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## Historical Origins of International Criminal Law: Volume 5

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## The Function of Analysis and Analysts

Peter Nicholson\*

### 3.1. Introduction

This chapter is intended to provide thoughts, comment, guidance, ideas and advice to an International Criminal Court prosecutor's office on the function of analysis, military analysis and the role of the analyst within it. It also touches on associated matters that are relevant to the main subject, including management issues, broader analytical issues, information management issues, intelligence, information and evidence collection, technological requirements and security matters.

### 3.2. Function of Military Analysis

Military analysis provides investigation and subsequently prosecution cases with the military dimension of integrated events, personalities, organisations and crimes under scrutiny. The analyst will examine *de jure* and *de facto* issues relating to crimes, prosecution targets and events, and will provide analysis from the most preliminary stages of an investigation or assessment, right through to the presentation in court of such analyses by the analyst for the prosecution. He or she provides the ability to monitor, research for and advise the prosecutor in the defence phase of a trial.

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To enable a better understanding of military analysis, the component parts have been deconstructed from each other below and described individually. It should be noted that all the categories outlined are in fact critically integrated and interwoven with each other. All facets have to be examined and considered together in reality, and one cannot separate one topic from another if one requires complete analyses for cases.

### **3.2.1. Events**

The military analyst will provide the picture of who was doing what to whom, when, where, how and why in the military sense, and, when appropriate, in the criminal sense too. He or she will place into context single, low-level events and actions (the tactical level in military terms), will provide a broader context of collected/linked actions and events over larger geographical areas (the operational level), and will provide the broadest picture of actions and events across an entire country or geographical region (the strategic level). He or she will also provide the interface between the political and military hierarchies at the centre of government (the grand strategic level). Finally, the analyst will provide the above for both or all sides of any conflict, actions or events as required.

#### **3.2.1.1. Legitimate Military Targets**

The analyst will provide analysis and advice regarding the definitions and interpretation of what constitutes a legitimate military target or otherwise. He or she will apply the law on the topic to date, together with factual analysis of events and targets of relevant time periods to establish the legitimacy or otherwise of a target(s) at any one given time.

#### **3.2.1.2. Proportionality**

The analyst will provide analysis and advice regarding the definitions and interpretation of what constitutes the legitimate use of force or otherwise, and lawful and unlawful attacks and acts, when examining events. The concepts of proportionality will be examined from a *de jure* perspective and applied to events which have taken place in the *de facto* sense.

#### **3.2.1.3. Military Objectives**

The military analyst can place into context actions and events, and can examine the relevance and military necessity of such events from the tac-

tical, operational and strategic objectives perspective of an overall military campaign where appropriate.

### **3.2.2. Personalities**

The military analyst will place individuals into the context of events which have taken place, either in the context of “at a certain time on a certain day”, or in the broader context of “during the time period when crimes occurred”. This is done for low-level individuals, perhaps at the scene of a crime itself, all through the chain of command as required up to and including a commander of an army, his or her staff and into the political/military interface, including the political mechanisms and ministerial responsibilities where appropriate.

#### **3.2.2.1. Command Responsibility: *De Jure***

The analyst will establish where, why and how an individual will, or will not, hold command responsibility for events, individuals and units, and crimes which have occurred. The analyst will establish the *de jure* position of an individual, not only through the application of international humanitarian law but also within the subject’s military law, constitutional law and military doctrine, including the concepts of chain of command and the orders process. He or she will outline the obligations of a commander, *before, during and after* criminal events have occurred, and will demonstrate the mechanisms and options available to military commanders when executing their command responsibilities.

#### **3.2.2.2. Command Responsibility: *De Facto***

The analyst will also establish the *de facto* command responsibility aspects relevant to a case, from establishing an individual’s position within a hierarchy through to the demonstration of the individual’s practice of military command and control of military formations and units *before, during and after* events in relevant time periods. The analyst will establish the chain(s) of command above and below targeted individuals in order to establish further, higher level culpability for crimes which have taken place if relevant, and to establish the practicing working chain of command from the target down to the crimes which occurred. In this way, the analyst establishes an individual’s knowledge and/or intent *before, during and after* relevant events. Finally, the analyst will examine the working

process and mechanisms which are *de jure* available to a commander to establish their utilisation in the factual sense *before, during and after* the course of relevant events.

### **3.2.2.3. Command Responsibility: Use of Military Experts**

The analyst will offer advice in the use or not of an external military expert(s) during the investigative and prosecutorial phase of a case. Such an expert(s) can provide added value to the case by providing advice, and eventually writing a report and giving evidence, in relation to the targeted accused, his or her knowledge and his or her likely command responsibility for events and crimes which have taken place. The expert should be of similar or higher rank than the target/accused, and have had operational experience or similar in order to authenticate and validate the ‘expert’ label. The expert need not necessarily be from the same military environment of the target/accused, nor have served in the relevant theatre of operations; however, when selecting an expert, a matrix of required factors should be drawn up, with benefits and drawbacks weighed accordingly.

Ordinarily, such an expert is invited to accept that the facts of the case are correct, and draws conclusions on that basis, having read into the case thoroughly in both the *de jure* and *de facto* senses. The expert will then write a report to cover the command responsibility, command and control, knowledge and intent aspects of the case, and present for the benefit of the court his or her opinion.

### **3.2.3. Organisations**

The analyst will examine the linkage between targeted individuals and others within their command chain, and tangentially to it as appropriate. He or she will establish the extent and mechanisms of ‘knowledge’ throughout an organisational structure vertically and horizontally. The analyst will establish the nature, type and structure of organisations involved in events and more specifically, when appropriate, crimes that have occurred.

He or she will establish the organisation(s) involved, including the examination of formal military organisations, both regular and reserve, *ad hoc* military units, paramilitary formations, special police units, armed criminal gangs, sponsored armed groups or individuals. The analyst will also provide the relationships between the diverse groupings, including

the concepts of joint operations, superior–subordinate hierarchy, mixed military groups and concepts of operational control or otherwise.

### **3.2.3.1. Integrated Functions within the Military Environment**

Within the analysis of military organisations and events, the analyst will provide the extent to which individuals and organisations conducted and utilised military functions, for example: combat operations, combat support, logistics, intelligence, training, finance, fuel supply, communications (including secure), transport, air defence, engineering support, ammunition re-supply, medical support and administration (including accommodation, promotions, welfare).

### **3.2.3.2. Use of Military Expert in Organisational Function Analysis**

The analyst will offer advice in the use or not of an external military expert during the investigative and prosecutorial phase of a case. Such experts can provide technical/operating advice, eventually writing a report and giving evidence in relation to the nature of a specific function being examined. For example, in the analyses of artillery and its use, an expert may give advice/evidence regarding the technical capabilities of a weapons system and may give operating advice as to how such systems work, are used and engaged, and by whom. The expert should be of appropriate rank and/or experience, be of sufficient knowledge, and have had operational experience or similar where appropriate in order to authenticate and validate the ‘expert’ label. The expert need not necessarily be from the same military environment of the target/accused, nor have served in the relevant theatre of operations, however, when selecting an expert, a matrix of required factors should be drawn up, with benefits and drawbacks weighed accordingly.

### **3.2.4. Crimes**

The military analyst will provide analysis and advice relating to the crimes committed and the involvement of individuals from the military perspective. He or she can establish whether criminal acts took place within a broader legitimate action, or whether the action itself had no legitimate military value. He or she can examine such crimes from the tactical, operational and strategic perspective when establishing culpability and knowledge levels.

### 3.3. Evidence Requirements for Military Analysis

Military analysis as defined above demands specific forms of evidence to establish the fullest and most comprehensive picture as possible. It is critical to note that *breadth of sources* is vital for quality analysis, and that the majority of evidence will not come from victim and ‘low-level witness to crimes’ testimony, but from information collected by other means. These include:

- Indigenous documents: seized, handed over, requested, captured, openly acquired. Such documents provide a contemporaneous record of knowledge and events for all levels of military command, and vary greatly in type (for example, daily combat reports, intelligence situation reports, orders, administrative instructions, military magazines, war diaries, formation/unit records and so on).
- *De Jure* documents: constitutional decrees, military law, military manuals (for example, doctrine, command levels, operations, technical), standard operating procedures and so on).
- Witness interviews: of targeted indigenous individuals in a position to provide evidence to events at all levels of command as appropriate. Interviews to be requested overtly or achieved through ‘insider’ acquisition. Interviews to be carefully prepared beforehand.
- Open source information: newspapers, journalists, media footage, interviews, books, television coverage, commercial imagery, websites (in particular official military intelligence).
- Internationals: for example, non-governmental organisation representatives, diplomats, United Nations (‘UN’) representatives, mercenaries, special representatives of regional bodies (such as the European Union), monitoring missions, military forces deployed in area (such as the UN, NATO and so on).
- Intelligence: imagery, human intelligence, signal intercepts. Can be provided by contributing governments, special caveats invariably apply legally, procedurally and evidentially (see below on “Utilisation of Intelligence”).

### 3.4. Collection of Evidence

The military analyst should be used as a collector of the above forms of evidence *where appropriate*. This immediately creates a dilemma, given

that when an analyst is collecting, he or she is not analysing. However, the balance has to be struck given that the specialised knowledge possessed by a military analyst, both by past experience and through case knowledge, can be critically useful in the collection phase. This should be factored into case planning and time management of resources. The military analyst should possess training and experience in the interview of individuals, especially those with a military background.

### **3.5. Time Management of the Analysis Function**

It is critically important to recognise that the military analyst needs time to produce a quality product, as well as a breadth of sources of information and evidence. The analyst should be integrated into the case *at the start*, and should be given the continuity of task to remain on the case all the way through its life wherever possible. There is a direct correlation between time given, breadth of sources and quality of product: if either of the first two are lacking, the product will suffer.

### **3.6. Presentation of Military Analysis**

Military analysis can be presented in different forms to suit the prosecutor's requirements. It can be verbally briefed, despatched in micro-elements electronically, produced as a text report, and presented visually by the use of electronic analytical tools such as timelines, link charts and geographical information systems.

The means by which the analysis is disseminated will depend on factors such as individual customer preference, evidentially driven minimum standards, volume of data, nature of data and for which phase of a case, that is, indictment review, presentation in court and so on.

It is highly recommended that electronic analytical tools are utilised throughout the phases of a case, from the earliest gathering and examination stage, through the mature investigation phase and on into the trial phase. This achieves continuity of information, a systematic approach to analysis and saves much time as the case develops. Presentational items for the courtroom can thus be merely extensions of a dynamic and developing investigative/prosecutorial product, rather than a start from scratch creation using raw data.

### **3.7. Utilisation of Intelligence**

While the acquisition of intelligence to support the investigations, and latterly, the prosecutions, of the prosecutor is not *fundamentally vital* to the success of cases, it can be extremely useful indeed given the reasons for its collection, and the sophistication of the means and methods by which it was collected.

It is implicit that in a geographical environment where serious and sometimes widespread crimes have been committed, other organisations and governments may have had an interest, if not a stake, in events that have occurred. Thus, it is highly likely that not only host nation governments but others external to the area have been collecting intelligence for their own reasons, for example to achieve a political advantage and/or to facilitate military planning. It can follow therefore that much of what may have been collected by such entities is of some value too to an international court.

#### **3.7.1. Critical Factors in Acquiring Intelligence**

##### **3.7.1.1. Establishing Relationships with Providers**

Such relationships must be developed at the most senior political levels, and must be followed up with a very knowledgeable working-level team from the prosecutor to exploit appropriately any success achieved at the highest levels of negotiation. Demonstrating knowledge of means, methods, capabilities and, especially importantly, *sensitivities* is critical to establishing a working relationship with a provider.

##### **3.7.1.2. Procedures for Intelligence**

It is most important to establish appropriate working procedures to satisfy the provider who may pass intelligence to the prosecutor. It is extremely important to know what to ask for and how to ask for it. Also, receiving, viewing, handling and storing procedures must be appropriate to ensure the intelligence is not mismanaged at any stage, ever. One mistake can turn off a flow of intelligence immediately. Ordinarily, the providers have to satisfy themselves that the procedures are in accordance with their own procedures and requirements.

### **3.7.1.3. Intelligence in the Courtroom**

Mechanisms must be developed to enable vital intelligence of critical importance to a case to be used in the courtroom. It must be acknowledged that this will not always be possible, and some intelligence provided may forever remain outside of the courtroom. However, a flexible, creative and procedurally solid approach must be adopted, using the rules as positively as possible, often on a case-by-case basis only, in the negotiation with providers to make the product available where needed. Different measures can be examined, such as downgrading product by classification; downgrading by quality of information; specific focus on the actual requirement for the data, including what its end use is actually going to be; applications to the court, representations from the provider, further information provision by a provider and so on.

### **3.7.2. Types of Intelligence and Its Use to the Prosecutor**

#### **3.7.2.1. Imagery**

Imagery can provide contemporaneous evidence in relation to events, crimes and actions on the ground. It can be especially useful to show, for example, destruction, killing fields, mass graves, military logistics and military positions. Imagery can be pinpointed in time, even to the minute and hour in a day. It can therefore be used to corroborate the veracity of human information, for example provided by a witness to events and/or crimes. Imagery is a form of intelligence that can surmount the usual security and sensitivity caveats of a provider and be used in the courtroom.

#### **3.7.2.2. Signal Intelligence**

Signal intelligence can provide contemporaneous evidence in relation to events, actions, crimes and individuals. It can be especially useful to show command chains in operation, to show interplay between the political/military interfaces, and to show, critically, intent and knowledge of an individual. Signals intelligence is a difficult form of evidence to bring into the courtroom, given its sensitivities from the providers' perspective regarding their means and methods of collection. Some lower-level tactical signals intelligence can be easier to negotiate for with providers, but requires extensive validation and authentication procedures to render it evidential in standard.

### 3.7.2.3. Human Intelligence

Human intelligence can provide very detailed and well-placed evidence in relation to events, actions, crimes and individuals, especially at the highest levels. It can be especially useful to show command chains in operation, to show interplay between the political/military interfaces, and to show, critically, intent and knowledge of an individual. Human intelligence is a difficult form of evidence to bring into the courtroom, given its sensitivities from the providers' perspective regarding their sources and the security issues surrounding them. Because acquisition of high-quality human sources is painstaking and very carefully done, normally clandestinely, it requires a lot of motivation and negotiation with a provider to enable a source to be used in the courtroom.

It should be noted that the collection of human intelligence is a function that a prosecutor's office can perform for itself, *providing the appropriate working parameters are applied*. It should be done by professionals in this sphere of intelligence work, and should not be traded off to others who do not possess the necessary skills and experience, for example, untrained law enforcement officers or analysts.

### 3.8. Strategic Use of the Broader Analysis Function

- *The analyst and the analysis function (therefore, by definition, the military analysis function where appropriate) should form a third of the triumvirate of main disciplines supporting the prosecutor. They should be aligned in equal measure to the other two disciplines in terms of numbers of resource, and should provide an equal voice in the input to the Office of the Prosecutor's strategy and direction.*

The reasoning here is that the analyst can provide breadth of knowledge, a strategic view and objectivity of relevant case(s), and can provide advice as to the nature of sources, timescales required for work, linkage requirements, tasking and collection needs and future targeting opportunities. The analyst should have the strategic view whereas other staff disciplines may only have a lower-level focus.

'Equal numbers' is critical in so far as much very senior and senior level perpetrator work is focused on its linkage to a crime base and the enshrining of an accused in status and position within the country's managing organs. This demands systematic and thorough analysis of types of evidence and information which are not ordinarily dwelt upon, or even

sometimes collected by investigators. This function is time consuming, resource intensive yet critical for success.

- *The analyst should have a separate management chain in terms of the execution of his or her professional obligations to the Office of the Prosecutor, namely objectivity, ethical analytical process, qualitative contribution and proper utilisation of the resource.*

At the International Criminal Tribunal for the former Yugoslavia ('ICTY'), the role of the analyst had been minimised and incorrectly used in its earlier days. Too many analysts were used as administrative support staff, and their intellectual capacities were not properly utilised or misunderstood in many cases. Historically the effective use of analysis had been from outside the investigation team environment, where the analyst nevertheless supported the team, but the tasks were identified, allocated and supervised by the analytical management structure.

Sometimes analysts were stifled into not being able to provide an opinion because it may have run contrary to the prevailing view of an investigative team. This issue created a subjective, one-dimensional environment, where counter-thinking and alternative strategies were not encouraged, and direction, case status and future indictments were therefore sometimes based on personal bias and views, and not from the objective analysis of facts. The analyst should be a component part of the checks and balances in the investigation and case development processes. This avoids skew, bias and subjectivity as the work unfolds. The analyst should have a platform for voicing opinion long before he or she feels the need to express professional ethical concerns.

### **3.9. Structure**

- *The analyst should support the investigative function and investigation teams from outside of the immediate investigative management structure. This ensures integrity of tasking, quality of product, focus of requirements and proper use of the resource. Similarly, the analyst should support the prosecutions team from without, but working in close liaison with attorneys to provide advice, knowledge and guidance of the case. The analyst should work from the Analysis Section's project-driven tasking, ensuring the necessary modules for case completion are identified, collected against and resourced accordingly.*

At the ICTY, much analytical work could be identified as modular and identifiable by template application, based on the experience of the analyst teams in support of cases. It was unnecessary to reinvent the entire wheel for each investigation, and although each case was unique in terms of facts, it was not in terms of certain analytical requirements for a complete case.

Although analysts work very closely with investigators for crime base work, there is little requirement for them to conduct linkage analysis or political analysis from within the investigator environment. Case direction should come from the attorneys, and the analysis and investigations requirements should be modular, project-driven and not based on a rigid hierarchal structure, which leads to inflexibility, dearth of knowledge and lack of attention paid to linkage aspects of cases.

### **3.10. Work Cycle: Analyst's Involvement**

- *The analyst should be fully integrated into every aspect and phase of the case life cycle. There is no such concept as “collect first, then analyse”:* the two functions should work hand in glove at all times, with one driving the other and vice versa. As cases develop and mature, and most likely therefore become ever more complicated, the analytical component of them becomes more significant and pivotal in terms of managing the data, developing theories and ensuring collection is continued appropriately in the areas which are required.

Often at the ICTY the two functions were seen as consecutive in their application, rather than concurrent. This had the effect of creating stop/go/stop/go forms of case management, and is tied to the hierarchal managerial structures, within which the analyst was largely unable to advise in case direction, collection requirements and status effectively.

- *A strategic investigations plan, closely backed up by a strategic collection plan, should be written to provide the framework within which a case can be managed throughout the extent of its life. The analyst should participate in the writing of the former, and write (for authorisation) and manage the latter. In this way, a case can remain focussed, efficiently directed and can avoid over and under collection. It also serves to provide a transparent status report and update at all times: this has the effect of spreading knowledge*

*throughout the case team, and enables management staff to monitor case progress and status effectively.*

This aspect was lacking in some ICTY cases, leading to situations where some cases took too long to come to court, or were seriously over-collected against, significantly under-collected for, and sometimes charged over-ambitiously through lack of facts being established.

- *The analyst(s) should be critical component members of case status committees, indictment writing groups and indictment review boards. They should be allowed to air opinions and views independently of their legal and investigative colleagues, and offer alternative theories of fact interpretation and target culpability where necessary.*

This was not always the situation in international criminal jurisdictions.

- *The composition of the required professional skill-sets within project teams beginning an investigative review of a case should not necessarily be the same as the one which completes the indictment or deals with the prosecution of the case. This means that the case requires individuals with relevant skills at relevant times to its phases of development. It is highly likely that more analysts are required the further a case matures, as well as support staff. Thus a flexible management and resource allocation process, incorporating the ability to manage change in relation to project team structure appropriately, is required.*

This was not always the situation in international criminal jurisdictions.

- *A function of the senior management is to ensure the education of the prosecutor's staff in relation to what an analyst can and should do to support a case. It should be acknowledged and understood by all staff to ensure such staff are utilised in their correct professional capacity. Similarly, analysts should be able to maintain and update their specific skills, especially in the electronic tools developing environment.*

This was not always the situation in international criminal jurisdictions.

### **3.11. General Management Issues**

#### **3.11.1. Organisational Development and Change**

The management of the analytical function requires more than individuals with only analysis experience. It requires real management experience, particularly in the area of organisational development and the management of change and the change process. It is critical to maximise the effectiveness of the individuals in the analytical function, at the same time ensuring the resource is efficiently deployed.

In a dynamic office that frequently changes its shape, such as a prosecutor's office, the tasks it accepts and the shifts in workload-emphasis require a flexible and experience management approach, where a culture of organisational development and change is integral to the philosophy of the management team. It is extremely important that hierarchal structures are relatively fluid and flexible to absorb necessary changes to reflect strategies, yet without being too quick to reorganise at every unnecessary opportunity.

#### **3.11.2. Analytical Staff and Others**

It is important to recognise the difference between an analyst who has the fundamental training, skills and experience to analyse information and data in a systematic and objective manner, and a country expert who is knowledgeable about a specific geographical area. It is necessary to have a blend of both individuals when dealing with a specific task in hand, but the trained analyst should always be the driving or supervising authority. A well-trained and experienced analyst will apply an approach to *any* analytical tasks, and will achieve results that should be fulsome, objective and focused on the requirement. A country expert runs the risk of subjectivity according to his or her knowledge base and personal views held; while their knowledge is crucial in the preliminary stages of investigative and analytical work, it wanes as time goes on and analytical knowledge increases in importance and requirement.

It is important to recognise the skills which the analyst contributes to the working process, and that they are not mistaken for providing by default another function that others do not want to take on. They should not be used to perform administrative tasks that others will not do (over and above that which all staff are expected to perform during various

phases of a case and at various ‘crisis’ times), and should not be viewed within the professional culture as the junior member of staff or a team. They should be considered for the intellectual contribution they make to a case, and allowed the time and facilities to perform their function correctly.

### **3.11.3. Cases Are Modular and Are Foreseeable in Structure**

The management of the analysis function should understand that many, if not all, cases are modular and foreseeable in working methodology, strategy, structure and requirements. By understanding the modular components, resourcing and time allocation can be planned for in advance, and appropriate tasks can be allocated in an appropriate order. Concurrent work can be implemented with other forms of case work, and timescales can be reduced accordingly, together with ensuring that critical aspects of cases, in particular its linkage components, are fully developed in time.

### **3.12. Final Comment**

The comments offered above are designed to cover many aspects of the role of the analyst and function of analysis, without dwelling too deeply on any one particular facet. Thus, should amplification or greater depth of answer be sought by ICC staff to any of the above topics, they should feel confident in contacting the author at any time to arrange further provision of information.

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## **Historical Origins of International Criminal Law: Volume 5**

Morten Bergsmo, Klaus Rackwitz and SONG Tianying (editors)

This volume is about the birth of the Office of the Prosecutor of the International Criminal Court. It concerns the strategy and activities of the preparatory team for the Office between 1 August 2002 and November 2003. The emphasis is on the thinking of the team and dozens of experts it consulted. Part 1 of the book contains 41 chapters by some of these experts, including Xabier Agirre, Richard J. Goldstone, Fabricio Guariglia, Mark B. Harmon, Daryl A. Mundis, Bernard O'Donnell, Mohamed C. Othman, John Ralston, Christopher Staker, William A. Schabas, James K. Stewart and Clint Williamson. Their reflections are relevant to builders of capacity to prosecute core international crimes also at the national level.

Part 2 has chapters on three expert-group reports that the preparatory team organised: on the length of proceedings, fact-finding and state co-operation, and complementarity in practice. Introductions by actors involved at the time explain the background, main issues, and impact of the reports. Parts 3 and 4 contain three chapters on governance documents prepared by the team with experts: the draft Regulations of the Office, the draft Code of Conduct, and budgetary documents.

In Chapter 1, Morten Bergsmo, the co-ordinator of the preparatory team, analyses its risk-assessment and strategy, as well as challenges that subsequently beset the ICC Office of the Prosecutor. He calls for accurate historical research on the institutions of international justice and, beyond that, for a sociology of international justice. He argues for renewed commitment to integrity as a binding legal standard.

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