

Towards a Culture of Quality Control in Criminal Investigations

By Morten Bergsmo

FICHL Policy Brief Series No. 94 (2019)

1. Discourse Context

On 15 January 2019, the case against Laurent Gbagbo, former President of Côte d'Ivoire, collapsed before the International Criminal Court ('ICC'). This has caused a flurry of comments. In a tempered text, Richard J. Goldstone observed that it "cannot be doubted [that] mistakes have been made by organs of the ICC", and that the "challenge to the Office of the Prosecutor is to expend greater effort in ensuring that cases brought to trial are fully investigated and supported by sufficient evidence".¹ Referring to the acquittal of Gbagbo as "a stinging rebuke of OTP's *modus operandi*", Patryk Labuda opined that the response of the ICC Office of the Prosecutor ('OTP') to "the challenges of conducting effective investigations in the coming years will define the Court's future".² Highlighting the implications for the prosecution's "investigation methods and strategies", he called for a "thorough evaluation of the Prosecutor's performance".³ The ICC Prosecutor has in turn indicated her disagreement with the decision.⁴

As an article in *Le Monde* pointed out,⁵ the concern for quality control in international criminal justice goes several years back. That gave birth in 2012 to the 'Quality Control Project', a research project led by the Centre for International Law Research and Policy (CILRAP) with partners. It has already produced three volumes on quality control in documen-

tation as well as preliminary examination.⁶ The third leg – the 'Quality Control in Criminal Investigation Project' ('QCCI') – was launched in the autumn of 2018, with a conference in New Delhi in late February 2019.⁷ It concerns the phase that encompasses criminal investigation and case preparation.⁸ This is the period from the opening of criminal investigation until the start of trial. As with the two previous legs, the focus is on core international crimes,⁹ but it also includes perspectives from other fact-rich criminal cases¹⁰ such as serious fraud and organised crime (for example, human trafficking).

⁶ See Morten Bergsmo (ed.), *Quality Control in Fact-Finding*, Torkel Opsahl Academic EPublisher ('TOAEP'), Florence, 2013, 500 pp. (<http://www.toaep.org/ps-pdf/19-bergsmo>), and Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volumes 1 and 2*, TOAEP, Brussels, 2018, 1,470 pp. (<http://www.toaep.org/ps-pdf/32-bergsmo-stahn> and <http://www.toaep.org/ps-pdf/33-bergsmo-stahn>). For films and podcasts on the latter, see <https://www.cilrap.org/events/170613-14-the-hague/>.

⁷ The QCCI Project is led by the author in co-operation with Mr. Xabier Agirre (Head of Investigative Analysis Section, OTP, ICC), Dr. Simon De Smet (Legal Officer, Chambers, ICC), Professor Carsten Stahn (Leiden University), and the Indian Law Institute in New Delhi and its Director, Professor Manoj Kumar Sinha. The team is grateful for the financial support from the Norwegian Ministry of Foreign Affairs and for the kind co-operation on the project by the ICC Prosecutor. You find more information on the project at <https://www.cilrap.org/events/190222-23-delhi/>.

⁸ There is not a clear line between 'investigation' and 'case preparation'. Jurisdictions use different regulatory frameworks and terminology. The QCCI Project does not define the two terms, to avoid narrowing the discourse it convenes. Generally speaking, 'case preparation' includes 'investigation' in addition to the legal and other preparation of a case-file for trial. This policy brief refers several times to both 'investigation' and 'case preparation', not to limit the analysis to 'investigation'. Moreover, the decision to open an investigation is prepared during the earlier phase which we often referred to as 'preliminary examination'. The first investigation plan should be drawn up late in preliminary examination. Such preparatory steps that become investigatory tools or instruments do also fall within the scope of the QCCI Project.

⁹ For the purposes of this brief, the term 'core international crimes' denotes war crimes, crimes against humanity, genocide and aggression.

¹⁰ Examples of 'fact-rich' cases include core international crimes, serious fraud and organised crime. Violent crime cases in peace-time national jurisdictions – such as isolated murders or sexual violations – normally lack the factual complexity to be considered 'fact-rich'.

¹ Richard J. Goldstone, "Acquittals by the International Criminal Court", in *EJIL: Talk!*, 18 January 2019.

² Patryk Labuda, "The ICC's 'Evidence Problem': The Future of International Criminal Investigations After the Gbagbo Acquittal", in *Völkerrechtsblog*, 18 January 2019. Borrowing from a 2013-article by Christian M. De Vos, Labuda observed that the ICC "has an 'evidence problem'", see Christian M. De Vos, "Investigating from Afar: The ICC's Evidence Problem", in *Leiden Journal of International Law*, vol. 26, no. 4, pp. 1009–1024. Labuda traces the 'evidence problem' "directly to certain policies put in place by the first Prosecutor, Luis Moreno Ocampo".

³ *Ibid.*

⁴ ICC Press Release, "Statement of the ICC Prosecutor, Fatou Bensouda, following today's decision by Trial Chamber I in the case of Laurent Gbagbo and Charles Blé Goudé", 15 January 2019 (available on the Court's web site).

⁵ See Morten Bergsmo, "La CPI, l'affaire Gbagbo et le rôle de la France", in *Le Monde*, 18 January 2019 (<http://www.legal-tools.org/doc/d499f6/> (French) and <http://www.legal-tools.org/doc/693bee/> (English)).

2. Desensitizing Quality Control

The QCCI Project is premised on the assumption that there is room for improvement in the quality control of all investigation or preparation of fact-rich criminal cases. This is a common challenge both in international and national jurisdictions in cases that involve many alleged incidents, acts, transactions, victims, perpetrators, witnesses and other potential evidence. “Prosecutorial professionalization – as other forms of professionalization in the public sector – requires awareness on the part of prosecutorial leaders of the importance of self-questioning and -improvement. This is a precondition for such professionalization to take proper hold in the practice of criminal justice teams.”¹¹ Discussing quality control does therefore not imply criticism of specific jurisdictions or actors. Such discussions are required as the available literature is limited.¹²

Inherent in criminal justice systems around the world are two fundamental mechanisms of quality control: the work of the defence and the assessment and decisions of the judges. Both should correct errors and expose weaknesses in the prosecution’s investigation and case-preparation. Both are fundamental ‘quality-control mechanisms’ in criminal justice, for the outcome of the case as a whole. In order to focus more in-depth, the QCCI Project is primarily concerned with quality control in the prosecution’s investigation and case-preparation, not in the work of the defence or during the trial, each of which deserves a separate, subsequent project.

¹¹ See Carsten Stahn, Morten Bergsmo and CHAN Icarus, “On the Magic, Mystery and Mayhem of Preliminary Examinations”, in Bergsmo and Stahn (eds.), *Quality Control in Preliminary Examination: Volume 1*, *supra* note 6, p. 3, which continues: “It is this awareness and culture of quality control, including the freedom and motivation to challenge the quality of work, that this project seeks to advance”. This applies equally to the QCCI Project. See also: “This quality control approach recognises the importance of leadership in fact-finding mandates, the responsibility of individual fact-finders to continuously professionalise, and the need for fact-finders to be mandate-centred, as discussed above. It is an approach that invites consideration of how the quality of every functional aspect of fact-finding can be improved, including work processes to identify, locate, obtain, verify, analyse, corroborate, summarise, synthesise, structure, organise, present, and disseminate facts. It is a state of mind characterised by a will to professionalise, and not just by the *ad hoc* development and adoption of standard procedures or universal methodologies that come so easily to lawyers”, Morten Bergsmo, “Foreword by the Editor”, in Bergsmo (ed.), *Quality Control in Fact-Finding*, *supra* note 6, p. viii.

¹² Further to the references in note 6 above, the following publications are among the relevant contributions: Martin Witteveen, “5. Dealing with Old Evidence in Core International Crimes Cases: The Dutch Experience as a Case Study”, in Morten Bergsmo and CHEAH Wui Ling (eds.), *Old Evidence and Core International Crimes*, TOAEP, Beijing, 2012, pp. 65–108 (<http://www.toaep.org/ps-pdf/16-bergsmo-cheah>); Morten Bergsmo, “1. Institutional History, Behaviour and Development” (pp. 1–31) and Xabier Agirre, “2. The Role of Analysis Capacity”, in Morten Bergsmo, Klaus Rackwitz and SONG Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, TOAEP, Brussels, 2017 (<http://www.toaep.org/ps-pdf/24-bergsmo-rackwitz-song>); and Helge Brunborg, “12. The Introduction of Demographic Analysis to Prove Core International Crimes”, in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 4*, TOAEP, Brussels, 2015, pp. 477–512 (<http://www.toaep.org/ps-pdf/23-bergsmo-cheah-song-yi>).

The project zooms in on some systemic bottlenecks or problems that give rise to the long duration and high cost of the majority of investigations of core international crimes – undermining the quality of work-processes in cases – and it asks whether we can improve the way we work. The focus is not on habitual reform of rules of procedure or evidence, but on the less visible work-processes that constitute the day-to-day reality of investigation and preparation of core international crimes.¹³ They face a number of bottlenecks, of varying degrees of seriousness. The expression of these challenges differs between jurisdictions, depending on factors such as whether lawyers lead the investigations or not.¹⁴

3. Seven Bottlenecks

Based on continuous observation and analysis of work-process problems in international and national war crimes jurisdictions since July 1994, the QCCI Project team has identified the following bottlenecks as particularly problematic.

3.1. Overview of information: The loss or fragmentation of overview of information and potential evidence¹⁵ in the possession of the team during investigation or case-preparation (a problem closely related to point 3.3. below), which can cause delays, lack of awareness of gaps in the available potential evidence (including missing ‘meta-evidence’ demonstrating authenticity and reliability), the problems described in 3.4.–3.7., and can perpetuate weak evidence-overview at the stages of confirmation of charges and trial.¹⁶

3.2. Factual analysis: Inadequate analysis of factual propositions relevant to the prosecution’s burden in the case¹⁷ and cor-

¹³ This distinction may have escaped some of the colleagues who have considered the problem of length of proceedings in international criminal justice since the expert report prepared under the auspices of the preparatory team of the ICC Office of the Prosecutor in 2003, see Morten Bergsmo and Vladimir Tochilovsky, “Measures Available to the International Criminal Court to Reduce the Length of Proceedings”, in Bergsmo, Rackwitz and SONG (eds.), *Historical Origins of International Criminal Law: Volume 5*, *supra* note 12, pp. 651–693. Pages 660–661 discuss subsequent reports, with references.

¹⁴ In international(ised) criminal jurisdictions, the investigators and prosecutors tend to be in one office of the prosecutor. In many Civil Law jurisdictions, lawyers lead the investigations (despite two-fold chains of authority), whereas in many common law jurisdictions, there is more of a separation between investigators and lawyers.

¹⁵ The distinction between ‘information’ and ‘potential evidence’ is not strict. But much of the materials that have come into the possession of the prosecution in several core international crimes jurisdictions have had limited potential to become evidence. Search and seizure operations or requests for information may have been too wide; state actors may have dumped large amounts of information of dubious relevancy on the prosecution; non-governmental organisations may not have been selective in what they have submitted; or the prosecution may have accessed a large amount of open source information, including audio-visual material, without a clear understanding of the limits of such material. The volume of materials directly impacts on translation and disclosure requirements.

¹⁶ Although war crimes cases do not exceed the largest serious fraud cases, the QCCI Project will consider how cases can be narrowed where it is doubtful that the investigation team has the capacity to proceed with proper overview (and in other situations), including the rationale for narrowing and how it can be implemented. Such narrowing entails a form of ‘micro-prioritization’ and needs careful reflection to avoid perceptions of confirmation-bias or target-driven investigation.

¹⁷ That is, the factual propositions that must be proven to the requisite

responding evidence, which can lead to blind alleys, misleading confirmation biases, poor evaluation of source credibility and reliability,¹⁸ factual errors,¹⁹ wasteful over-collection of potential evidence, unawareness of possible counter-arguments,²⁰ unwitting reliance on unsustainable inferences or impeachable evidence, delayed exploration of alternative factual narratives, or lack of modesty in the assessment of the work done by the team and the quality of the evidence collected.²¹

3.3. *Evidence-review*: Irregularity in the team's daily routine of assessing relevancy and possible weight of information or potential evidence (for reasons such as unavailability of the skill-sets required for effective and reliable subsumption-analysis,²² stationary evidence-review being seen by team members as a less attractive task delegated to unqualified junior staff or even interns, relevant senior team members simply travelling too much, the team failing to avail itself of evidence-review mechanisms which may exist, or lack of senior oversight from levels above the investigation team and senior prosecutor assigned to the case), which can weaken the efforts to build the case steadily, undermine a sense of dynamic progress in the team, and prevent that individual team members develop a proper overview of the case (3.1.), with subsequent delays and demotivation.²³

3.4. *Formulation of responsibility*: Vague or non-substantial formulation of criminal responsibility within the team *after*²⁴ it has in its possession enough potential evidence (that is, the formulation is not properly informed by existing potential evidence, for reasons such as lack of overview (3.1.) or inadequate management of evidence-review (3.3.)), which can prevent proper prioritisation of team resources to focus on weak links, slow down work-processes for lack of clarity, prolong the fact-gathering period, and inundate the team's systems with information of limited value.²⁵

level of proof in order to satisfy the applicable legal requirements under the legal classification or charges. These are the factual propositions that are material to, or necessary to sustain, the charges.

¹⁸ This can be a particular problem if reports by non-governmental organisations based in part on hearsay are relied upon.

¹⁹ In international(ised) criminal jurisdictions and in the exercise of universal jurisdiction by states, materials relevant to the prosecution may be in foreign language(s) and witnesses or crime scenes situated within locations and cultures with which team members are not familiar.

²⁰ The manner in which the investigation team collects and analyses exculpatory evidence can significantly impact on this analytical work.

²¹ It is relevant whether the prosecution is investigating all sides to the conflict. Multi-front investigations may generate a more nuanced understanding and narrative. One-sided investigations may make it harder to get relevant information on the other side.

²² By 'subsumption-analysis' is meant analysis that subsumes (or sorts and assesses) potential evidence or related factual propositions under applicable legal standards in the jurisdiction in question, primarily subject-matter provisions. This form of analysis is vital to the success of fact-rich investigations. Teams need to have adequate subsumption-analysis capacity at all times during case-preparation.

²³ Point 3.3. essentially concerns the role lawyers should play in the investigation, including in overall co-ordination.

²⁴ This bottleneck scenario does not presuppose the problems of target-driven investigations or factual confirmation-bias: the described bottleneck may be there even when these additional problems are absent.

²⁵ There is obviously a difference (especially early in the investigation) between having specific investigative targets (which can facilitate a

3.5. *Cumulative charging*: Broad use of cumulative charging of crimes and modes of liability²⁶ – often pursuant to a precautionary fear of acquittals caused by failure to include a classification,²⁷ not just a desire to ensure accountability for the full range of criminal conduct engaged in – which can diffuse the focus of the case, swell both the prosecution and defence cases, and reduce the impact of the judgment.

3.6. *Too much evidence*: Excessively long exhibit- and witness-lists in the prosecution's part of the case²⁸ (caused by a variety of reasons, including lack of focus in the framing of the case (3.4.), fear of not having enough evidence, misconstrued faith in the effect of voluminous evidence, and weak quality control in selecting the best-suited evidence), which delay proceedings and make them costlier.

3.7. *Disclosure*: Prosecution²⁹ disclosure to the defence of voluminous materials not clearly related to a central hypothesis of criminal responsibility (for reasons described in 3.1.–3.6., by pressure to start the trial, by fear of being accused of hiding materials, or by the prosecution having received a large amount of materials collected by others), which delays the case and can raise questions of *de facto* fairness.

4. Further Challenges

There are of course other challenges than these seven that face fact-rich war crimes investigations, for example, a) context-specific difficulties in obtaining evidence in the first place because of factors such as ongoing conflict or time-consuming mutual legal assistance procedures; b) that the available personnel lack the experience or ability to effectively undertake these types of investigations, especially where lawyers are not involved at the earliest stages and do not oversee or supervise the investigation, or where the personnel are not so familiar with applicable core international crimes (which can contribute to, for example, vague formulation of criminal responsibility or evidence overload); c) co-ordination deficiencies between investigation teams that pursue different crimes in the same conflict; and d) that the personnel may be assigned to several inquiries at the same time (especially in domestic agencies), affecting their drive to bring the investigation for-

more efficient investigation, but may not be in keeping with the facts as they emerge during the investigation) or a more open-ended investigation (perhaps ultimately fairer, but possibly less efficient). But the challenge of vague formulation of criminal responsibility described in 3.4. needs to be addressed in both scenarios.

²⁶ In some instances, there may even be an unwillingness to undertake an internal prosecution assessment of what the best-suited principal and subsidiary charges would be, as an exercise to better understand the core of the case under preparation. Jurisdictions that do not have the principle of *iura novit curia* may sometimes be more constrained in their ability to avoid cumulative charging. There is, however, a difference between narrow and broad use of cumulative charges even then.

²⁷ Frequently referred to as 'technical acquittals'.

²⁸ Which is then often replicated by the defence.

²⁹ It should be considered how appropriate it is that the prosecution – as opposed to the registry or judicial administration – is the central repository of materials that may only potentially be disclosable and is not its work-product (such as documents from archives in the country where the alleged crimes occurred). This does not refer to witness-related materials generated by the prosecution. The rapid increase in open source materials is also relevant in this connection.

ward.³⁰ These challenges should be kept in mind when analysing the core bottlenecks identified in Section 3.

5. Structuring an Open Inquiry

The QCCI Project asks whether work-processes can be developed to reduce the negative impact of the seven bottlenecks described in 3.1. to 3.7. above. Such inquiry requires unbiased analysis and new ideas on how we can work better, in manners that are not boxed in by the particulars of any one jurisdiction or by preferences related to the familiar distinctions between Common and Civil Law procedures, which can easily be a distraction. The project is not constrained by the traditional discourse-delimitation between procedural and evidentiary questions (for the lawyers) and police methods (for the police). Rather, it carves out and focuses on a third discourse domain which we have called *key work-processes in investigation and case preparation*, with a pragmatic focus on high-quality results, cost-efficiency, and best project-management techniques, for critical and innovative input by lawyers, analysts, investigators and others. We are particularly concerned that lawyers participate in the discussion on the seven bottlenecks in Section 3., rather than retreat into comfortable shells of legalese.

The project is structured into five main parts which are reflected in the conference programme and the anthology to be subsequently published: I. “The Context of Quality Control in Investigations and Case Preparation”; II. “Evidence and Analysis”; III. “Systemic Challenges in Case-Preparatory Work-Processes”; IV. “Investigation Plans as Instruments of Quality Control”; and V. “Prosecutorial and Judicial Participation in Investigation and Case Preparation”.

We are especially interested in whether the use of existing quality-control instruments³¹ such as a) investigation plans,³² b) evidence-review panels,³³ c) draft indictments, d) indict-

³⁰ A case law with judgments running into hundreds of pages, and a proliferation of separate and dissenting opinions, may increase the consequences of a less settled law.

³¹ These tools have the *capacity* to be used to enhance quality control. We are not suggesting that they are actually being used to that end, or that they have been designed to serve that purpose only.

³² Due consideration will be given to the added importance of such plans when a team is composed of professionals from different national jurisdictions and cultures, and the common glue that binds them is not yet strong.

³³ By this is meant panels with senior officers, external to the team, to assess the strength of the case and its evidence. This should involve what is referred to as ‘stress-testing’ of the evidence, including of crime-base incidents and linkage to persons higher in chains of authority. In some entrenched situations, it should even be considered to use experts from outside the organisation, who are not part of the chains of authority and who have no loyalty or other conflicts of interest. Evidence-review

ments, and e) pre-trial briefs can be further developed; how newer tools such as f) analysis techniques³⁴ can be used more intuitively and consistently; and whether a) to f) should be supplemented by additional instruments to avert the bottlenecks described in Section 3. or reduce their negative impact. It should also be considered whether there are areas of expertise that could meaningfully be tapped into more actively during investigation.³⁵

We invite broad participation in this project. Chapters in the anthology should not only describe the best available practice as seen by the author in question, but develop new ideas for what can be done differently and how. Honest problem-descriptions are vital but not enough. To generate new ideas, minds from outside established criminal justice practice should also contribute: *In hora venit*.

Morten Bergsmo is Director of the Centre for International Law Research and Policy (CILRAP). He was formerly Legal Adviser, OTP, International Criminal Tribunal for the Former Yugoslavia (ICTY) (1994-2002), Senior Legal Adviser, ICC-OTP (2002-2005), before serving as an academic. Relevant to the QCCI Project, he worked on numerous ICTY cases by writing the applicable law sections of pre-trial briefs and other motions. He also played a critical role in raising the importance given by the ICTY-OTP to documentary evidence (linked initially to the use of the archive of the UN Commission of Experts for the Former Yugoslavia (UNSC 780 (1992)), the Kotor Varoš municipal documents, municipal archives secured after the lifting of the siege of Bihać, and the archive of the International Conference for the Former Yugoslavia); in securing the co-operation of vital insider-witnesses; and in conceptualising the non-military analysis function within the ICTY-OTP. The author thanks Xavier Agirre, Gilbert Bitti, Eleni Chaitidou, Cale Davis, Simon De Smet, Richard J. Goldstone, Teresa McHenry, Matthias Neuner, David Re, Carsten Stahn, Bård Thorsen and William H. Wiley for their comments. The author alone is responsible for the text.

ISBN: 978-82-8348-081-8.

TOAEP-PURL: <http://www.toaep.org/pbs-pdf/94-bergsmo/>.

LTD-PURL: <http://www.legal-tools.org/doc/65157b/>.

should be multi-disciplinary in many cases, while led by competent lawyers.

³⁴ Such as statistics, mapping, analysis of organisational structures and telecommunications, and source evaluation.

³⁵ One example is social anthropology, which could be employed to shed light on what actually happened on a factual level, and develop case hypotheses and supplement evidence reviews.