The collection of evidence is a part of the pre-trial inquiry and is broadly associated to the word “investigation”.\textsuperscript{1} It may involve preliminary examination of the accused, taking testimony from eye-witnesses and victims, gathering of documents and tangible objects, exhumation of mass graves and on-site investigations. Both prosecution and defence may collect evidence. This does not mean that the parties are treated on the same footing during the pre-trial inquiry.

Since the collection of evidence covers numerous issues, the following representative issues are discussed: 1) the duties and powers of the parties, 2) judicial intervention and 3) State cooperation. The issue of evidence obtained in violation of statutory provisions or internationally recognized human rights is elaborated upon in chapter 6 on admissibility.

Note that “information” and “evidence” are two separate concepts. Anyone can collect information and much of it can later be used at trial as evidence. Not all information is necessarily evidence, but all evidence is information.\textsuperscript{2}

### 4.1 Duties and Powers of the Parties

#### 4.1.1 The Prosecutor

At all of the historical tribunals, the \textit{ad hoc} tribunals, the MICT, the SCSL and the ICC, each of the prosecutors is in charge of the investigations, which practice departs from the traditional approach in common law jurisdictions such as England where the investigations are carried out by the police.\textsuperscript{3} It also departs from systems with an investigating judge

\textsuperscript{1} Sluiter, 2002, 301.

\textsuperscript{2} Axboe and Kleffner, 2011, 52.

(juge d'instruction) in certain civil law countries, a feature that has been adopted by the ECCC.

Even though the prosecutor in an adversarial procedure has to be faithful to the principles of truth and objectivity, the difference is that the prosecutor in the “one-case approach” of civil law procedure is considered to be an independent agent rather than a party.

Considering that the prosecutor in international criminal proceedings has burden of proof, he or she should be in a position to collect evidence in order to secure a conviction. The prosecutor has thus distinct and coercive powers to collect evidence, and more direct possibilities to obtain State cooperation, resources, privileges and immunities facilitating on-site investigations.

4.1.1.1 The Historical Tribunals
At the IMT and IMTFE the chief prosecutors were responsible for investigation and collection of all necessary evidence. The term “necessary” is to be understood as the evidence needed for the tribunal to reach a guilty verdict. Despite the lack of specific rules, it is evident that the chief prosecutors had the duty and power to carry out search, seizure and on-site investigations. The allies found documents, records, reports and other files in Army headquarters, Government buildings and elsewhere. The allies also found records in “salt mines, buried in the ground, behind false walls and many other places believed secure by the Germans”. Field teams from the prosecution’s office “were directed to screen and analyze the mass of captured documents…. Literally hundreds of tons of enemy documents and records were screened and examined and those selected were forwarded to Nuremberg for processing.”

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7 IMT Charter, article 15(a); IMTFE Charter, article 8(a). The IMT prosecution also had the duty to undertake “the preliminary examination of all necessary witnesses and of all Defendants” (IMT Charter, Article 15(c)).

8 TMWC, volume II, 156–157.