOs such

<sup>12</sup> *Ellis* (fn. 5), p. 144.

<sup>13</sup> *Korey* (fn. 6), p. 325.

<sup>14</sup> Physicians for Human Rights, *Bosnian Serb Commander Ratko Mladic Convicted of Genocide, War Crimes, Crimes Against Humanity*, 22.11.2017, <https://phr.org/news/bosnian-serb-commander-ratko-mladic-convicted-of-genocide-war-crimes-crimes-against-humanity/#top> (6.2.2019).

<sup>15</sup> Physicians for Human Rights, <http://phr.org/issues/investigating-deaths-and-mass-atrocities/investigating-mass-crimes-for-prosecutions/mass-crimes-in-former-yugoslavia-srebrenica/> (15.2.2019); *Ellis* (fn. 5), p. 156.

<sup>16</sup> Physicians for Human Rights, *Forensic science is applied in nearly every area of our work and is crucial to document mass crimes*, available at <https://phr.org/issues/investigating-deaths-and-mass-atrocities/> (6.2.2019).

<sup>17</sup> In the same vein *Jallow*, in: *Decaux/Dieng/Sow* (ed.), *From Human Rights to International Criminal Law*, 2007, p. 437 (438).

<sup>18</sup> *Jallow* (fn. 17), p. 438.

<sup>19</sup> *Ellis* (fn. 5), p. 156.

<sup>20</sup> Physicians for Human Rights, *War Crimes in Kosovo – A Population-Based Assessment of Human Rights Violation Against Kosovar Albanians*, 1999, p. 1, available at <https://phr.org/wp-content/uploads/1999/08/kosovo-war-crimes-1999.pdf> (6.2.2019).

<sup>21</sup> Physicians for Human Rights (fn. 20), p. 1.

<sup>22</sup> Physicians for Human Rights (fn. 20), p. 1.

<sup>23</sup> *Ellis* (fn. 5), p. 156.

<sup>24</sup> See, for instance, American Bar Association/Central European and Eurasian Law Initiative, *An Introduction to the Human Trafficking Assessment Tool*, December 2005, available at

[http://cedoc.inmujeres.gob.mx/documentos\\_download/trata\\_de\\_personas\\_28.pdf](http://cedoc.inmujeres.gob.mx/documentos_download/trata_de_personas_28.pdf) (6.2.2019). See also *Ellis* (fn. 5), p. 156.

<sup>25</sup> American Bar Association/Central European and Eurasian Law Initiative/American Association for the Advancement of Science, *Political Killings in Kosova/Kosovo*, March-June 1999, 2000, p. xi, available at

<https://www.hrdag.org/wp-content/uploads/2015/07/kosovo-politicalkillings-2000-cc.pdf> (6.2.2019).

<sup>26</sup> *Ellis* (fn. 5), p. 157; American Bar Association/Central European and Eurasian Law Initiative/American Association for the Advancement of Science (fn. 25), p. xi.

<sup>27</sup> American Bar Association/Central European and Eurasian Law Initiative/American Association for the Advancement of Science (fn. 25), p. xi.

as the previously mentioned HRW and PHR, the American Association for the Advancement of Science (AAAS) – with members of the Human Rights Data Analysis Group (HRDAG) – wrote several reports on the conflict.<sup>28</sup> Employing the statistical expertise of the AAAS and HRDAG, NGO-investigations collected evidence of ethnic cleansing against Kosovar Albanians.<sup>29</sup> In its report “Political Killings in Kosovo/Kosovo, March-June 1999”, ABA/CEELI and the Science and Human Rights Program of the AAAS concluded that “approximately 10,500 Kosovar Albanians were killed between March 20 and June 12, 1999, with a 95 percent confidence interval from 7,449 to 13,627”.<sup>30</sup> This analysis was used by the ICTY Office of the Prosecutor in the trial of Slobodan Milosevic to refute the argument that the killings were simply a consequence of battles between the Kosovo Liberation Army and Serbian forces.<sup>31</sup>

### 3. Sierra Leone and Cambodia

In Sierra Leone, No Peace Without Justice (NPWJ) initiated a Conflict Mapping Program, namely “the reconstruction of the chain of events during the ten-year war through the scrupulous selection and debriefing of key individuals throughout the country whose profession, role in their community or in the forces involved in the conflict, placed them in a position to follow events as they unfolded”.<sup>32</sup> NPWJ’s analysis was “based on testimonial and other data overlaid with order of battle and command structures of the various forces as they evolved over time and space”.<sup>33</sup> The mapping aimed at establishing the “chain of command within the armed forces oper-

ating in Sierra Leone and assembling these disparate pieces of information to create the bigger picture of the decade-long conflict in Sierra Leone” to demonstrate “direct and command responsibility for crimes committed during the conflict”.<sup>34</sup>

As in Kosovo, in 1999, the ABA established a Sierra Leone War Crimes Documentation Project aimed at contributing to the documentation of the war crimes committed in Sierra Leone between 1991 and 2002, and, thereby, strengthening the ongoing truth and reconciliation process.<sup>35</sup> In Cambodia, the International Crisis Group (ICG), in partnership with NPWJ<sup>36</sup> and the Documentation Centre of Cambodia (DCCam)<sup>37</sup>, have created similar successful documentation projects for the Extraordinary Chambers in the Courts of Cambodia (ECCC).

### III. Private International Criminal Investigations in Syria

Despite growing expectation, the international criminal community has remained largely unable to stop the alleged commission of international crimes in Syria. As a result, Syrian civil society organizations (CSOs) and a few innovative NGOs have been working to document and build cases against those most responsible in Syria.<sup>38</sup> Furthermore, a test of a completely new and unique form of international criminal investigations can be witnessed in the context of the conflict in Syria: after the Security Council remained inactive to ensure accountability for international crimes committed in the war in Syria, on 21 December 2016, the UN General Assembly through Resolution 71/248 created an “International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011” (IIIM).<sup>39</sup> The

<sup>28</sup> Human Rights Data Analysis Group, Kosovo <https://hrdag.org/kosovo/> (6.2.2019).

<sup>29</sup> *Ellis* (fn. 5), p. 157.

<sup>30</sup> American Bar Association/Central European and Eurasian Law Initiative/American Association for the Advancement of Science (fn. 25), p. xi.

<sup>31</sup> Prosecutor v. Slobodan Milosevic, Transcript of Hearing from 14.3.2002, p. 2256: “During the break, I checked some assertions that you denied, and I would like to ask you a few questions about this. Namely, I asked about your cooperation and adjustment of data to the data of the International Crisis Group, and you said that was not true. However, on the website of your AAA association, and that is website [hrdataaas.org/kosovo/index/html](http://hrdataaas.org/kosovo/index/html) [as interpreted], titled “Political Killings in Kosovo from March to June 1999,” in the column called “Statistical Analysis of Data,” it says: The method of killing people in Kosovo coincides with migrations, and this claim corresponds to the data obtained from the International Crisis Group; and then others are enumerated as well”, available at <http://www.slobodan-milosevic.org/documents/trial/2002-03-14.html> (6.2.2019).

<sup>32</sup> No Peace Without Justice, Conflict Mapping in Sierra Leone: Violations of International Humanitarian Law 1991 to 2002, Preface, p. III, available at [http://www.npwj.org/sites/default/files/documents/C-%20Preface\\_0.pdf](http://www.npwj.org/sites/default/files/documents/C-%20Preface_0.pdf) (6.2.2019).

<sup>33</sup> No Peace Without Justice (fn. 32), p. VII.

<sup>34</sup> No Peace Without Justice (fn. 32), p. VIII.

<sup>35</sup> American Association for the Advancement of Science, Partnership 8: Surveying Human Rights Abuses in Sierra Leone,

<https://www.aaas.org/programs/scientific-responsibility-human-rights-law/partnerships-scientists-working-human-rights-organizations> (6.2.2019).

<sup>36</sup> See International Crisis Group, Reality Demands: Documenting Violations of International Humanitarian Law In Kosovo (1999), available at

<http://cms.crisisgroup.org/europe-central-asia/balkans/kosovo/reality-demands-documenting-violations-international-humanitarian-law-kosovo-1999> (15.2.2019); *Ellis* (Fn. 5), p. 157.

<sup>37</sup> <http://www.d.dccam.org/> (6.2.2019).

<sup>38</sup> *Elliott*, Journal of International Criminal Justice 15 (2017), 239 (240).

<sup>39</sup> United Nations General Assembly, International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, 2016, UN Doc. A/RES/71/248. See also *Wenaweser/Cockayne*, Journal of International Criminal Justice 15 (2017), 211; *Elliott* (fn. 38),

Syria Mechanism is a subsidiary organ of the UN GA and not a prosecutorial body but “quasi-prosecutorial”: it is required to “prepare files to assist in the investigation and prosecution of the persons responsible and to establish the connection between crime-based evidence and the persons responsible, directly or indirectly, for such alleged crimes, focusing in particular on linkage evidence and evidence pertaining to mens rea and to specific modes of criminal liability”.<sup>40</sup> It is headed by Catherine Marchi-Uhel, former Judge at the ECCC and former Senior Legal Officer and Head of Chambers at the ICTY.<sup>41</sup>

In addition, CIJA is collecting information that could eventually be used to hold perpetrators of International Humanitarian Law violations accountable. The private actions of the CIJA amidst the ongoing conflict in Syria represent a departure from the practice of conducting international criminal investigations under the aegis of public institutions. CIJA has developed organisationally into a not-for-profit that is funded by a number of states and organisations, including the United Kingdom, the European Union, Canada and Germany.<sup>42</sup> CIJA “has 130 specialist personnel investigating, gathering and preserving evidence, analyzing and building case files and indictments against those most responsible in Syria (and Iraq in terms of Da’esh crimes)”.<sup>43</sup> It “combines international expertise with local on the ground capacity building which effectively develops a local Syrian civil society response. CIJA works with trained and mentored Syrian investigators with access to areas across Syria”.<sup>44</sup>

Even though CIJA is not meant to replace, but rather complement, public institutions involved in criminal investigations, it symbolises a trend of the international criminal community towards private investigations, once political leaders demonstrate a lack of will to officially investigate the commission of core international crimes.

239; *Whiting*, Journal of International Criminal Justice 15 (2017), 231.

<sup>40</sup> United Nations General Assembly, Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, 2016, UN Doc. A/71/755. See also *Elliott* (fn. 38), 239.

<sup>41</sup> United Nations Secretary-General, Secretary-General appoints Catherine Marchi-Uhel of France to head International Impartial Independent Mechanism Investigating Serious Crimes in Syria [Press release], 2017, available at <https://www.un.org/press/en/2017/sga1744.doc.htm> (6.2.2019), *Cumming-Bruce*, Ex-judge chosen by U.N. to gather evidence of Syria war crimes, The New York Times, 4.7.2017, available at <https://www.nytimes.com/2017/07/04/world/middleeast/syria-war-crimes-prosecution-united-nations.html> (6.2.2019).

<sup>42</sup> *Rankin*, Global Responsibility to Protect 9 (2017), 395 (400–401).

<sup>43</sup> *Elliott* (fn. 38), 239 (245).

<sup>44</sup> *Elliott* (fn. 38), 239 (245).

#### IV. Advantages of Private International Criminal Investigations

The advantages of investigations conducted by private entities in the international field are obvious – even when there is, at a later moment, an official investigation. Members of those entities are often among the first persons to view crime scenes. Investigators of Prosecutor’s Offices of ICTs rarely have the opportunity to inspect a crime scene until well after the underlying conduct has been perpetrated.<sup>45</sup> Consequently, in its recent Strategic Plan, the ICC-OTP explains: “Preliminary examinations are critical to the Office in its determination of whether to open an investigation. They also greatly facilitate the Office’s investigative work in various ways, such as: e.g. by systematically capturing and exploiting open source data; and building networks of cooperation partners and contacts for handover for investigative activities; and identifying potential cases for future investigations”.<sup>46</sup> Furthermore, the OTP declared that it “will also react promptly to upsurges or serious risks of violence by reinforcing its early interaction with States, international, regional organisations and NGOs in order to fine-tune its assessment and coordinate next steps”.<sup>47</sup> Last but not least, according to Article 44 (4) ICC-Statute, the ICC “may, in exceptional circumstances, employ the expertise of gratis personnel offered by States Parties, intergovernmental organizations or nongovernmental organizations to assist with the work of any of the organs of the Court. The Prosecutor may accept any such offer on behalf of the Office of the Prosecutor.”

*Bergsmo* and *Wiley* too identify as one of their four broad phases of investigation services of international criminal jurisdictions: “preliminary analysis of open-source materials, operational planning and liaison with personnel employed by IGOs, NGOs, governmental and other organisations who have prepared reports of particular interest to the investigative body”.<sup>48</sup> As to the components of an investigation, they highlight especially two components: “(a) the work to establish the so-called crime base of the case; and (b) the process to develop information on the link between the suspect and the actual perpetration of the crimes in question”.<sup>49</sup>

CIJA has not only preserved and analysed over 600,000 pages of original documentation, including regime military and intelligence documents.<sup>50</sup> It also focuses on the linkage evidence in order to build leadership cases and indictments.<sup>51</sup> As *Elliott* describes, “it has a ‘names database’ with over one million entries, and three indictments/pre-trial files against 25 top regime officials including Assad, and a further three in-

<sup>45</sup> *Bergsmo/Wiley* (fn. 1), p. 4.

<sup>46</sup> ICC Office of the Prosecutor, Strategic Plan 2016–2018, p. 20, available at [https://www.icc-cpi.int/iccdocs/otp/EN-OTP\\_Strategic\\_Plan\\_2016-2018.pdf](https://www.icc-cpi.int/iccdocs/otp/EN-OTP_Strategic_Plan_2016-2018.pdf) (6.2.2019).

<sup>47</sup> OTP Strategic Plan (fn. 46), p. 21.

<sup>48</sup> *Bergsmo/Wiley* (fn. 1), p. 12–13.

<sup>49</sup> *Bergsmo/Wiley* (fn. 1), p. 8.

<sup>50</sup> *Kassab*, Michigan Journal of International Law 2018, 283 (287); *Elliott* (fn. 38), 239.

<sup>51</sup> *Elliott* (fn. 38), 239; *Kassab* (fn. 50), 283 (287).

dictment/case files against over 35 Da'esh operatives in Syria and Iraq". Nevertheless, CIJA's purpose is to assist national and international prosecutions.<sup>52</sup> This assistance proved to be quite effective in Germany: As the weekly magazine *Der Spiegel* reported on 8 June 2018, the German Federal Prosecutor issued an internationalised arrest warrant for Jamil Hassan, head of Syria's Air Force Intelligence Directorate on charges of war crimes and crimes against humanity.<sup>53</sup> Where an initial threshold of suspicion is met, and the case has some link to Germany, German authorities will open a "Strukturverfahren" or a background investigation. As the European Center for Constitutional and Human Rights describes, "[t]hese proceedings qualify as investigations as defined in the German Code of Criminal Procedure and can thus involve criminal justice mechanisms such as the hearing of witness testimony. They are comparable to 'situations' under scrutiny at the ICC. Over the course of these proceedings, individual suspects may be identified. Further investigations are then

pursued against these suspects in separate proceedings".<sup>54</sup> While early Strukturverfahren focused – inter alia – on Rwanda and Congo, it is now to a great extent Syria and Iraq.<sup>55</sup> The evidence for these investigations seems to be partly provided by CIJA, as *Der Spiegel* suggests.<sup>56</sup> In addition, an earlier call for an international criminal trial in Germany was made in November 2016, when six German lawyers filed a criminal complaint against the Syrian President Bashar al-Assad for his involvement in the commission of war crimes and crimes against humanity between 26 April and 19 November 2016 in the Syrian town of Aleppo.<sup>57</sup> The evidence was mainly collected by NGOs such as Amnesty International, Human Rights Watch and Physicians for Human Rights. A reporter of the weekly magazine *Die Zeit* argues that Germany is the appropriate place to hold a trial against Assad, since the country has accepted over half a million Syrian refugees within the last six years, the highest number in Europe.<sup>58</sup> These refugees could be used as potential witnesses.<sup>59</sup> As to the quality of CIJA's work, Rapp, who led the prosecutions at the ICTR and in Sierra Leone, claimed that CIJA's documentation was "much richer than anything I've seen, and anything I've prosecuted in this area".<sup>60</sup>

<sup>52</sup> See *Engels*, Written Testimony before the Commission on Security and Cooperation in Europe, 22.9.2016, available at [https://chrissmith.house.gov/uploadedfiles/1\\_chris\\_engels\\_testimony.pdf](https://chrissmith.house.gov/uploadedfiles/1_chris_engels_testimony.pdf) (15.2.2019); *Elliott* (fn. 38), 239.

<sup>53</sup> See *Diehl/Reuter/Schmid*, *Der Spiegel*, 9.6.2018, p. 40–42; *Burghardt*, *Völkerrechtsblog*, 11.6.2018, available at <http://voelkerrechtsblog.org/endlich-erster-haftbefehl-gegen-einen-ranghohen-vertreter-des-syrischen-assad-regimes/> (6.2.2019). On 7.2.2019, the investigative judge of the German Federal Court of Justice issued arrest warrants against two former secret service officers from the Syrian government, since they were strongly suspected of having carried out or aided torture and crimes against humanity, see the Press Statement of the German Federal Prosecutor of 13.2.2019, available at <http://www.generalbundesanwalt.de/de/showpress.php?newsid=819> (16.2.2019). The jurisdiction of the investigative judge of the German Federal Court of Justice follows from the Courts Constitution Act (*Gerichtsverfassungsgesetz*), §§ 142a (1) cl. 1, 120 (2) cl. 1 No. 1, 74a (1) No. 2, English translation available at [https://www.gesetze-im-internet.de/englisch\\_gvg/index.html](https://www.gesetze-im-internet.de/englisch_gvg/index.html) (16.2.2019). The "strong suspicion"-degree for arrest warrants follows from § 112 (1) cl. 1 of the German Code of Criminal Procedure, English translation available at [https://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html#p0865](https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0865) (16.2.2019). On 12.2.2019, the German Federal Prosecutor – through officers of the Federal Criminal Police Office (*Bundeskriminalamt*) – arrested the two suspects in Berlin and Zweibrücken, see *Diehl/Reuter/Schmid*, *Der Spiegel*, 16.2.2019, p. 38-40. As a result of the creation of a French-German Joint Investigation Team, another Syrian alleged to have worked for the secret service was arrested by Parisian prosecutors. This is the first time western criminal prosecutors have arrested alleged torturers working for Bashar al-Assad.

## V. Challenges for Private International Criminal Investigators

If investigations by non-state entities are so effective, especially in times where there is a lack of political will to end impunity, why then has this model not become a success story much earlier? In national jurisdictions, private investigations are nothing unusual. In Britain the rudiments of the private investigation industry "lay in the thief takers and bounty hunters that preceded and continued after the establishment of the new police in 1829".<sup>61</sup> In fact, private investi-

<sup>54</sup> European Center for Constitutional and Human Rights, *Universal Jurisdiction in Germany? – The Congo War Crimes Trial: First Case under the Code of Crimes against International Law*, 8.6.2016, p. 7, available at [https://www.ecchr.eu/fileadmin/Juristische\\_Dokumente/Report\\_Executive\\_Summary\\_FDLR\\_EN.pdf](https://www.ecchr.eu/fileadmin/Juristische_Dokumente/Report_Executive_Summary_FDLR_EN.pdf) (15.2.2019).

<sup>55</sup> Cf. *Ritscher*, *ZIS* 2016, 807 (807 f.); *Ambos*, *Internationales Strafrecht*, 5<sup>th</sup> ed. 2018, § 6 para. 40.

<sup>56</sup> *Diehl/Reuter/Schmid*, *Der Spiegel*, 9.6.2018, p. 41. CIJA also provided documentary evidence against one of the two former secret service officers from the Syrian government who were arrested by German authorities on 12.2.2019 (fn. 53).

<sup>57</sup> Reported in *Helberg*, *Zeit Online*, 28.11.2016, available at <http://www.zeit.de/politik/ausland/2016-11/baschar-al-assad-syrien-kriegsverbrechen-anklage> (6.2.2019).

<sup>58</sup> *Helberg* (fn. 57).

<sup>59</sup> *Helberg* (fn. 57).

<sup>60</sup> *Taub*, *The New Yorker*, 31.8.2016, available at <https://www.newyorker.com/news/news-desk/does-anyone-in-syria-fear-international-law> (6.2.2019). See also *Kassab* (fn. 50), 283 (289).

<sup>61</sup> *Johnston*, in: Newburn/Williamson/Wright (ed.), *Handbook of Criminal Investigation*, 2007, p. 277 (278).

gators in Britain “provided the only form of post-incident intervention in the policing of crime”.<sup>62</sup> The beginning of private investigations in the USA was marked by Allan Pinkerton’s establishment of the Pinkerton National Detective Agency in 1850.<sup>63</sup> Interestingly, the agency operated within the security framework of the state.<sup>64</sup> Many of the personnel in the US Justice Department’s “detection unit” in its early days were originally trained Pinkerton detectives.<sup>65</sup> In fact, Pinkerton executives took up senior public police positions, and there always was vital exchange of information between the agency and public organisations.<sup>66</sup> *Johnston* generally observes a “division of labour” in the USA between state police forces and private investigators.<sup>67</sup> This division of labour has even increased after the terrorist attacks on 11 September 2001 in New York and Washington and the ensuing counter-terrorist demands in the US.<sup>68</sup> In Britain, *Gill and Hart* revealed that “some 80% of private investigators are retired or former public police officers”.<sup>69</sup> In Germany, private investigations were the norm in old-germanic procedure of the 12th century, which was basically a two-party-system.<sup>70</sup> Even in the Roman criminal process, it was the citizen who brought charges and investigated.<sup>71</sup> This, of course, changed with the introduction of the inquisitorial system. But even the criminal process of the “*Constitutio Criminalis Carolina*” from 1532 incorporated the accusatorial party system with private investigations.<sup>72</sup> Today, Germany – as other legal systems do – still provides for the possibility of private prosecutions.<sup>73</sup> This means that the aggrieved party

may either prosecute minor offences without the mandatory participation of the public prosecutor<sup>74</sup> or participate as a kind of auxiliary (second) prosecutor with full procedural rights.<sup>75</sup> In Germany, private investigations are explicitly provided for in the German Code of Criminal Procedure (*Strafprozessordnung, StPO*). Apart from the private prosecution (§ 374 et seq. *StPO*) and the accessory prosecution (§§ 395 et seq. *StPO*), there’s the application for the production of evidence (§§ 166, 219, 244 et seq. *StPO*), just to mention a few.<sup>76</sup>

Nevertheless, private investigations create certain conceptual and practical problems. These problems reach a new dimension on the international level, when there is an alleged commission of core international crimes.

### 1. Definition

The first problem is one of definition: What is a private investigator? The term “investigator” has roots in the latin noun “*vestigium*”, meaning “sole of the foot”, “footprint” or, more figuratively, “something lost” or “that has passed before”.<sup>77</sup> *Gill and Hart* therefore conclude: An investigator is “someone who “tracks” or “traces out” something that is missing; something that has occurred, or something that was or is known by someone but remains hidden”; and a private investigator is someone who “either runs or is employed by a business which provides investigative services for a fee”.<sup>78</sup> An even broader definition seems to be employed by *Bockemühl*, who implicitly defines “private investigation” as every investigation not conducted by the prosecution.<sup>79</sup> Thus, these broad definitions are subject to all sorts of qualifications and refinements. *Prenzler* uses “private investigators”, “inquiry

<sup>62</sup> *Gill/Hart*, *European Journal on Criminal Policy and Research* 7 (1999), 245 (247–248).

<sup>63</sup> *Churchill*, *The New Centennial Review* 4 (2004), 1 (3); *Johnston* (fn. 61), 278.

<sup>64</sup> *Johnston* (fn. 61), 279.

<sup>65</sup> *Churchill* (fn. 63), 1 (45).

<sup>66</sup> *Johnston* (fn. 61), 279.

<sup>67</sup> *Bayley/Shearing*, *The New Structure of Policing: Description, Conceptualization and Research Agenda*, 2001, p. 19; *Johnston* (fn. 61), 279; *Aas*, *Globalisation & Crime*, 2007, p. 139.

<sup>68</sup> *Johnston* (fn. 61), 292.

<sup>69</sup> *Gill/Hart* (fn. 62), 245 (249).

<sup>70</sup> See in more detail *Dezza*, *Geschichte des Strafprozessrechts in der Frühen Neuzeit*, 2017, p. 122; *Geppert*, *Der Grundsatz der Unmittelbarkeit im deutschen Strafverfahren*, 1979, p. 8.

<sup>71</sup> *Dezza* (fn. 70), p. 4, 17 et seq.; *Geppert* (fn. 70), p. 9–11; *Geppert*, *Jura* 2015, 143 (144).

<sup>72</sup> *Bechtel*, *ZJS* 2018, 20 (25); *Geppert* (Fn. 70), p. 15–19; *Geppert*, *Jura* 2015, 143 (150).

<sup>73</sup> §§ 374 et seq. German Code of Criminal Procedure. In the USA, it is generally not possible for private citizens to initiate criminal prosecutions (*Linda R.S. v. Richard D.*, 410 U.S. 614 [1973]; *Smith v. Kreiger*, 389 Fed. Appx. 789 [10th Cir. 2010]). In several states, however, the prosecutors’ offices accept – and even solicit – contributions from the private sector for a variety of purposes, including financing certain

prosecutions, see *Kennedy*, *Hastings Constitutional Law Quarterly* 24 (1996), 665.

<sup>74</sup> E.g. in *Roxin/Schünemann*, *Strafverfahrensrecht*, 29<sup>th</sup> ed. 2017, § 63; in Spain, see *Borja de Quiroga*, *Tratado de Derecho Procesal Penal*, 3<sup>rd</sup> ed. 2009, p. 788 et seq.; in England and Wales the private prosecution is not limited to minor offences. According to section 6 (2) of the Prosecution of Offences Act 1985 the public prosecutor is allowed to take over the conduct of any criminal proceedings and thereafter to discontinue it, see *Hungerford-Welch*, *Criminal Procedure and Sentencing*, 7<sup>th</sup> ed. 2009, p. 134 et seq.

<sup>75</sup> E.g. in Poland, Germany, Spain; see *Thaman*, *Electronic Journal of Comparative Law* 11.3 (2007), 4.

<sup>76</sup> *Eckhardt*, *Private Ermittlungsbeiträge im Rahmen der staatlichen Strafverfolgung*, 2009, p. 7–8.

<sup>77</sup> *Gill/Hart*, *British Journal of Criminology* 37 (1997), 549 (550 with fn. 1).

<sup>78</sup> *Gill/Hart* (fn. 77), 549 (550 with fn. 1).

<sup>79</sup> *Bockemühl*, *Private Ermittlungen im Strafprozess*, 1996, p. 15 et seq., reviewed by *Klip*, *European Journal of Crime, Criminal Law and Criminal Justice* 6 (1998), 82 (83). This broad definition would thus include so-called “private policing” (see, e.g., *Rappaport*, *Columbia Law Review* 118 [2018], 2251 [2254]; *Simmons*, *Wake Forest Law Review* 42 [2007], 911 [919-924]; *Sklansky*, *UCLA Law Review* 46 [1999], 1165).

agents” and “private agents” interchangeably.<sup>80</sup> In his view, “[t]he term ‘private investigator’ has both generic and specific legal definitions. In its broadest terms, it relates to any person who conducts enquiries for a customer or employer. This may include serving summonses after locating a person, as well as repossessing property”.<sup>81</sup> *Button* blames the diversity of the branch for the impossibility to define private investigators: “[T]here are other occupations that compete with and undertake similar activities”.<sup>82</sup> Fraud investigations, for instance, can be conducted by private investigators but also by “accountants” and “specialised forensic accountants”.<sup>83</sup> Who can tell the difference between an accountant and a private detective after having watched “The Accountant”, starring Ben Affleck, a movie about the forensic accountant Christian Wolff, who – living with a high functioning form of autism – discovers that 61 million dollars have been embezzled from the company who hired him. Investigative journalists and solicitors are also performing acts that could be assigned to a private investigator.<sup>84</sup> The list of those resembling activities (store detectives, solicitors and even psychics) is long.<sup>85</sup> *George* and *Button* therefore use a more complex definition, reproduced by *Johnston*: Private investigators are “[i]ndividuals (whether in house or contract) and firms (other than public enforcement bodies) who offer services related to the obtaining, selling or supplying of any information relating to the identity, conduct, movements, whereabouts, associations, transactions or character of any person, groups of persons or association, or of any other type of organization”.<sup>86</sup> The narrowest definition would reduce private investigators to “work either for the victim or for the defendant or his attorney in criminal proceedings”.<sup>87</sup> Or slightly broader the definition of *Dörmann*: “Usually, private investigators working in the criminal justice field do so on behalf of the defence, checking the accuracy of police evidence and looking for witnesses who might undermine the case for the prosecution. By contrast, criminal investigations for private companies usually aim to establish the causes of loss and of any guilt associated with such loss”.<sup>88</sup>

The difficulty to define the term “private investigator” or “private investigations” is increased on the international

level. Here, too, many actors do the work of investigators, such as journalists or the media in general. Take, for instance, the “Group Caesar”, the code name of a former Syrian military photographer who brought over 50,000 photographs out of the country, 28,000 of which show detainees in Syrian prisons killed by torture, outright execution, disease, malnutrition or other ill-treatment.<sup>89</sup> But even when the term “private investigator” is narrowed down to IGOs or NGOs, the nature of these organisations is often unclear. Thus, any definition would be arbitrary.<sup>90</sup> The only suggestion I would make is to dispense with the term “private”, since it is too broad and seems to be rather occupied by a domestic understanding. I also recommend avoiding the term “human rights”, since agencies such as CIJA do investigative work without human rights monitoring. The best term to use would therefore be Third Party Investigations, which goes back to *Bergsmo’s* and *Wiley’s* description of personnel “not serving with a belligerent party”.<sup>91</sup>

## 2. Ethics

A second problem is the one of ethics. Lawyers are expected to abide by laws, professional rules, and informal professional norms, and in many jurisdictions, they are also required to abide by a professional code of conduct.<sup>92</sup> Professional legal ethics involve a recognition that lawyers are often confronted with ethical dilemmas. Criminal lawyers in particular face “conflicting values, aims and interests”.<sup>93</sup> They are expected, however, to separate the “morality in their representation” from the “morality of the client’s cause”.<sup>94</sup> A criminal lawyer is expected to vigorously argue for her side of the case, whether as a defence lawyer or a prosecution lawyer, and whether or not she thinks that she in fact has the most compelling argument. But this vigour remains limited by ethical constraints, such as the moral requirement to respect the dignity of all persons involved in a criminal trial, and the moral prohibition on lying to advance a client’s interests. While a defence lawyer may have little control over criminal justice proceedings other than determining how best to advocate for his client, a prosecutor has additional ethical obligations due to her ability to select defendants for trial and determine the scope of the criminal justice process.<sup>95</sup>

<sup>80</sup> *Prenzler*, Private Investigators in Australia: Work, Law, Ethics and Regulation. Report to the Criminology Research Council, 2001, p. 5, available at <http://www.criminologyresearchcouncil.gov.au/reports/prenzler.pdf> (6.2.2019); see also *Prenzler*, in: *Hucklesby/Lister* (eds.), *The Private Sector and Criminal Justice*, 2018, p. 97.

<sup>81</sup> *Prenzler* (fn. 80 – 2001), p. 7. See also *Johnston* (fn. 61), p. 278.

<sup>82</sup> *Button*, *International Journal of the Sociology of Law* 26 (1998), 1 (2).

<sup>83</sup> *Button* (fn. 82), 1 (2).

<sup>84</sup> *Button* (fn. 82), 1 (2).

<sup>85</sup> *Button* (fn. 82), 1 (2).

<sup>86</sup> *George/Button*, *Private Security* 1 (2000), p. 88.

<sup>87</sup> *McMahon*, *Practical Handbook for Private Investigators*, 2001, p. 22.

<sup>88</sup> *Johnston* (fn. 61), p. 285.

<sup>89</sup> *Afshar*, *The Guardian*, 27.8.2018, available at <https://www.theguardian.com/commentisfree/2018/aug/27/as-sad-syria-atrocities-regime-photographed-murdered> (6.2.2019). The photographs presented an important basis for the evidence against the two former secret service officers from the Syrian government who were arrested by the German Federal Prosecutor on 12.2.2019 (fn. 53).

<sup>90</sup> In the same vein for the national level *Johnston* (fn. 61), p. 278.

<sup>91</sup> *Bergsmo/Wiley* (fn. 1), p. 12.

<sup>92</sup> See *Nicolson*, *Legal Studies* 25 (2005), 601.

<sup>93</sup> *Young/Sanders*, *Legal Ethics* 7 (2004), 190.

<sup>94</sup> *Luban*, *Legal Ethics and Human Dignity*, 2007, p. 20.

<sup>95</sup> This of course applies more to the criminal justice process in the legal tradition of the Common Law than to a Civil Law criminal process, cf. *Heinze*, *International Criminal Proce-*

The normative foundations of prosecutorial ethics consist of two main concepts: a prosecutor's general duty to seek justice,<sup>96</sup> and the moral theories that inform the corresponding, specific ethical obligations of the prosecutor. In both adversarial and inquisitorial systems of law,<sup>97</sup> regardless of other specific duties, the prosecutor is expected to seek justice.<sup>98</sup> While the particular features of what constitutes justice vary between, and sometimes within, criminal legal systems, it is always tied to the concept of fairness.<sup>99</sup>

Especially deontological constraints are well suited to play the primary role in shaping prosecutorial ethics and promoting fair trials. *Danner* has argued that prosecutorial decisions will be both actually legitimate and perceived as such if they are taken in a principled, reasoned, and impartial manner.<sup>100</sup> The ICC's OTP has adopted this approach in several policy papers. The duty to treat every individual as an end in herself and thus apply the same rules without bias or

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sure and Disclosure, 2014, p. 107 et seq. See also *Heinze/Fyfe*, in Bergsmo/Stahn (eds.), *Quality Control in Preliminary Examination*, Vol. 2, 2018, p. 1 (5–6).

<sup>96</sup> See *Zacharias*, *Vanderbilt Law Review* 44 (1991), 45 et seq.

<sup>97</sup> About the meaning of terms “inquisitorial” and “adversarial” in more detail *Heinze* (fn. 95), p. 117 et seq.; *Ambos/Heinze*, in: Bergsmo (ed.), *Abbreviated Criminal Procedures for Core International Crimes*, 2017, p. 27, 28 et seq.

<sup>98</sup> *Boyne*, *The German Prosecution Service*, 2014, p. 5 (“[P]rosecutors possess an ethical obligation to pursue justice”). The fact that the search for truth in inquisitorial systems is a constitutive feature (*Heinze* [fn. 95], p. 107) does not render justice as an ethical obligation of the prosecutor less relevant. In inquisitorial systems too truth is a means to the end of justice, as Karl Peters famously pointed out in his seminal work about the German criminal process (*Peters*, *Strafprozeß*, 1985, p. 82 [“Das Strafverfahren kann das Ziel der Gerechtigkeit nur erreichen, wenn es die Wahrheit findet”]). In the same vein *Kubicek*, *Adversarial Justice: America's Court System on Trial*, 2006, p. 37, with further references. See also *Ingraham*, *The Structure of Criminal Procedure*, 1987, p. 13.

<sup>99</sup> See, e.g., ICC (Trial Chamber), *Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006 of 14.12.2006 – ICC-01/04-01/06-772 (The Prosecutor v. Thomas Lubanga Dyilo)*, para. 37: “Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped”. See also *Namakula*, *International Criminal Law Review* 17 (2017), p. 935, 936. About the meaning of fairness in that context *Heinze/Fyfe* (fn. 95), p. 6–8.

<sup>100</sup> *Danner*, *The American Journal of International Law*, 2003, p. 536–537.

concern about outcomes lends itself to ensuring procedural fairness. The prosecutor is constrained by “rules which apply in an all-or-nothing, categorical manner without reference to the particular context or consequences of the prohibited or required behaviour”.<sup>101</sup> The impartiality demanded by deontological constraints applies “separately to every relation between persons”, which means that no one's rights may be violated, even if the violation could be “offset by benefits that arise elsewhere” in the justice system.<sup>102</sup>

This is not the place to go too deep into the matter of prosecutorial ethics, I have done this elsewhere with *Shannon Fyfe*. One aspect of the procedural fairness mentioned above is that staff employed by international criminal jurisdictions are ethically bound to search for inculpatory as well as exculpatory evidence from the start of an inquiry.<sup>103</sup> It is doubtful whether staff employed by CIJA abides by the same ethical obligations. This does not mean that NGOs or IGOs can never be trusted to comply with certain ethical obligations. In fact, human rights organisations are more concerned with issues of monitoring and protection through advocacy.<sup>104</sup> The problem are indeed entities such as CIJA who do mainly investigatory work and have donors at the same time. Here, concerns about the substantive outcomes of investigations and criminal trials, the overall performance or record of an investigator/prosecutor, or the social and political impacts of criminal trials will likely involve more consequentialist considerations.<sup>105</sup>

This is most visible at the national level. In meeting the needs of their clients, private investigators pursue instrumental ends.<sup>106</sup> As *Johnston* describes, “[u]nlike police detectives, who collect evidence for constructing cases within a system of public justice, private investigators aim only to minimize the economic, social or personal losses of their clients. Instrumentalism is driven by a proactive, risk-based mentality, the object of which is to anticipate, recognize and appraise risks and, having done so, to initiate actions that will help to minimize their impact on clients”.<sup>107</sup> *Prenzler* in his previously mentioned study found that “the large majority [of interviewees] also felt that anecdotal reports of misconduct were of sufficient gravity to justify greater control and scrutiny of the industry by government”.<sup>108</sup> The investigators he interviewed particularly nominated “privacy as the area where their profession posed the greatest danger to the public”.<sup>109</sup> Privacy is especially problematic in the case of social media evidence. Take, for instance, the investigations in

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<sup>101</sup> *Nicolson* (fn. 92), 606.

<sup>102</sup> *Markovits*, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age*, 2010, p. 7.

<sup>103</sup> *Bergsmo/Wiley* (fn. 1), p. 2.

<sup>104</sup> *Bergsmo/Wiley* (fn. 1), p. 2.

<sup>105</sup> *Mégret*, *Leuven Centre for Global Governance Studies*, Working Paper No. 18, 2008, p. 8; *Stahn*, *A Critical Introduction to International Criminal Law*, 2018, p. 353.

<sup>106</sup> *Johnston* (fn. 61), p. 280.

<sup>107</sup> *Johnston* (fn. 61), p. 280.

<sup>108</sup> *Prenzler* (fn. 80), p. 6.

<sup>109</sup> *Prenzler* (fn. 80), p. 36.

Myanmar, where the Human Rights Council recently created another IIM.<sup>110</sup> Human Rights Council resolution 34/22 mandated the Mission “to establish the facts and circumstances of the alleged recent human rights violations by military and security forces, and abuses, in Myanmar, in particular in Rakhine State, including but not limited to arbitrary detention, torture and inhuman treatment, rape and other forms of sexual violence, extrajudicial, summary or arbitrary killings, enforced disappearances, forced displacement and unlawful destruction of property, with a view to ensuring full accountability for perpetrators and justice for victims”.<sup>111</sup> Apart from 875 in-depth-interviews the mission conducted,<sup>112</sup> it also emphasised the important role of social media information.<sup>113</sup> It reported, *inter alia*: “The Mission has seen a vast amount of hate speech across all types of platforms, including the print media, broadcasts, pamphlets, CD/DVDs, songs, webpages and social media accounts. For example, the Mission encountered over 150 online public social media accounts, pages and groups that have regularly spread messages amounting to hate speech against Muslims in general or Rohingya in particular”.<sup>114</sup>

In another study, *Prenzler and King* reported that according to “one-third of the respondents, non-compliance [with ethical boundaries] was fairly widespread”, while others felt that instances of non-compliance were rather isolated.<sup>115</sup> *Button* describes that “there are many examples of illegal and unethical behaviour. There have been many alleged and reported incidents of private investigators bugging premises,

breaking and entering, kidnapping or gaining confidential information from the police”.<sup>116</sup>

As previously remarked, investigators are expected to separate the “morality in their representation” from the “morality of the client’s cause”.<sup>117</sup> This may lead to a moral dilemma when investigators who comply with ethical standards are asked by their clients to ignore these. *Gill and Hart* describe that “there is a demand for services that can only be considered to be of dubious legitimacy”.<sup>118</sup> All investigators interviewed “could cite instances when clients, including members of the legal profession, had directly asked them to perform illegal or unethical actions. While some cited occasions when they had been asked to organise a serious offence, such as murder or serious assault, these most commonly included gaining unlawful access to confidential information, such as criminal records, medical histories and bank account details”.<sup>119</sup>

Similar ethical problems are expected on the international level. Leaders and members of NGOs have private interests, such as financial interests, the increase of group membership, personal career motivations, or simply personal relationships.<sup>120</sup> Entities such as CIJA investigate and collect material without the permission of the UNSC or an International Treaty Body.<sup>121</sup> Thus, the investigations undertaken by third parties have not only been applauded.<sup>122</sup> It comes as no surprise that tribunals often impose limits upon investigatory NGOs. For example, the ICTY’s Office of the Prosecutor has cautioned NGOs not to conduct in-depth interviews with potential witnesses and have established strict guidelines for collecting evidence.<sup>123</sup>

Of course, it is emphasised that “CIJA adheres to international standards of ethical conduct and evidence management”.<sup>124</sup> *Rankin*, however, paints a too optimistic picture when she remarks: “CIJA’s objectives require an extraordinary degree of individual responsibility at all ranks of the organisation, for example many Syrian investigators share a personal responsibility to collect the material in an effort to establish the truth, and share a sense of public duty to investigate”.<sup>125</sup>

<sup>110</sup> <http://globaljusticecenter.net/press-center/press-releases/959-statement-on-the-creation-of-the-iiim-for-myanmar> (6.2.2019); <https://www.icj.org/hrc39-myanmarres/> (6.2.2019); *Abbott*, *Opinio Juris*, 6.12.2018, available at: <http://opiniojuris.org/2018/12/06/myanmars-ongoing-independent-mechanism-careful-planning-needed/> (16.2.2019).

<sup>111</sup> Human Rights Council, Thirty-ninth session, 10–28 September 2018, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, A/HRC/39/CRP.2, 17.9.2018, para. 4, <https://www.icj.org/wp-content/uploads/2018/09/HRC39-MyanmarFFM-FullReport-2018.pdf> (6.2.2019).

<sup>112</sup> Human Rights Council (fn. 111), para. 19.

<sup>113</sup> Human Rights Council (fn. 111), para. 515, 744. See also *Irving*, *Opinio Juris*, 7 September 2018, <http://opiniojuris.org/2018/09/07/the-role-of-social-media-is-significant-facebook-and-the-fact-finding-mission-on-myanmar/> (6.2.2019).

<sup>114</sup> Human Rights Council (fn. 111), para. 1310.

<sup>115</sup> *Prenzler/King*, *Australian Institute of Criminology*, August 2002, p. 5, available at <https://research-repository.griffith.edu.au/bitstream/handle/10072/6539/20935.pdf?sequence=2> (6.2.2019).

<sup>116</sup> *Button* (fn. 82), 1, 10. See also *Johnston* (fn. 61).

<sup>117</sup> *Luban* (fn. 94), p. 20.

<sup>118</sup> *Gill/Hart* (fn. 62), 245 (255).

<sup>119</sup> *Gill/Hart* (fn. 62), 245 (255). In a similar vein *Nemeth*, *Private Security and the Law*, 3<sup>rd</sup> ed. 2005, p. 67

<sup>120</sup> *Roach*, *Governance, Order, and the International Criminal Court*, 2009, p. 115.

<sup>121</sup> *Rankin* (fn. 42), 395 (414).

<sup>122</sup> Cheryl Hardcastle for instance, *Windsor-Tecumseh Minister for Canadian Parliament*, highlighted: “We do know in the international community that some people have criticized the privatizing of international criminal investigations”, cited in *Rankin* (fn. 42), 395 (405 with fn. 39).

<sup>123</sup> See *Danner* (fn. 100), 510 (532); *Ellis* (fn. 5), p. 156.

<sup>124</sup> *Rankin* (fn. 42), 395 (414).

<sup>125</sup> *Rankin* (fn. 42), 395 (414).

### 3. Evidence and Disclosure

The aim of a private investigator is to answer the questions who, what, when, where, how, and why.<sup>126</sup> Investigators – whether private or public – use observation, inquiry, examination, and experimentation to obtain evidence and factual information that can be used – if necessary – in court.<sup>127</sup> More concretely, a criminal investigation “is the systematic process of identifying, collecting, preserving, and evaluating information for the purpose of bringing a criminal offender to justice”.<sup>128</sup> *McMahon* mentions the “three Is”: information, interrogation, and instrumentation.<sup>129</sup> By applying the three Is, “the investigator gathers the facts that are necessary to establish the guilt or innocence of the accused in a criminal trial”.<sup>130</sup> The private investigator is often the “last hope for many people”<sup>131</sup> and it is certainly fair to say the same applies to CIJA’s investigations in Syria.

This is the reason why the information CIJA collects must be admissible in Court as evidence<sup>132</sup> – and exactly that is unclear.<sup>133</sup> For CIJA’s material to be admissible, its work must satisfy international standards of an evidentiary nature.<sup>134</sup> Here, these “standards” might actually work in favour for CIJA in two ways: First, the evidence law of international criminal tribunals is governed by the principle of the free assessment of all evidence.<sup>135</sup> This means that Trial Cham-

bers have “maximum flexibility”<sup>136</sup> and “broad discretion” when deciding on the admissibility.<sup>137</sup> The admissibility decision of the ICC, for instance, depends on the “relevance”<sup>138</sup> and “probative value”<sup>139</sup> of the evidence<sup>140</sup> and the

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missibility of four documents of 13.6.2008 – ICC-01/04-01/06-1399 (Prosecutor v. Lubanga), para. 24, 32; ICC (Trial Chamber V[A]), Public redacted version of Decision on the Prosecution’s Application for Addition of Documents to Its List of Evidence of 3.9.2014 – ICC-01/09-01/11-1485-Red2 (Prosecutor v. Ruto and Sang), para. 28 (“The Prosecution notes that there is a principle that the Chamber should have the ability to freely assess the evidence before it rather than seek to limit the use of evidence at the outset”); ICC (Pre-Trial Chamber II), Decision on Prosecution Request in Relation to its Mental Health Experts Examining the Accused of 28.6.2017 – ICC-02/04-01/15 (Prosecutor v. Ongwen), para. 6.

<sup>136</sup> *Boas/Bischoff/Reid/Taylor III*, International Criminal Procedure, 2011, p. 336; *Ambos* (fn. 132), p. 447.

<sup>137</sup> Cf. ICC, Decision on the admissibility of four documents of 13.6.2008 – ICC-01/04-01/06-1399 – (Prosecutor v. Lubanga), para. 23 (“wide discretion”); ICC (Trial Chamber III), Judgment pursuant to Article 74 of the Statute of 21.3.2016 – ICC-01/05-01/08-3343 (Prosecutor v. Bemba), para. 222 (“In deciding on the admission of the various items, [...] the Chamber is afforded a measure of discretion”); for the same position at the Ad Hoc Tribunals see ICTY (Appeals Chamber), Decision on Prosecutor’s Appeal on Admissibility of Evidence of 16.2.1999 – IT-95-14/1-AR73 (Prosecutor v. Aleksovski), para. 15; ICTY (Appeals Chamber), Decision on Appeal Regarding Statement of a Deceased Witness of 21.6.2000 – IT-95-14/2-AR73.5 (Prosecutor v. Kordić and Čerkez), para. 20; ICTY (Appeals Chamber), Judgment of 24.3.200 – IT-95-14/1-A (Prosecutor v. Aleksovski), para. 63; ICTR (Appeals Chamber), Judgment of 16.11.2011 – ICTR-96-13-A (Prosecutor v. Musema), para. 37–38; SCSL (Trial Chamber I), Appeal against Decision Refusing Bail of 11.3.2005 – SCSL-04-14-AR65 (Prosecutor v. Norman et al.), para. 26 (purpose of Rule 89 [C] “to avoid sterile legal debate over admissibility ...”). For the literature see e.g. *Ambos* (fn. 132), p. 447 et seq., with further references.

<sup>138</sup> Articles 64 (9) (a) and 69 (4) ICC Statute (authorising the Trial Chamber to “rule” on the “relevance” of evidence), Rule 63 (2) ICC RPE; see also Rule 89 (C) ICTY RPE/ICTR RPE/SCSL RPE and Rule 105 (C) MICT RPE (referring to “relevant” evidence); *Ambos* (fn. 132), p. 448.

<sup>139</sup> Article 69 (4) ICC Statute, Rule 72 (2) ICC RPE; see also Rule 89 (C) ICTY RPE /ICTR RPE and Rule 105 (C) MICT RPE. Cf. SCSL (Appeals Chamber), Decision on “Prosecution Notice of Appeal and Submissions Concerning the Decision Regarding the Tender of Documents” of 6.2.2009 – SCSL-03-01-T-721 (Prosecutor v. Taylor), para. 37; also *Boas/Bischoff/Reid/Taylor III* (fn. 136), p. 340 with further references in fn. 18.

<sup>140</sup> In more detail *Ambos* (fn. 132), p. 449–450.

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<sup>126</sup> *McMahon* (fn. 87), p. 16.

<sup>127</sup> *McMahon* (fn. 87), p. 16.

<sup>128</sup> *McMahon* (fn. 87), p. 138.

<sup>129</sup> *McMahon* (fn. 87), p. 144.

<sup>130</sup> *McMahon* (fn. 87), p. 144.

<sup>131</sup> *McMahon* (fn. 87), p. 16.

<sup>132</sup> The term “evidence” must be distinguished from the more general terms “material” or “information”. While “evidence” refers more narrowly to the forms of evidence legally prescribed and permitted, that is, “any species of proof legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, concrete objects, and the like” (see *Garner*, Black’s Law Dictionary, 10<sup>th</sup> ed. 2014, p. 673–674). See also *Ingram*, Criminal Evidence, 2009, p. 24. “Material” encompasses any information and does not in itself have to be admissible in evidence, see *Ambos*, Treatise on International Criminal Law, Vol. 3: International Criminal Procedure, 2016, p. 446–447.

<sup>133</sup> In a similar vein *Rankin* (fn. 42), 395 (402).

<sup>134</sup> *Rankin* (fn. 42), 395 (403).

<sup>135</sup> *Ambos* (fn. 132), p. 447. Cf. Rule 63 (2) ICC Rules of Procedure and Evidence (RPE) (“assess freely all evidence”); for the case law, e.g., see ICC (Appeals Chamber), Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute” of 8.3.2018 – ICC-01/05-01/13-2275-Red (Prosecutor v. Bemba et al.), para. 93, 554 (“[d]eferring these assessments is also more consonant with” the right and duty to assess freely, according to Rule 63 (2) of the Rules, all evidence submitted”), 585, 591; previously ICC (Trial Chamber I), Decision on the ad-

absence of any serious rights violation.<sup>141</sup> Thus, as long as CIJA investigators do not commit a serious rights violation, it could be speculated that their information will at least not be ruled inadmissible prior to a judgment, especially considering that the ICC – as an example and more concretely the Ongwen Trial Chamber<sup>142</sup> – rejected the Chambers’ previous practice<sup>143</sup> of deciding on admissibility issues at the moment of submission and promoted an alternative approach (authorised by the Bemba Appeals Chamber<sup>144</sup>) that deferred the admissibility decision “until the end of the proceedings”.<sup>145</sup>

Second, on the international level, the importance of documentary evidence cannot be overstated.<sup>146</sup> Unsurprisingly, Wiley, CIJA’s Director, maintained: “The queen and king of evidence in any criminal investigation is a document. It isn’t cross-examined because it is factual”.<sup>147</sup> As to the admissibility of documentary evidence, the same general principles

apply, that is, it depends on its relevance and probative value (reliability).<sup>148</sup> A document can only be reliable if it is authentic since “the fact that the document is what it purports to be enhances the likely truth of the contents thereof”.<sup>149</sup> Thus, authenticity speaks to the probative value of a document, be it in the form of reliability or of its evidentiary weight.<sup>150</sup> Furthermore, the “chain of custody”, that is, the document’s production process from its creation to the submission to a Chamber, is to be considered.<sup>151</sup> The demonstration of that chain of custody is certainly one of the main challenges for the work of CIJA-investigators.<sup>152</sup>

Another challenge is the position of a human rights organisation with respect to the confidentiality of witnesses and the information collected from them.<sup>153</sup> The problem this creates became visible at the ICC: In the Lubanga case, the Prosecution obtained evidence from the UN and certain NGOs pursuant to confidentiality agreements made under

<sup>141</sup> Article 69 (4) ICC Statute, Rule 72 (2) ICC RPE; see also Rules 89 (D) ICTY RPE and 105 (D) MICT RPE. Cf. ICC (Trial Chamber II), Decision on the Prosecutor’s Bar Table Motions of 17.12.2010 – ICC-01/04-01/07-2635 (Prosecutor v. Katanga), para. 13 et seq.

<sup>142</sup> ICC, Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute of 10.8.2016 – ICC-02/04-01/15-520 (Prosecutor v. Ongwen), para. 7. In the same vein *Guariglia*, Journal of International Criminal Justice 16 (2018), 315 (321), who, however, cites the wrong decision in fn. 20.

<sup>143</sup> See e.g. ICC, Decision on the Prosecutor’s Bar Table Motions of 19.12.2010 – ICC-01/04-01/07-2635 (Prosecutor v. Katanga), para. 15. For a similar approach at the ICTY, see *Schuon*, International Criminal Procedure, 2010, p. 137-138 (shift from admissibility to weight/reliability). See generally *Ambos* (fn. 132), p. 449.

<sup>144</sup> ICC (Appeals Chamber), Judgment on the Appeals of Mr. Jean-Pierre Bemba Gombo and the Prosecutor against the Decision of TC III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence” of 3.5.2011 – ICC-01/05-01/08-1386 (Prosecutor v. Bemba), para. 37, 41–42, 52–57.

<sup>145</sup> ICC (Appeals Chamber), Judgment on the Appeals of Mr. Jean-Pierre Bemba Gombo and the Prosecutor against the Decision of TC III entitled “Decision on the admission into evidence of materials contained in the prosecution’s list of evidence” of 3.5.2011 – ICC-01/05-01/08-1386 (Prosecutor v. Bemba), para. 37; in the same vein, ICC, Decision on Prosecution Requests for Admission of Documentary Evidence of 24.9.2015 – ICC-01/05-01/13-1285 (Prosecutor v. Bemba et al.), para. 9. See generally vein *Guariglia* (fn. 142), 315.

<sup>146</sup> *Ambos* (fn. 132), p. 487. cf. *Gaynor*, in: Sluiter/Friman/Linton/Vasiliev/Zappalà (eds.), International Criminal Procedure: Principles and Rules, 2013, p. 1045–1046. But see also *Combs*, Fact-Finding Without Facts, 2010, p. 6, 12–14, finding that ICTR, SCSL, and SPSC basically relied on witness testimony with only the latter also receiving significant forensic evidence.

<sup>147</sup> *Rankin* (fn. 42), 395 (409).

<sup>148</sup> See also ICTY, Standards Order of 15.2.2002 – IT-99-36-T (Prosecutor v. Brđanin and Talić), para. 18; ICTR, Judgement of 16.11.2001 – ICTR-96-13-A (Prosecutor v. Musema), para. 56; . ICC (Trial Chamber II), Decision on the Prosecutor’s Bar Table Motions of 17.12.2010 – ICC-01/04-01/07-2635 (Prosecutor v. Katanga), para. 13 et seq.; ICC, Decision on the Prosecution’s Request for Admission of Documentary Evidence of 10.6.2014 – ICC-01/09-01/11-1353 (Prosecutor v. Ruto and Sang), para. 13 et seq., 37. See generally *Ambos* (fn. 132), p. 487.

<sup>149</sup> ICTR, Judgement and Sentence of 18.12.2008 – ICTR-98-41-T (Prosecutor v. Bagosora et al.), Admission of Tab 19 Decision, para. 8 (considering authenticity and reliability as “overlapping concepts”). See also the reference to reliability in the context of authenticity in ICC, Public Redacted Version of Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64 (9) of the Rome Statute of 6 September 2012 of 8.10.2012 – ICC-01/05-01/08-2299-Red (Prosecutor v. Bemba), para. 9 (document can “shown to be *authentic and reliable* by the tendering party through provision of sufficient information to enable the Chamber to verify that the documents are what they purport to be”. [emphasis added], see *Ambos* (fn. 132), p. 501).

<sup>150</sup> ICTY (Trial Chamber), TC Decision on the Defence Motion for Reconsideration of the Ruling to Exclude from Evidence Authentic and Exculpatory Documentary Evidence of 30.1.1998 – IT-95-14-T (Prosecutor v. Blaškić): “the weight to be ascribed to it will depend on the additional elements which will have, if necessary, been provided and which permit attesting to its authenticity”. See also *Boas/Bischoff/Reid/Taylor III* (fn. 136), p. 341 (discussing it in relation to reliability).

<sup>151</sup> ICC, Judgment pursuant to Article 74 of the Statute of 5.4.2012 – ICC-01/04-01/06-2842 (Prosecutor v. Lubanga), para. 109; ICC, Judgment pursuant to article 74 of the Statute of 7.3.2014 – ICC-01/04-01/07-3436-tENG (Prosecutor v. Katanga), para. 91.

<sup>152</sup> *Rankin* (fn. 42), 395, 401.

<sup>153</sup> *Bergsmo/Wiley* (fn. 1), p. 18; *Stahn* (fn. 105), p. 354.

Art. 54 (3) (e) ICC-Statute.<sup>154</sup> Basically, there was nothing wrong with that. As long as the amount of evidence obtained this way is relatively minor and the documents or information were received on a confidential basis “solely for the purpose of generating new evidence”, the Prosecution was allowed to do this.<sup>155</sup> In other words, a few documents and pieces of information can be obtained, coupled with an agreement for non-disclosure, as long as the only purpose of receiving this material is that it leads to other evidence. However, this was far from what the Prosecution did. First, the Prosecution obtained more than fifty (!) per cent of its evidence on the basis of confidentiality agreements with NGOs.<sup>156</sup> The Prosecution itself admitted that its use of Art. 54 (3) (e) ICC-Statute to obtain evidence “may be viewed as excessive” and that “an excessive use of Art. 54 (3) (e) would be problematic”.<sup>157</sup> Second, a great amount of these documents was exculpatory material relevant to defence preparation.<sup>158</sup> These

<sup>154</sup> Article 18 (3) of the ICC-U.N. Relationship Agreement provides that “the United Nations and the Prosecutor may agree that the United Nations provide documents or information to the Prosecutor on condition of confidentiality and solely for the purpose of generating new evidence and that such documents shall not be disclosed to other organs of the Court or third parties, at any stage of the proceedings or thereafter, without the consent of the United Nations.”, cited in ICC, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54 (3) (e) agreements of 15.6.2008 – ICC-01/04–01/06-1401 (Prosecutor v Lubanga), para. 93. The same rule applies to the U.N. peace-keeping mission, MONUC, in the Democratic Republic of Congo by way of Article 10 (6) of the MONUC Memorandum of Understanding with the ICC, which reads: “Unless otherwise specified in writing [...], documents held by MONUC that are provided by the United Nations to the Prosecutor shall be understood to be provided in accordance with and subject to arrangements envisaged in Article 18, paragraph 3, of the Relationship Agreement.”, cited in *Ambos*, New Criminal Law Review 12 (2009), 543 (550). Generally *Heinze* (fn. 95), p. 454.

<sup>155</sup> Cf. ICC, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54 (3) (e) agreements of 15.6.2008 – ICC-01/04–01/06-1401 (Prosecutor v Lubanga), para. 93.

<sup>156</sup> ICC, Hearing Transcript of 13.3.2008 – ICC-01/04-01/06-T-79 (Prosecutor v. Lubanga), p. 5–6.

<sup>157</sup> Cf. ICC, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54 (3) (e) agreements of 15.6.2008 – ICC-01/04–01/06-1401 (Prosecutor v Lubanga), para. 32.

<sup>158</sup> ICC, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54 (3) (e) agreements of 15.6.2008 – ICC-01/04–01/06-1401 (Prosecutor v Lubanga), para. 63 (“In this case over 200 documents, which the prosecution accepts have potential exculpatory effect or which are material to defence preparation, are the subject of agreements of this kind. On 10 June 2008, the Chamber was told that there are ‘approximately’ 95 items of potentially

documents usually have to be turned over to the defence.<sup>159</sup> Third, and most importantly, the Prosecution did not use the Art. 54 (3) (e)-agreements only for the purpose of obtaining other evidence, i.e. its “springboard or lead potential”.<sup>160</sup> In fact, the Prosecution did quite the opposite, as the Trial Chamber described: “[T]he prosecution’s general approach has been to use Article 54 (3) (e) to obtain a wide range of materials under the cloak of confidentiality, in order to identify from those materials evidence to be used at trial (having obtained the information provider’s consent). This is the exact opposite of the proper use of the provision, which is, exceptionally, to allow the prosecution to receive information or documents which are not for use at trial but which are instead intended to ‘lead’ to new evidence.”<sup>161</sup> As a result of this, the Chamber opted for a “stay of proceedings” because of an abuse of process.<sup>162</sup> It stated that “[t]he prosecution’s approach constitutes a wholesale and serious abuse, and a violation of an important provision which was intended to allow the prosecution to receive evidence confidentially, in very restrictive circumstances.”<sup>163</sup>

CJIA will face (or is already facing) a similar challenge when it comes to confidentiality agreements. At the ICTR, many international and local NGOs “did not provide the OTP with the supporting documentation it needed. They maintained that doing so would breach express or implied promises of confidentiality or endanger informants. In some cases such concerns were addressed by redacting certain information”.<sup>164</sup> Without access to certain documents, it will be difficult to weigh the validity of allegations and decide whether further investigations in a given case were needed.<sup>165</sup>

exculpatory material and 112 items which are ‘material to defence preparation’, pursuant to Rule 77, making a total of 207 items of evidence. Of these 207 items, 156 were provided by the UN.”, fn. omitted). See also *Heinze* (fn. 95), p. 455.

<sup>159</sup> See *Heinze* (fn. 95), p. 344 et seq.

<sup>160</sup> Cf. ICC, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54 (3) (e) agreements of 15.6.2008 – ICC-01/04–01/06-1401 (Prosecutor v Lubanga), para. 72.

<sup>161</sup> ICC, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54 (3) (e) agreements of 15.6.2008 – ICC-01/04–01/06-1401 (Prosecutor v Lubanga), para. 73.

<sup>162</sup> *Turner*, New York University Journal of International Law & Policy 45 (2012), 175 (194 et seq.): “The ‘balancing approach’ recognizes that remedies such as dismissal, stay, retrial, and exclusion may impose significant burdens on third parties and on the justice system, and it takes these burdens into consideration when determining the optimal remedy.”

<sup>163</sup> Cf. ICC, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54 (3) (e) agreements of 15.6.2008 – ICC-01/04–01/06-1401 (Prosecutor v Lubanga), para. 73; see generally *Turner*, New York University Journal of International Law & Policy 45 (2012), 179 et seq.

<sup>164</sup> *Jallow* (fn. 17), p. 438–439.

<sup>165</sup> *Jallow* (fn. 17), p. 439.

## VI. Conclusion

Considering the current political landscape of anti-multilateralism and the politically impotent UN Security Council, it was long overdue that the international community becomes more creative in its fight against impunity. The IIIMs in both Syria and Myanmar are a first step, CIJA is another. In an instructive short article about private investigations in Austria and Germany, *Maier* listed three reasons for the initiation of private investigations.<sup>166</sup> First, when public authorities are unwilling or unable to investigate; second, when the investigations of public authorities are ineffective and badly done; third, when the victim does not want public authorities to investigate. Requirements one and two are met in the situation of Syria: the ICC (or any other ICT) cannot investigate and investigations on the ground are fruitless. Private investigations are without an alternative, so to say, and there is nothing wrong with that. Despite the rich history and impressive success of private investigations in domestic contexts, private investigators still feel that “their role within society, the value of their services and the problems they faced, have been overlooked and undervalued for too long”.<sup>167</sup> In fact, the perception of private investigators does not mirror the admiration readers identify with Sherlock Holmes and Miss Marple. Many private investigators are still viewed as “cow-boys” and “dodgy characters”.<sup>168</sup> This does not do justice to their work.

Private investigations may be the future of International Criminal Justice. However, this comes at a price. Privatisation of public goods is a common tool for governments to increase efficiency and save money. However, subjecting important public branches such as transport, electricity and water supply to the rules of the market – without some sort of regulation – will eventually leave certain groups of people without transport, electricity and water. In other words: fair distribution will not be the main criterion any more. The same applies to private international criminal investigations. We need to be conscious of the challenges that lie ahead and I named just a few: Definition, ethical boundaries and evidentiary rules. Entities such as CIJA have donors and donors have demands that can be implemented by cutting funds. It is therefore highly recommendable to regulate private international criminal investigations. Countries such as the USA, Canada, Australia, New Zealand, Belgium, the Netherlands, Germany, Finland or Spain, have a statutory framework for regulating private investigators.<sup>169</sup> However, regulation cannot go at the detriment of the nature of those investigations. In other words, overregulation will eventually deprive private investigators of the advantages they have vis-à-vis public investigators. Thus, until today Britain has not regulated private investigations.<sup>170</sup> The best solution would be a mini-

imum regulation, or at least some sort of guidelines.<sup>171</sup> Private entities can only be supplementary to the investigation of public authorities.<sup>172</sup> Sherlock Holmes is still not Scotland Yard. But both him and Scotland Yard share the same goal, namely to solve crimes. In that sense, human rights organisations and entities such as CIJA on the one hand, and the investigative arms of internationalised criminal jurisdictions on the other, also share one goal: the desire to end impunity.<sup>173</sup>

<sup>166</sup> *Maier*, *Kriminalistik* 2001, 670.

<sup>167</sup> *Gill/Hart* (fn. 62), 245 (246).

<sup>168</sup> *Gill/Hart* (fn. 62), 245 (246).

<sup>169</sup> *Johnston* (fn. 61), p. 288.

<sup>170</sup> *Gill/Hart* (fn. 62), 245 (248); *Johnston* (fn. 61), p. 288.

<sup>171</sup> Something close to a collection of guidelines is the Handbook on Assisting International Criminal Investigations, edited by *Nystedt, Nielsen* and *Kleffner* and published by the Folke Bernadotte Academy and Swedish National Defence College in 2011.

<sup>172</sup> In the same vein *Jallow* (Fn. 17), p. 439: “Nothing of what has just been said should be construed as criticism, because NGOs should not be regarded as a substitute for the criminal investigatory role of the OTP. The service to humanity that NGOs render is highly laudable. Nonetheless they are not geared to conducting inquiries for the purpose of criminal prosecutions”.

<sup>173</sup> *Bergsmo/Wiley* (fn. 1), p. 2.