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Old Evidence and Core International Crimes

Morten Bergsmo and CHEAH Wui Ling (editors)

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*To Judge Hanne Sophie Greve
for her outstanding dedication, integrity and ability
in service to criminal justice for core international crimes*

PUBLICATION SERIES PREFACE

The Torkel Opsahl Academic EPublisher is pleased to release this anthology on *Old Evidence and Core International Crimes* in its *Publication Series*, the first of its four publications series. Most of the chapters are based on papers presented at an international expert seminar on the topic convened by the Forum for International Criminal and Humanitarian Law ('FICHL') in Dhaka, Bangladesh, on 11 September 2011. Other chapters were solicited by the editors of the volume from outside the context of the seminar, in response to the considerable interest it generated around the world of criminal justice for atrocities.

Four chapters also concern the war crimes justice process in Bangladesh, including a long chapter by Professor Otto Triffterer. The volume editors have separated these chapters into a Part II of the anthology. Their inclusion helps to contextualise and concretise the challenges linked to old evidence and core international crimes, as these are issues that are common not only to a number of national jurisdictions dealing with World War II crimes, but also to countries such as Argentina, Bangladesh and Cambodia.

We think that this book belongs to the *FICHL Publications Series* and that it strengthens further the relevancy and innovative nature of the *Series*.

Morten Bergsmo
Editor-in-Chief

Kiki A. Japutra
TOAEP Executive Editor

FAN Yuwen
TOAEP Editor

PREFACE BY THE EDITORS

When the FICHL organised the seminar on “Old Evidence and Core International Crimes” in Dhaka, Bangladesh, it was to place an important but still insufficiently discussed topic on the agenda of criminal justice for atrocities. The objective was not to consider the topic of old evidence from a purely theoretical or doctrinal perspective; rather, discussions were grounded in practice, by examining how issues of old evidence play out in real jurisdictions. This is why the seminar was organised in Bangladesh, where the national authorities were at that time starting to investigate atrocities perpetrated in the 1971 war, which would involve questions of old evidence. At the time of writing, Bangladesh is therefore a particularly current and relevant case study, examined in greater detail in the second part of this book.

Against this background, we have sought to include chapters from a wide variety of actors who have dealt with questions of old evidence in their work. Our objective was to interrogate the question of old evidence in a multi-perspective manner, by examining it through the lens of different actors with input into the prosecutorial and adjudicative processes. We have been fortunate to obtain contributions from national and international judges, prosecutors, counsel of victims, investigators, analysts, and academics.

A common take-away from the contributions is that old evidence should not be automatically seen as an obstacle to delayed prosecutions – or an excuse not to pursue justice. A rigorous and critical approach in locating and analysing evidence is necessary. For example, the amount and quality of documentary evidence may actually increase over time, as highlighted by Siri S. Frigaard in her Foreword. Each situation should be carefully analysed on its own merits, with a view to designing and implementing the best possible solution to the evidentiary challenges at hand. Fair criminal justice needs to be based on evidence that meets a standard of beyond reasonable doubt. This may be difficult, but such challenges may be overcome by tapping into the accumulated experience of national and international jurisdictions. As Ambassador Rapp notes, “[a]ll can benefit from the experience of those who have participated in and studied these

processes”. It is our hope that this anthology will contribute to this common pool of shared knowledge.

Many people were instrumental in bringing this project to fruition. First and foremost, we would like to thank all the authors for their contributions. We would also like to thank Temme LEE Wei Wei, Abeer YUSUF and CHEAH Wui Jia for having assisted with proofreading. We are grateful to Khondoker Mehdi Maswood, Elisa Novic and Alf Buntenschøn Skre who assisted in connection with the Dhaka seminar, and to Dr. Rosalynd C.E. Roberts who contributed at the end of the editorial process. Finally, our thanks to Kiki A. Japutra and FAN Yuwen for their outstanding assistance with the formatting and support of the editing process on behalf of the Torkel Opsahl Academic EPublisher.

Morten Bergsmo

CHEAH Wui Ling

FOREWORD BY SIRI S. FRIGAARD

This book deals with a *problématique* that I have encountered several times in my work as a prosecutor, also in core international crimes cases. Criminal justice can lead to deprivation of liberty as a punishment. Raising the shadow of incrimination and imposing punishment are serious acts of State. Indictments, prosecutorial pleadings and judgements must therefore be firmly based in the best available facts. Witnesses should be reliable, documents authentic, sites uncontaminated, and experts credible. The passing of time affects each of these categories of evidence. Access to archives may actually improve over time, especially when peace replaces war. This may strengthen the knowledge and understanding of expert witnesses. But the same is not necessarily true for other types of witnesses, and normally not for the condition of crime scenes.

This volume contributes significantly to our understanding of these challenges in the context of the investigation, prosecution and adjudication of war crimes, crimes against humanity, genocide and aggression. It brings together experts and practitioners, with experience from a broad range of international and national war crimes prosecutions. It is particularly valuable that the book seeks to address the topic of old evidence with focus also on the situation in a jurisdiction such as that of Bangladesh. It gives the book a very real character.

I encourage national war crimes actors to not only use this book in their work, but to take forward the discourse which has now been started by the editors and the publisher, acknowledging their pioneering effort.

Siri S. Frigaard

*Chief Public Prosecutor and Director,
Norwegian National Authority for Prosecution
of Organised and Other Serious Crime*

*Former Deputy General Prosecutor for Serious Crimes,
East Timor*

FOREWORD BY STEPHEN J. RAPP

This anthology highlights and addresses challenges associated with old evidence when investigating, prosecuting and adjudicating core international crimes. Old evidence is of particular concern for the investigators and prosecutors of such crimes because these prosecutions often take place many years or decades after they were committed. Criminal justice actors find themselves having to deal with aging accused persons, witnesses with fading memories, disintegrating physical evidence, and documents reflecting decisions taken in a world different from that of today. To be able to deal effectively with such old evidence, those involved should have an awareness of potential problems, understand the issues involved, and have requisite analytical skills. This anthology brings together a spectrum of experts – judges, policy-makers, prosecutors, lawyers, scientists, jurists – who discuss problems of old evidence and offer a variety of practical solutions for overcoming the problems inherent in dealing with old evidence in cases of core international crimes.

These crimes have been defined by custom and convention over the course of more than a century, but prosecutorial efforts remain relatively young. As many of the authors in this anthology point out, the start of modern-day prosecutorial efforts is often traced to the post-World War II period. Nevertheless, the idea and practice of ensuring individual accountability for these crimes has rapidly spread, with numerous and increasing efforts being undertaken at the national as well as the international level. As we pursue our joint efforts to achieve accountability for atrocities, we can learn from each other and benefit from the expertise developed by those who have faced similar challenges. This is particularly important for judicial actors at the national level so that the societies most affected can be equipped and empowered to conduct trials on their own terms.

All of us, regardless of our nationality, and all States, whether presently parties or non-parties of the Rome Statute, should stand together behind the pursuit of individual accountability for atrocities by national and international authorities. Wherever possible, challenges should be met head on, and addressed through respectful international co-operation and assistance. National prosecutorial efforts should be supported and assisted

in line with the needs and circumstances of the society concerned. As the burden and responsibility of prosecuting grave atrocities is increasingly taken up by national authorities, it is inevitable that these efforts will be shaped by each country's own national legal culture and circumstances. Such familiarity will make trial efforts more relevant to national populations. There may be types of challenges commonly encountered by practitioners across borders, such as that of old evidence, but the precise solution chosen by each national authority needs to be tailored to the country's culture and circumstances. This does not mean relativism or an abandonment of international standards. The basic rights guaranteed by treaties such as the International Covenant on Civil and Political Rights must be upheld in all proceedings.

In recognizing that the trials need to be relevant to a nation's population, it is also important to note that the process must be undertaken in a way that will be recognized as just and equitable by fair-minded persons from all parts of that population. These core international crimes have generally been committed against victims targeted on the basis of religion, ethnicity or political affiliation. Years after their commission, memories of specific events may have faded, but not the passions. Persons from a group whose members were victimized may be ready to believe the worst about members of a group associated with the perpetrators. Persons of the latter group may find it hard to believe that its members committed such crimes and view the process as one designed to marginalize the group politically.

This is why a clear prosecution strategy and strong public information and outreach program can be at least as important in dealing with old crimes as they are with those committed more recently. The prosecution of crimes committed decades in the past will necessarily be limited to those who remain alive, competent, and within the reach of the court. The criteria for deciding which of these living persons are to be investigated and prosecuted is a matter of vital public interest. It is important that a prosecution strategy be clearly announced that explains case selection in terms of level of responsibility of the alleged perpetrators or the representative nature of their alleged acts. Information about the trials should not just be available but widely disseminated through a program of public outreach, so that all parts of the population can see and hear the evidence and understand the factual basis for the verdicts. Such efforts are critical to avoiding the perception that such trials are an exercise in political marginalisation and will help ensure their acceptance in future years no matter what political transitions will follow.

For justice to be done, and seen to be done, after the commission of mass atrocities, judicial actors can benefit from the experience of those who have participated in and studied these processes. This anthology brings together the resources and references that have proved effective. By providing a wide range of views and practical solutions on how to overcome the challenges of old evidence when investigating and prosecuting atrocities, it can be an invaluable tool for practitioners seeking to achieve justice for core international crimes.

Stephen J. Rapp
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Office of Global Criminal Justice,
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**PART I:
OLD EVIDENCE
AND CORE INTERNATIONAL CRIMES**

Placing Old Evidence and Core International Crimes on the Agenda of the International Discourse on International Criminal Justice for Atrocities

Morten Bergsmo* and CHEAH Wui Ling**

The investigation, prosecution, and adjudication of core international crimes often take place years or decades after their actual commission. Such delay usually results as societies recovering from mass atrocity are faced with a variety of more pressing reconstructive needs; a fragile political environment; or a lack of criminal justice capacity. Much time may be required before post-atrocity societies are able to implement fair and effective criminal trials. The undertaking of such delayed prosecutions is nevertheless supported by arguments made by various international legal actors that domestic statutes of limitations do not apply to such crimes. There may in fact be an increase in such prosecutions in the future as the pursuit of individual accountability for such crimes becomes a norm, rather than an exception, with societies increasingly willing and able to investigate atrocities perpetrated in their past. Even when such prosecutions

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are undertaken by international criminal courts, such as the International Criminal Court ('ICC'), experience shows that all too often it is many years before investigations are effectively initiated or an accused person actually brought to trial.

This anthology addresses one of the challenges associated with delayed criminal justice for core international crimes: the location, treatment, and assessment of old evidence. It is primarily based on presentations made at the international expert seminar on old evidence convened by the Forum for International Criminal and Humanitarian Law ('FICHL') on 11 September 2012,¹ in Dhaka, Bangladesh. The seminar aimed to base its discussions on the use of old evidence in atrocity cases in an ongoing domestic justice process where old evidence is a real challenge. The discussion considered and was, in this manner, informed by, the range of practical issues confronting war crimes justice actors. This lent additional credibility to the seminar discussion and the presentation of papers. It also provided an opportunity to consider the Bangladesh war crimes process more closely. The first part of this anthology considers this issue from the perspective of different criminal justice actors at the domestic and international levels. The second part comprises chapters that focus on the Bangladeshi authorities' efforts to investigate and prosecute atrocities that took place during the 1971 war.

In the chapter that follows, Chapter 2, Professor David Cohen draws on a number of historical and contemporary cases to highlight some problems encountered in the use of old evidence when prosecuting and adjudicating atrocities. First, by using the *Demjanjuk* case that was repeatedly litigated over several decades in different countries and before a variety of courts, he describes how problems of obtaining a credible identification of the accused increasingly impeded prosecutions. Second, he refers to a number of cases by the International Criminal Tribunal for Rwanda ('ICTR') and the Special Panel for Serious Crimes ('SPSC') to demonstrate how courts have dealt with the effect of 'cultural factors' or collective memory on witness testimony. Third, he critically considers the judicial approach developed by the ICTY and ICTR towards the impact of trauma and memory on witness testimony.

The contributors of second, third, and fourth chapters of this anthology are judges with extensive experience in the adjudication of atroci-

¹ See <http://www.ficHL.org/activities/>.

ty cases at the national and international levels. In Chapter 3, Judge Alphons M.M. Orié (International Criminal Tribunal for the former Yugoslavia), highlights problems commonly encountered when dealing with old evidence, and suggests how they may be overcome. The Chapter explains that old evidence does not necessarily have to be “bad” or inferior to new evidence, and that there is a need to subject all evidence to rigorous testing, such as by employing DNA tests. The Chapter draws attention to issues that should be considered when dealing with witness evidence, such as the impact of stress on witness statements and the importance of establishing and following proper procedure from the very start when questioning witnesses or identifying suspects. Beyond the locating and testing of evidence, the Chapter also emphasises the need to ensure that such evidence is presented, analysed, and interpreted by defence counsel, prosecutors, and judges in a fair and professional manner.

In Chapter 4, Judge Agnieszka Klonowiecka-Milart (Supreme Court, Extraordinary Chambers in the Courts of Cambodia) draws on her judicial experience as a U.N. International Judge at the Supreme Court of Kosovo and explains how evidential assessments in atrocity cases are rendered particularly complex by the passage of time due to their politically contested nature and unstable post-atrocity environments. Due to the former, any use of collective knowledge or memory in the adjudication of atrocity cases should be undertaken with caution. Judge Milart refers to certain legal frameworks that permit judicial notice to be taken of facts of ‘common knowledge’, ‘objective truth’ or ‘public notoriety’. This allows the introduction of collective knowledge or memory. While these concepts facilitate trial expediency, they also *de facto* lower the standard of proof. It is therefore particularly important that the legal framework permits parties to contest them. Also, there is a need to ensure that judges do not rely exclusively on secondary evidence when dealing with the first case, which bears the burden of establishing the historical context for subsequent cases. Evidence collection and interpretation in atrocity cases is further complicated by the instability of post-atrocity environments which results in much evidence being lost or inadequately preserved. To facilitate evidence gathering, more inter-State co-operation is needed and evidence should be collected by those with proper training. There is also the need to be aware of how evidence collection and interpretation may also be influenced by politics, as demonstrated by the advocacy conducted by some political or civil society actors in Kosovo.

Judge Martin Witteveen, in Chapter 5, comprehensively traces and analyses the journey taken by old evidence from the field to the courtroom in atrocity cases. His chapter begins by providing an overview of the problems associated with old evidence. He focuses on issues of witness memory from a scientific perspective, elaborating on the problems associated with the ‘encoding’, ‘retention’, and ‘retrieval’ phases of memory. This part of Judge Witteveen’s chapter thus speaks to Dr. Seena Fazel and Dr. Anya Topiwala’s chapter on memory, further considered below. Judge Witteveen then examines the unique challenges faced by investigators, prosecutors, and judges respectively. He emphasises the importance for criminal justice actors to be self-aware of these challenges, and for proper procedures to be put in place. He then describes the legal and institutional framework established by the Dutch authorities to deal with atrocity crimes. In doing so, he points out and evaluates a number of problematic issues, such as that related to the application of ordinary criminal procedure to atrocity crimes.

The next two chapter contributors are key players in the prosecution and investigation of core international crimes in their respective institutions. In Chapter 6, Andrew Cayley, Q.C., (International Co-Prosecutor, Extraordinary Chambers in the Courts of Cambodia) explains the real-life problems encountered when leading the prosecution of atrocity crimes before the Extraordinary Chambers in the Courts of Cambodia, such as the destruction of crime scenes or physical evidence by forces of nature and the building of development projects. He emphasises the need to ensure that evidence is documented as soon as possible and as regularly as possible thereafter. Also, he notes the importance of retaining original documents and preserving the ability to prove the chain of custody.

Mr. Sriyana (Head of Division of Monitoring and Investigation, Indonesian National Commission on Human Rights), in Chapter 7, presents the institutional and operational set-up implemented in the inquiry undertaken by the Indonesian National Commission on Human Rights into a massacre that occurred in Indonesia in 1965–1966. By presenting the steps taken by the Commission in this case, Sriyana’s Chapter underscores the need for well-planned work processes, sufficient preparatory work prior to undertaking field investigations, and proper documentation of investigations.

Chapter 8 by Dr. Patrick J. Treanor (Case Matrix Network Senior Adviser, formerly Senior Research Officer and Team Leader, Office of

the Prosecutor of the ICTY) discusses the challenges associated with using historical documentary evidence when investigating core international crimes. Documentary evidence is important as it becomes increasingly difficult to locate living witnesses in such cases. Such evidence is also particularly useful in establishing certain elements, such as organisational structure and locating leadership or individual responsibility. The location and analysis of such evidence, however, often requires historical training or the possession of requisite historical skills. This chapter is thus particularly useful in its exposition of approaches and practical tips that will facilitate the location and analysis of historical documentary evidence. For example, Dr. Treanor points out how while the relevant historical documentation is often found in public archives, much may also be found in the files of government agencies, in private hands, or with NGOs. Some very valuable documentation was collected by the International Criminal Tribunal for the former Yugoslavia ('ICTY') from private sources who had been contacted as witnesses. Also, he explains how expert reports may be used to facilitate the efficient and effective introduction of such large volumes of information into the trial. However, he cautions the need to give "clear and transparent instructions" to the expert, and highlights a number of these, which will ensure that such evidence will be accepted by the court.

Chapter 9, by Dr. Seena Fazel (Clinical Senior Lecturer, University of Oxford) and Dr. Anya Topiwala (Clinical Lecturer, University of Oxford), analyses scientific evidence on the effects of trauma on memory. It provides a preliminary survey of normal memory, and a summary of the effects of delay on autobiographical memory in normal persons. They highlight, among others, how traumatic memories are different from normal memories. Specifically, traumatic memories may be fragmented, with less recall of peripheral events, with occasionally vivid sensations and perceptions being remembered. However, they also note that there is no clear consensus on whether stress improves or worsens memory and that the relationship between memory and trauma is complex, dependant on an individual's psychosocial and biological characteristics.

The next chapter, by Assistant Professor Mahdev Mohan (School of Law, Singapore Management University), deals with the challenges faced by civil party representatives in obtaining testimony from victims about historical crimes that took place in Cambodia and highlights lessons that may be applied to Bangladesh. Using an expressive justice framework,

the author emphasises the need to manage the expectations of victims through the provision of adequate information, and ensure that their narratives are treated respectfully by the judicial process. Among others, his chapter puts forward a number of lessons drawn from Cambodia's experience, such as the need to work with local partners, identify focal sites as starting points, adopt a qualitative research approach, design clear interview questions, and provide independent legal representation to victims.

The second part of this anthology focuses on the investigation, prosecution, and adjudication of atrocities committed during Bangladesh's 1971 war before the International Crimes Tribunal of Bangladesh ('ICT-BD'). In Chapter 11, Mr. M. Amir-Ul Islam (Senior Advocate, Bangladesh Supreme Court; Senior Partner, Amir and Amir Law Associates) notes that the ICT-BD is in line with the spirit of the Rome Statute's declaration that perpetrators of atrocities not go unpunished and that "their effective prosecution be ensured by taking measures at the national level". The author sets out the historical context of Bangladesh's 1971 war, emphasises the need to ensure individual accountability for atrocities, and suggests how impunity had contributed to "the destabilisation of the constitution, democracy, and the rule of law [...]".

Chapter 12, by H.E. Mr. Shafique Ahmed (Minister of Law, Justice and Parliamentary Affairs), explains that Bangladesh is undertaking prosecutions pursuant to the International Crimes (Tribunals) Act of 1973 ('the 1973 Act') and the Rules adopted pursuant to the 1973 Act. He states his Government's commitment to conducting the trials in accordance with international legal and human rights standards, and highlights the fact that amendments have already been made to the 1973 Act to meet these standards. For example, provisions guaranteeing fair trial and the independence of the Tribunal have been adopted, while the provision related to the inclusion of an Army person in the Tribunal has been deleted.

Chapter 13, by Judge Md. Shahinur Islam (International Crimes Tribunal of Bangladesh), provides a comprehensive description and analysis of the substantive and procedural legal framework applicable to investigations and trials before the ICT-BD. This chapter provides valuable insight into the practice of the ICT-BD and highlights less-known aspects of the applicable legal framework beyond the 1973 Act, such as the domestic Jail Code. He argues for an understanding of the ICT-BD's legal framework in a 'holistic' manner. For example, though the right to interlocutory appeal is not expressly provided for, the Tribunal nevertheless

may intervene to correct any injustice upon assessing the process as a whole.

The final chapter, by distinguished Professor Otto Triffterer (University of Salzburg), focuses on the international legal framework and its inter-relationship with Bangladeshi justice efforts. He provides an overview of the international laws then applicable to Bangladesh when it adopted the 1973 Act, and explains the extent of Bangladesh's own involvement in related international efforts, such as the establishment of a permanent international criminal court.

A number of common themes were raised and discussed by contributors to this anthology. First, there is the need to be aware of a number of challenges when old evidence is used in the prosecution and adjudication of atrocities. Some of these problems are common to all crimes, but some are particularly pertinent to core international crimes due to their characteristics, such as their politically charged nature, the disorder and stress accompanying such crimes, and an unstable post-atrocity environment. It is important that we better understand how these features impact the quality of evidence, such as by undertaking further scientific research, and avoid adhering to common general beliefs, such as how stress always compromises one's ability to serve as credible witnesses.

Second, several of the authors point out the need to be sensitive to the constructed nature of local knowledge and how this impacts the evidence put forward by witnesses, NGOs, and other trial actors. Due to the politically charged nature of these crimes, their narratives are usually subject to contestation or societal pressures to conform. Criminal justice actors should be aware of this political dimension, and the legal framework should have sufficient safeguards.

Last, such challenges, while substantial, are not insurmountable. They can be addressed by building adequate capacity in skills, knowledge, and professionalism. Self-awareness, capacity development and information sharing among criminal justice actors are crucial in this regard. Apart from highlighting and explaining the challenges of using old evidence when prosecuting and adjudicating core international crimes, this anthology makes available a variety of knowledge and experience from different national and international contexts so that they may be applied, with proper contextual adjustment, by other criminal justice actors.

The Passage of Time, the Vagaries of Memory, and Reaching Judgment in Mass Atrocity Cases

David Cohen*

Other contributions to this volume analyse a wide variety of evidentiary issues that arise in prosecutions occurring decades after the commission of the crimes in question. This chapter takes up three inter-related problems as to the way the passage of time affects evidence and the ability to prove a case beyond a reasonable doubt. None of these problems is necessarily unique to long-delayed prosecutions. Indeed, they may all arise as normal evidentiary issues in all trials. This chapter, however, discusses to what extent these problems are affected or exacerbated by the passage of time and how this process impacts the need to establish guilt beyond a reasonable doubt. A ‘devil’s advocate’ position might maintain that beyond a certain threshold, as the passage of time takes its toll, a reasonable doubt is almost necessarily present in the absence of other, less contestable, forensic evidence. This paper examines the way in which judges have attempted to come to terms with such claims when advanced by defence counsel.

The three areas to be discussed are:

1. Establishing and documenting the identity of the accused. Here the *Demjanjuk* case will be the primary reference point.
2. What some courts have termed ‘cultural factors’, or problems of collective memory, as opposed to individuals’ personal experience, that may taint the way witnesses describe what they saw and experienced. Here, the discussion will focus on the *Akayesu* case at the International Criminal Tribunal for Rwanda (‘ICTR’) and the

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Tacaqui case at the Special Panels for Serious Crimes in East Timor ('SPSC').

3. The inter-relation of trauma and the passage of time on memory. Other contributions to this volume reflect cutting-edge scientific research on this issue. The analysis here will focus rather on how some cases at the ICTR and International Criminal Tribunal for the former Yugoslavia ('ICTY') have attempted to conceptualize this problem and to assess its impact on the credibility of individual witnesses.

2.1. The *Demjanjuk* Case and the Legacy of World War II Prosecutions

World War II trials of alleged German war criminals have continued for many decades after Nuremberg. In Germany and Italy, for example, cases have continued to be tried into 2011. Since the *Einsatzgruppen* trials in 1958 and, the beginning of the *Auschwitzprozesse* in Frankfurt in the early 1960s, the German courts in particular have increasingly faced difficulties concerning both the credible identification of accused persons, especially because they were for the most part relatively low level perpetrators rather than prominent public figures, and also the connection of individual accused to specific criminal acts. These became frequent grounds for acquittal or extreme mitigation of punishment.

Falsification or substitution of identity documents, together with the difficulty of witnesses in identifying a person 20 years or more after they saw them in a Wehrmacht or SS uniform in a camp or killing site, proved to be stumbling blocks in a number of cases. The chaos following World War II contributed to the ability of some individuals to credibly establish false identities. In one of the most notorious cases, a famous German journalist in Hamburg simultaneously pursued his professional career in that city while under criminal investigation for war crimes in Frankfurt under a different name. It was only much later that his dual identity was revealed.

Such grounds also provided ample opportunity for some German judges who, in the Cold War atmosphere of the 1960s, were often not particularly interested in convicting Germans of war crimes.¹ In the Ausch-

¹ As has been well documented in books such as *Die Kalte Amnestie*, J. Friedrich, a very significant percentage of judges sitting on the bench in the 1950s and 1960s had

witz and other mass murder trials that began in the 1960s, dealing mostly with guards and security personnel in killing centres in Poland, judges often insisted upon an “individuation” (*Individualisierung*) of guilt to prove the crime of murder under German criminal law. In contrast to contemporary practice in crimes against humanity prosecutions at the ICTY or ICTR, the prosecution had to prove that the defendant had ordered, supervised, or committed a particular murder, of particular persons, at a definite time and place. In one such case, for example, the charges were dismissed against an SS officer in charge of a district in Poland where SS units under his authority murdered 15,000 Jews because it could not be shown at exactly which murders he was present. The court accepted his authority as the local SS commander responsible for seeing that the liquidation was carried out, and that he was at times present at the scene where the actual crimes were committed (it takes a long time to execute 15,000 persons at a mass grave site). The prosecution, however, could not satisfactorily establish exactly who had been killed when he was physically present and at which times and dates those specific killings took place. Hence, his guilt could not be “individualised”.²

Needless to say, because of the very nature of systematic mass murder such a standard made prosecution quite difficult, since those who would be prepared to provide such evidence were the objects of the executions, and other SS officers present, if available as witnesses, were unlikely to incriminate their comrades or themselves.

The strange saga of one case in which issues of identity, documentation, and the effects of the passage of time on witnesses’ ability to recognize an accused person were litigated over many decades in three countries perhaps provides the most vivid and notorious example of these problems.

Ivan, or, as he later became known, John Demjanjuk was born in the Ukraine in 1920. He was apparently taken as a prisoner of war by German forces in the Ukraine in 1942. Recruited by the SS in the POW Camp in Chelm, Demjanjuk then served as a guard in various concentration camps. His 1942 SS-ID, or *Dienstausweis*, provided important doc-

served as judges in the NS period, producing a marked institutional “reluctance” to convict or hand down harsh sentences.

² David Cohen, “Beyond Nuremberg”, in C. Hesse and R. Post (eds.), *Human Rights in Political Transitions*, Zone, New York, 1999, p. 55.

umentary evidence in his subsequent prosecutions, both for purposes of identification and for establishing where he served.

After training as an SS camp guard at Trawniki, his *Dienstausweis* indicates that he was posted to the extermination centre at Sobibor in 1943. Exactly what he did at Sobibor proved to be a point of contention in subsequent litigation, but testimony from another SS guard, Ignat Danlichenko, alleged that he served in all parts of the camp, including where the unloading of the cattle cars, gassing, and cremation took place. What is known with certainty is that Demjanjuk emigrated to the United States after World War II and was less than candid about his activities during the war.

Demjanjuk's legal difficulties in the United States began in 1977, when he was accused of being a war criminal and citizenship revocation proceedings began against him. In 1981, he was stripped of his United States citizenship and in 1983, Israel requested extradition on the grounds that Ivan "John" Demjanjuk was the notorious Sobibor camp guard known as "Ivan the Terrible". Demjanjuk fought the extradition request for several years, notably on the grounds that he was not in fact the man who had been known as "Ivan the Terrible" and that the Israeli authorities had mistakenly identified him as such. Whether or not this identification was correct eventually turned out to be far from easy to establish beyond a reasonable doubt, but in 1986, Demjanjuk was deported to stand trial in Israel.

Demjanjuk's defence that he had been inaccurately identified as "Ivan the Terrible" proved to be in vain. Numerous Sobibor survivors identified him in the Israeli courtroom as such, and he was convicted on this basis in 1988. Demjanjuk appealed and new evidence indicated that "Ivan the Terrible" was in fact a different person, Ivan Marchenko. Demjanjuk had been wrongly identified by numerous witnesses. The Israeli Supreme Court overturned his conviction, and in 1993, he was returned to the United States.

His legal troubles did not end here, however, as in 2001, he was again accused in the United States of having served as a guard at the Sobibor and Flossenburg camps. He contested this accusation but in 2005, a deportation order was issued, against which he appealed.

Deported to Munich in 2009, Demjanjuk again stood trial, this time before a German court, where he was charged as an accessory to the murder of 29,000 persons at Sobibor. Unlike the trials of the 1960s, the prose-

cution did not connect him to specific crimes but rather to his role at Sobibor. They alleged that by working as a guard at a death camp, he was a participant in the killings that took place there. When he was convicted in May 2011, the BBC commented that this was the first time that such an argument had been accepted by a German court.³

One of the striking things about the Munich trial was that there were no longer any living witnesses brought to court to identify Demjanjuk and testify against him. With the passage of so many decades, witnesses had died or were no longer in a position to testify. The prosecution, deprived of witness identification in court that in any event would have been highly contested, relied instead upon documentary evidence. They claimed that his *Dienstausweis* showed both his training at Trawniki and his posting to Sobibor. The defence claimed that in the absence of corroborating witness identification, the documentary evidence was insufficient because his SS ID was part of a forgery campaign by the KGB. They introduced an FBI report which they alleged supported their claim. The prosecution, on the other hand, produced evidence to show the genuineness of the SS *Dienstausweis*. The court found that Demjanjuk was guilty as charged, sentenced him to five years imprisonment, but released him pending an appeal on grounds of ill-health. He died on 17 March 2012, finally ending this long saga of contested identity.

If witnesses had been alive to testify against Demjanjuk, how reliable would have been their in-court identification, some 65+ years later? In the end, Demjanjuk was convicted only on the basis of documentary evidence that showed that he was at the camp. No witnesses could either identify him or testify as to what he did there. Given that numerous witnesses had falsely identified him in Israel in 1988, how should a court have evaluated the credibility of witnesses whose memories were more than half a century old and who were seeing a man that bore scant resemblance to the young SS guard they had seen so long ago.

2.2. Collective Memory and ‘Cultural Factors’

The problem of collective memory in the context of the effect of time on evidentiary testimony refers to how in many societies the memory of events is shaped by community understandings of the past that influence

³ John Demjanjuk guilty of Nazi death camp horrors, BBC, 12 May 2011.

the way in which individuals recount past events. As has appeared in a number of cases in various tribunals, witnesses sometimes testify as if they had actually seen an event when in fact they have only heard about it. The interpretation that such a witness is lying may in fact reflect a misunderstanding of the way in which knowledge and memory are shaped and expressed in some societies. Testimony of individuals about what they saw or experienced in such cases may merge with the collective understanding of their neighbours, kin, or communities about what happened. This may be particularly the case for small, close-knit neighbourhoods, districts, or village communities in traditional societies, such as in Rwanda, Sierra Leone, or East Timor, with predominantly oral cultures. In such societies, the telling and retelling of the story of events is a way in which collective community memory and identity is shaped, transformed, and transmitted over time. With the passage of time, a collective story that makes sense of the violence for the community that experienced it emerges. This can begin soon after the events as members of the community discuss what occurred and try to come to terms with it. Someone who was at the scene but did not see X or Y may testify that they saw it because that is what others have told them and the community (or part of it) has decided that is what happened. Over time, they may come to believe it or may not appreciate the difference between having seen it themselves and having heard about it.

Such problems as described above sometimes become evident when, after direct examination about eye-witnessing, cross-examination reveals that the witness could not have seen the event in question. When monitoring the Special Court for Sierra Leone ('SCSL'), I experienced a striking example of this phenomenon when an insider witness was testifying about a campaign of violence in which he had participated. On direct examination, in response to the Prosecutor's repeated narrative of prompting questions of "What happened next?", the witness would relate what he had seen and experienced. Or so it seemed until the defence objected that no foundation had been laid for how the witness had come to know about what he was recounting. In response to a question as to how he knew that certain things had been done by the rebel forces, he revealed that he had not actually seen the event in question but had only heard about it. It took several reiterations of this pattern before the Prosecutor understood that she had to ask him "What did you see?" and not "What happened next?". Similar issues arose routinely in trials at the ICTR and at SPSC.

While it is clear that the passage of time plays an important role in the way in which collective memory develops in various societies, it is far from clear how to disaggregate common knowledge from personal eye-witness experience when witnesses may not be culturally equipped to appreciate fully the difference when they are testifying about events which they have both witnessed and intensively discussed with other witnesses and victims in their communities. A traumatic series of events in a small-scale traditional community may become the subject of on-going and intense discussion and interpretation. The community discussion and interpretation in which individuals participate may in turn affect the way in which they remember what they experienced. This phenomenon has been noted in a number of cases, of which an example from the ICTR may prove illustrative.

In the very first trial at the ICTR, the *Akayesu* case, the Court was confronted with the problem of whether witnesses were systematically lying and colluding to ensure convictions, as the defence claimed, or whether other factors were at work. This issue arose persistently at the ICTR in a number of cases.⁴ While some observers believed that Rwandans participated in a culture of falsehood, some trial chambers tried to come to grips with how “cultural factors” exerted an impact on testimony over time.

The court in the *Akayesu* case considered these issues in a section of the Judgment entitled, *Cultural Factors Affecting the Evidence of Witnesses*. The Court called expert witnesses to assist it in dealing with defence allegations of systematic lying. Dr. Mathias Ruzindana testified that:

[...] most Rwandans live in an oral tradition in which facts are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or

⁴ See, e.g., International Criminal Tribunal for Rwanda, *The Prosecutor v. Emmanuel Nindabahizi* (‘Nindabahizi case’), ICTR-2001-71-I, Judgement, Chapter II, Section 3.5, entitled “Fabrication of Evidence and Collusion among Witnesses”. In Paragraph 110, the Court states that, “[b]oth the Prosecution and the Defense have alleged that witnesses appearing for the other side have conspired in the presentation of false testimony”. Where such collusion in knowingly false testimony exists, this, of course, raises other issues than those under consideration here in regard to collective memory. For a discussion of the ways in which deliberate false testimony may operate in a social and culture context where it is condoned, regarded as natural, or encouraged, see David Cohen, *Law, Violence, and Community in Classical Athens*, Cambridge University Press, 1995.

recounted by someone else. Since not many people are literate or own a radio, much of the information disseminated by the press in 1994 was transmitted to a larger number of secondary listeners by word of mouth, which inevitably carries the hazard of distortion of the information each time it is passed on to a new listener. Similarly, with regard to events in Taba, the Chamber noted that on examination it was at times clarified that evidence which had been reported as an eyewitness account was in fact a second-hand account of what was witnessed.⁵

At the ICTR, as at most tribunals, witnesses were typically testifying several years after the events they alleged to have witnessed. In recent cases, trials are taking place 15 years or more after the Rwandan Genocide. Needless to say, with the passage of time, as more and more individuals participate in the shaping of the community memory of an event, the oral tradition of which this event becomes a part takes on a life of its own as it is transmitted and re-transmitted again and again over time. Although, Dr. Ruzindana opined that Rwandans, when asked, are able to distinguish between what they saw themselves and what they learned from others,⁶ the way in which the passage of time affects this ability has been little studied. In post-conflict situations, this may be a particular problem because the narrative of events that develops in a community may also be shaped by post-conflict politics and provide additional incentives or motivations for individuals to come to believe they have ‘seen’ something that they might not actually have witnessed, or, at the very least, to become increasingly reluctant to deviate from what has become the established ‘history’ of events in that community. This can impact every aspect of a case, including key identifications of the accused at crime scenes, as transpired, for example, in the *Ndindabahizi* case.⁷

This situation is similar to what occurred in a number of cases at the SPSC in East Timor. There were occasions where it appeared that wit-

⁵ International Criminal Tribunal for Rwanda, *The Prosecutor v. Akayesu* (‘Akayesu case’), ICTR-96-4-T, Judgement, 2 September 1998, para. 155.

⁶ *Ibid.*

⁷ There are lengthy discussions of credibility where the Judgment tries to sort out the various inconsistencies and contradictions in testimony and resolve to what extent they create reasonable doubt. See, e.g. *Ndindabahizi* case, *supra* note 4, paras. 128, 197, and 246, for a few examples of how such factors render identification of the accused or his presence at a crimes scene unreliable.

nesses who had testified to what they had seen were in fact testifying as to what they had heard from others in their communities. As noted above, this is a problem of traditional societies, especially in overwhelmingly oral cultures like that of East Timor, where literacy was low and Tetun, the most widely spoken indigenous language, was at the time for the most part not a written language. Many of the crimes prosecuted at the SPSC occurred in small or very small communities. Apart from the capital, Dili, there were no significant urban environments in East Timor in 1999, where the total population of the country was approximately one million.

The production of collective memory, of an accepted community version of events, can be particularly powerful in such small-scale traditional village societies though it also operates in larger societal contexts. The situation in East Timor was compounded by the fact (also found in many other post-conflict societies) that the internal divisions within communities and families over allegiance to Indonesia produced competing narratives and operated to solidify those narratives within groups in ways that could directly impact testimony in the courtroom.

In a small community, an event like those that transpired in East Timor in 1999 (and 1974–1999) rends the fabric of social and familial relations. In the aftermath of such conflict, it is necessary for the community to come to terms with what has happened, for every family has been affected by such events and decisions will need to be made as to the accountability and reintegration of victims and perpetrators. In traditional Timorese communities where little was known of the outside world, or even what was transpiring in the capital, events surrounding the conflict dominated the consciousness of the community and became a part of community identity. These events were intensely discussed, and inevitably the opinions of others and particularly the collective interpretation that emerged becomes what has happened. Many in the community will not readily distinguish between their personal experience and observations, and the communal story that has emerged and been accepted. This may be less true for direct victims testifying as to the rape or torture that they themselves experienced, but it may be quite different for those asked to recount what they saw. As noted above, social pressure may operate to motivate individuals to conform their individual memory of events to the accepted community narrative. One of the Judgments of the SPSC offers just such an explanation for the changes in the testimony of 14 witnesses to a massacre. In one example, such a change in testimony from before

and after the witness's community learned of what he had said is instructive:

Rather, the Court notices that the witness emphasized that in Dili and after years from the initial interview, he felt free to state the truth; the Court thinks that this new attitude of the witness, which can be put at the origin of the first change of version, may have dissolved when the witness was heard in Passabe, where the conditions of social pressure were clearly different: the witness didn't have the freedom to speak any more, surrounded, as he was, in the course of the testimony in the Police Station of Passabe, by villagers and eminent members of his community whose expectations he did not want to fail.⁸

The Judgment quoted immediately above, from the *Florenco Tacaqui* case at the SPSC, repeatedly reflects the court's frustration at trying to sort out what witnesses actually saw and what they later decided had occurred. This problem was not unusual in trials at the SPSC. What is unusual is the lengthy analysis that attempts, however clumsily, to deal with these issues, as opposed to most quite abbreviated SPSC Judgments that largely ignore or only deal cursorily with matters impacting credibility.⁹

Tacaqui was a local pro-Indonesian militia leader who was alleged to have been personally involved in a massacre of 47 persons. Almost none of the individuals who testified against him at trial even mentioned him in their initial interviews with investigators. They were not specifically asked about him at that point because he had not emerged as a suspect for investigators. Only after he had become the object of investigation did these individuals 'remember' that they saw him at the scene of the massacre. The Court attributes this shift to various cultural qualities of Timorese society such as a disposition to lie or a disposition to tell people what they think those persons want to hear.

⁸ Special Panels for Serious Crimes, *P. v. Florenco Tacaqui* ('Tacaqui case'), 20/2001, Judgement, 9 December 2004, p. 42. The Judgment was written by a judge who was not a native English speaker, which accounts for the style and grammatical errors.

⁹ I have dealt with these issues extensively elsewhere. See David Cohen, *Indifference and Accountability: the United Nations and the politics of international justice in East Timor*, East-West Center, Honolulu, 2006.

What may have in fact transpired is that with the passage of time the community comes to attribute responsibility to certain persons and to adopt a particular interpretation of what happened. This is then what everyone believes occurred. For example, one witness changed his story when pressed by the Presiding Judge and retracted his earlier statement that he had seen Tacaqui. When pressed to explain, he confirmed his earlier statement given in Court saying that “he did not know about the presence of the accused in Teolassi directly, but that my colleagues told me that he was there”. The presiding judge then asked him, “when you were interviewed by the investigators you said that Florencio Tacaqui participated in the killing, now why this (double change of version) happen?” The witness replied significantly, “[b]ecause he was a commander of the militia [...] he also killed people”.¹⁰

It was striking that it was only many months into the investigation that the witnesses first named Tacaqui as the leader of the militia that perpetrated the massacre and attack. They did not mention him before but soon all of them were able to recall his presence and his key role. What seems to have happened is that this understanding emerged in this community and soon all believed that they knew, and or had seen, Tacaqui. The court struggling to explain the contradictions in their various statements noted in regard to one such witness:

Now, the Court notices (and will come on the issue again later) the unsolvable contradiction in which the witness fell and his changing attitude in referring the episode before and after the arrest of the accused: it is not necessary to spend words to underline the inconsistency of the two versions which can only find a solution in the radical negation of the trustworthiness of one of them [...] Mateus Colo was unable to give any logical explanation.¹¹

In analysing the testimony of some 14 witnesses who had placed the accused at the scene of the massacre, the court reasoned:

Hearing their testimonies as reading their deposition in Court leaves the listener astonished for the level of unreliability of such versions where the severity of the contradictions or incongruities is only balanced by the apparent naivety of all

¹⁰ *Tacaqui* case, *supra* note 8, pp. 30–31. The Judgment italicizes quotations from the witnesses’ testimony.

¹¹ *Ibid.*, p. 35.

those who proffer them. All the witnesses but one in this batch were heard by investigators before the arrest of the accused but their declarations at the time, though detailed on the massacre in Teolassi, had not involved the accused whom they “discovered” only at the trial stage.¹²

The Court offers the following explanation for the evolution of the testimony on Tacaqui’s presence at the scene of the massacre:

The Court is not ready to state that someone specifically imposed or suggested the witnesses, after the arrest of Tacaqui, to go before the investigators and tell them a specific version [...] The members of the Panel have experienced, in several occasions in East Timor, how easy is for a witness, to be influenced and to fall victim of erroneous reconstructions of the facts, based on the need to satisfy the interlocutor. This is what the Panel believes has happened in the present case.¹³

The Court’s ultimate explanation, then, is what it refers to as “collective suggestion”. What this appears to involve, abstracting away from the particulars, is the impact of social context upon the recollection of witnesses as their testimony shifts over time to accommodate the expectations conveyed by the narratives dominant in the context in which they find themselves. As one of the examples above makes clear, the most powerful influence in those contexts is the small community in which they experienced the events and of which they continue to be a part. The normative expectations of that community, and in particular as expressed through its leaders and what the Court calls its “eminent persons” produce a coherent history of the past that individuals are loathe to appear to contradict. More importantly, as the Court recognizes, they come to believe those narratives. Of course, as noted above, there may exist competing narratives that may be articulated by different parties in different circumstances. In other words, as time passes from the initial criminal event, a narrative history of the events evolves, and continues to evolve, reflecting the social and political dynamics of the community and the cultural practices of an oral culture in which history is not written but is constantly recreated and re-instantiated through its role in the life of the community over time.

¹² *Ibid.*, p. 44.

¹³ *Ibid.*, p. 47.

A war crimes tribunal enters this scene at a remove in time and in cultural space. In societies like that of East Timor, when asking witnesses, at the various stages of the judicial process, often many years after the event, to recount what they saw and experienced, judges unfamiliar with such traditional cultural practices may experience the confusion and frustration clearly, if inopportunately, expressed by the Italian judge who authored the *Tacaqui* Judgment. One such section of the Judgment bears quoting at length as it reveals the depth and impact of this cultural divide in mutual understanding and its effect upon the conduct of the trial and the apprehension of judicial proof by the judges:

In general, on the collection of oral evidence, all the difficulties already met in previous trials before the Special Panels surfaced again in the present case: the interpretation of the words of the witnesses, issues relating to their credibility and reliability, the capacity to understand the context in which their narrations are embedded are crucial and more troublesome in the Timorese cultural environment than in other jurisdictions. Most of the people who came before the judges to say what they saw of the facts and to give their contribution to the trial, were basically illiterate and scarcely able to narrate events in a congruent and exhaustive manner. Their ways to refer things appeared very often [...] obscure and numb, like a piece of wood or of stone in the process of being worked by the artisan to become an utensil or a decoration [...].

It has sometime happened that this exposure of some witnesses to the cross-examination and to the rules and customs of inquiry by the Parties [...] has brought confusion and contradiction, instead of clarity, with witnesses unable to come out from the bundle of contradictions created from their own words. In many cases the original version of a fact or of a detail regardless of relevance was modified during the course of testimony and the attempt to clarify the facts lead to renewed sources of confusion.

What's more, it should be noted that a pattern of behavior was noticed in many witnesses: the paucity of their culture was used by them as a defense. In other words, when a contradiction emerged, the excuse of the limited capacity to understand or remember was readily used by the same interviewed to justify even the most macroscopic of contradic-

tions. Facing a request for clarification, or being asked which were the correct of two versions, the answer was often: “I don’t know: we are simple people; we didn’t go to school; we are illiterate; we are not like big people; we are son of God, what we know we say, what we don’t know, we don’t say”.¹⁴

The *Tacaqui* Court tried to evaluate witness credibility while trying to understand how what the Court in *Akayesu* case called “cultural factors” had affected what the witnesses recounted in the courtroom. It is to the credit of this panel of judges that they did so, for most Judgments at the SPSC paid scant attention to such issues and offered little analysis of credibility or justification of their factual findings. On the other hand, the failure to bridge that cultural divide made manifest by the *Tacaqui* Judgment itself is apparent. The obvious sense of frustration of the Court, and the offensive parody of Timorese witnesses in the last paragraph of the quotation immediately above, are indicative of the depth of this failure.

2.3. Assessing Credibility: Memory, Passage of Time, and Trauma as Impacting Witness Testimony

As one of the contributions to this volume deals in depth with the issue of trauma, memory, and witness testimony from the standpoint of clinical psychology, the purpose of this concluding section is simply to review the way in which the ICTR and ICTY trial chambers have evolved a judicial standard for dealing with such questions.

It is the nature of tribunals dealing with mass atrocity that many of the witnesses appearing before them have experienced horrific events that have left them deeply traumatized. Very often they have also had no opportunity to receive treatment or support for the psychological effects of their experience. It is also the nature of contemporary tribunals that individuals are often interviewed by investigators years after they witnessed or suffered the criminal conduct that is the focus of the proceedings. Moreover, several more years typically pass before those individuals appear in a courtroom and testify as to what they saw and experienced. The section above has dealt with the way in which social and cultural factors and practices can with the passage of time have an impact upon the way in which individuals remember or recount their experience. This section

¹⁴ *Tacaqui* case, *supra* note 8, p. 5.

deals with the way in which judges have taken into account the effect of trauma and of the effect of the passage of time on memory in assessing witness credibility and making factual findings based upon a standard of proof beyond a reasonable doubt.

We can begin by returning to the *Akayesu* case. As noted above, the Defence had argued that there had been systematic collusion among prosecution witnesses to provide false testimony. The court responded, however, by pointing out other factors that could produce the kinds of inconsistencies noted by the Defence. The judgment notes that such discrepancies could be due to the fallibility of perception and memory and the operation of the passage of time:

The majority of the witnesses who appeared before the Chamber were eye-witnesses, whose testimonies were based on events they had seen or heard in relation to the acts alleged in the Indictment. The Chamber noted that during the trial, for a number of these witnesses, there appeared to be contradictions or inaccuracies between, on the one hand, the content of their testimonies under solemn declaration to the Chamber, and on the other, their earlier statements to the Prosecutor and the Defence. This alone is not a ground for believing that the witnesses gave false testimony [...] Moreover, inaccuracies and contradictions between the said statements and the testimony given before the Court are also the result of the time lapse between the two. Memory over time naturally degenerates, hence it would be wrong and unjust for the Chamber to treat forgetfulness as being synonymous with giving false testimony.¹⁵

Akayesu was the first trial completed at the ICTR. Some ten years later, the issue becomes one which is seen to arise in every case as part of the more general issue of how to assess the credibility of witness testimony. By that time, however, the ICTY and ICTR have largely developed a standard approach for dealing with these questions. For example, the ICTR *Nchamihigo* case (trial in 2006–2007), was tried some 13 years after the genocide in Rwanda. How did the Trial Chamber deal with how this considerable lapse of time affected the ability of witnesses to recall facts with sufficient precision so as to meet the burden of proof? The

¹⁵ *Akayesu* case, *supra* note 5, para. 140.

court dealt with the passage of time and inconsistencies in testimony with what has become a routinized response:

The jurisprudence on the recollection of details is also well formulated. The events about which the witnesses testified occurred more than a decade before the trial. Discrepancies attributable to the lapse of time or the absence of record keeping, or other satisfactory explanation, do not necessarily affect the credibility or reliability of the witnesses. The Chamber will evaluate the testimony of each witness in the context of the testimony as a whole and determine to what extent it can believe and rely on the testimony. In making this assessment, the Chamber will consider whether the testimony was inconsistent with prior statements made by the witness and, if so, the cause of the inconsistency. [...] The Chamber will compare the testimony of each witness with the testimony of other witnesses and with the surrounding circumstances.¹⁶

This says little more than that such case will be handled in the same manner as judges handle any case in which there is a lapse of time: by assessing credibility according to the usual criteria. There is no special problem of memory and reliability acknowledged in such cases either because of the extreme lapse of time or because of the nature of the events. What happens, then, when the issue of trauma is sandwiched together with that of memory?

The ICTR *Nyiramasuhuko* case considers this issue:

Many witnesses lived through particularly traumatic events and the Chamber recognises that the emotional and psychological reactions that may be provoked by reliving those events may have impaired the ability of some witnesses to clearly and coherently articulate their stories. Moreover, where a significant period of time has elapsed between the acts charged in the indictments and the trial, it is not always reasonable to expect the witness to recall every detail with precision.¹⁷

¹⁶ International Criminal Tribunal for Rwanda, *The Prosecutor v. Siméon Nchamihigo*, ICTR-01-63-T, Judgement, 12 November 2008, para. 15.

¹⁷ International Criminal Tribunal for Rwanda, *The Prosecutor v. Pauline Nyiramasuhuko et al.*, ICTR-98-42-T, Judgement, 24 June 2011, para. 179.

This paragraph acknowledges that there is a problem but does little to resolve it, and in particular to resolve how that lack of precision and loss of ability to recount detail is to be dealt with in light of the presumption of innocence and the burden of proof beyond a reasonable doubt. How is reasonable doubt to be assessed when it is acknowledged that the dual forces of time and trauma have eroded the ability to precisely recall the details of events?

It is the ICTY Trial and Appeals Chambers that have dealt with this issue in the greatest depth. The *Kunarac* case was a thematic sexual violence prosecution involving the sexual enslavement and repeated rapes and other severe mistreatment and torture of a large number of victims, typically over a period of many months. In addition to the problem of memory and trauma, the conditions under which the victims were held made it difficult or impossible for them to testify as to the details of the dates and times when specific events occurred. In some cases, because of the repetition by multiple perpetrators of the sexual violence to which they were subjected, it was also difficult for some witnesses to recall the chronology of events or to identify the accused with certainty. In deciding how to evaluate credibility in light of all of these issues, as well as the passage of some seven or eight years since the crimes occurred, the Trial Chamber acknowledged the same framework as articulated by the ICTR decisions noted above. But the *Kunarac* case went a step further in also setting out a test on which to base findings in particular cases where there were discrepancies between previous statements and in-court testimony.

The essence of the Court's approach was to distinguish between details that were mere "*minutiae*" or peripheral, as opposed to the facts and details that made up the "essence" of the event. They were prepared to disregard considerable inconsistencies as to details if the "essence" was recounted with consistency and coherence. The Court dealt at some length with its approach in general terms and then applied it while examining the credibility of each witness in regard to each criminal act alleged in the indictment.

The Court began by acknowledging the impact of trauma upon the victims and their ability to recount events with clarity and detail:

By their very nature, the experiences which the witnesses underwent were traumatic for them at the time, and they cannot reasonably be expected to recall the minutiae of the particular incidents charged, such as the precise sequence, or

the exact dates and times, of the events they have described [...] In general, the Trial Chamber has not treated minor discrepancies between the evidence of various witnesses, or between the evidence of a particular witness and a statement previously made by that witness, as discrediting their evidence where that witness has nevertheless recounted the essence of the incident charged in acceptable detail [...] The Trial Chamber has also taken into account the fact that these events took place some eight years before the witnesses gave evidence in determining whether any minor discrepancies should be treated as discrediting their evidence as a whole.¹⁸

The Trial Chamber also explicitly acknowledged the burden placed upon the Prosecution by the particular circumstances of the victims. For example, in regard to the ability of women who were as young as 15 at the time the crimes were committed, the Court confirmed that they had scrupulously applied the test of proof beyond a reasonable doubt together with their standard of “essence” *versus* “periphery”:

[T]he absence of a detailed memory on the part of these witnesses did make the task of the Prosecution in providing proof to that degree of satisfaction more difficult, its absence in relation to peripheral details was in general not regarded as discrediting their evidence.¹⁹

Applying this standard to specific cases, the Trial Chamber in numerous instances attested that the inconsistencies or lapses in memory of the traumatized victims were serious enough that the Prosecution had not met its burden of proof in regard to those particular rapes or acts of sexual violence. In many other cases, however, the factual findings concluded that despite various inconsistencies the Prosecution’s burden had been met. For example, in regard to the rape of witness FWS-95 by Kunarac, the Judgment concludes that,

[t]he Trial Chamber regards this lapse of memory as being an insignificant inconsistency as far as the act of rape committed by the accused Kunarac is concerned. In particular, the Trial Chamber is satisfied of the truthfulness and completeness of the testimony of FWS-95 as to the rape by

¹⁸ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Kunarac et al.* (‘Kunarac case’), IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001, para. 564.

¹⁹ *Ibid.*, para. 565.

Kunarac because, apart from all noted minor inconsistencies, FWS-95 always testified clearly and without any hesitation that she had been raped by the accused Kunarac [...]. As already elaborated above, the Trial Chamber recognises the difficulties which survivors of such traumatic events have in remembering every particular detail and precise minutiae of these events and does not regard their existence as necessarily destroying the credibility of other evidence as to the essence of the events themselves.²⁰

If one systematically compares the way in which this standard was applied to different witnesses and events by the Trial Chamber in *Kunarac* case, it is at times difficult to discern consistency in its application. One is left at times with the conclusion that the ultimate test is actually whether the judges at some more instinctual level were “satisfied with the truthfulness and completeness of the testimony”. For in practice, it may indeed be difficult to distinguish between details that are so peripheral that they do not reflect upon the reliability of the memory of the accused and those which do. There is no need here to dwell upon this issue, however, for the main point is how the judges define their approach. It is interesting to see how their distinction between essential and peripheral events comports with the clinical findings reported elsewhere in this volume.

The approach followed in the context of sexual violence in *Kunarac* also reflects the general standard articulated by the ICTY Appeals Chamber in the *Delalić* case. There, the Appeals Chamber accepted the Trial Chamber’s method of focusing on the “fundamental features” of the witness’s testimony.²¹ The Appeals Chamber concluded that the Trial Chamber was entitled to find that the fact that a witness might “forget or mix up small details is often as a result of trauma suffered and does not necessarily impugn his or her evidence given in relation to the central facts relating to the crime”.²² In the end, what the Appeals Chamber does is to follow the traditional approach of leaving fact-finding to the Trial Court in the exercise of its judgment and discretion to assess the credibility of witnesses. There appears to be a complete reluctance on the part of the judges to

²⁰ *Ibid.*, para. 679.

²¹ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Zejnil Delalić et al.*, IT-96-21-A, Judgement, 20 February 2001, para. 485.

²² *Ibid.*, para. 497.

relinquish any part of this exercise of judgment on particular accused and particular witnesses to medical experts on trauma and memory. Such experts may provide general testimony as to the nature and impact of trauma on memory, but not on how it has affected the particular memory of a specific witness. The test of “fundamental features” or “essence” as opposed to minor or peripheral details may seem unsatisfactorily vague and subjective to defence counsel, but it also operates to preserve the core function of the trial judge to assess credibility through the traditional experience of observing the witness and weighing his or her testimony according to a variety of factors and impressions that determine the ultimate finding.

Adjudicating Core International Crimes Cases in which Old Evidence is Introduced*

Alphons M.M. Orie**

The purpose of this chapter is to participate in the discussion on the topic of old evidence. It will not be exclusively limited to the evidentiary problems encountered in the adjudication of international crimes, since evidence is evidence, whether it concerns the adjudication of international or domestic crimes. Therefore, international standards not only apply to international tribunals judging core international crimes, but also to any national criminal courts.

To make the matters that will be discussed more understandable, the following hypothetical case will be used as a background illustration, which will be revisited at the end of the chapter:

In 1946, “Mr. X” was convicted *in absentia* for collaborating with the German occupation as a *Quisling*, that is, not a war criminal but a collaborator. He first fled to South America where he lived a very decent life, within the Mennonite community before finally ending up in Canada. In the early 1990s, approximately 50 years after the event, he was arrested and expelled to the Netherlands. He was described in the media as the “terror of his village”.

The examination of his file, 50 years after the respective events, resulted in several interesting findings, in particular the stories of two inci-

* The text of the contribution of Judge Orie was extracted from an audio recording. Unfortunately Judge Orie was only able to superficially screen the text, which is published here. This chapter therefore primarily reflects co-editor CHEAH Wui Ling’s understanding of Judge Orie’s contribution.

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dents, both of which involved Mr. X. The first one related to a German soldier who had deserted his troop and was found shot. According to a witness statement in the file, Mr. X had ordered this person to stop as he ran away. The man had raised his hands but had nevertheless been shot in the head from a distance of 20–30 meters. The file also contained a medical report stating that the victim died of a shot wound in the left of his head. The other incident involved the pursuit of someone who had tried to escape Mr. X's arrest. In the file there was a detailed sketch of the streets down which this person had been pursued and finally killed.

Before looking at these stories in more detail, the first question that needs to be answered when talking about old evidence is what precisely is meant by the term 'old evidence'?

3.1. The Limits of the Legal Approach to 'Old Evidence'

The term 'old evidence' commonly refers to evidence concerning events that happened a long time ago. From a formal legal perspective, namely, that of the law of evidence, evidence is as fresh as it is presented. If someone gives testimony in court, it is quite hard to say whether it is 'old' or 'fresh' evidence. It is just evidence, presented at a certain point of time. It might therefore be that the legal approach does not produce a fully satisfactory answer to the challenges encountered when dealing with 'old evidence' about events that have long since passed. Furthermore, the meaning of the word 'evidence' differs from one legal system to another, for instance whether one comes from the common law system or the civil law system. Within the former, evidentiary material, or its admission into evidence, can only be done by virtue of a decision taken by the judge, or chamber, in court during trial. Within the latter it is what is put down on paper, and what makes up the content of the case file, that is considered to be evidence. In legal systems with juries (Bangladesh has abolished the jury), what can be considered as evidence is even clearer: evidence is what is presented to the jury.

Apart from differing views on the definition of what evidence is, these different legal systems also diverge with regard to the way evidentiary procedure is shaped, namely, whether all the material has been presented to the judges before the trial starts or, rather, during the trial itself. In the common law system, evidence is very much about what will be presented and admitted in court and what material can obtain evidentiary status. Whereas the civil law system often deals with what a judge can

consider as evidence or what the minimum evidentiary requirements are for arriving at a conviction. Thus, evidence means information upon which a trier of fact can rely. However, these differences in different legal systems should always be borne in mind when discussing evidence.

3.2. Approaching the Evidence Question in Court: Introductory Remarks

The general assumption is that evidence is the basis upon which a trier of fact bases his inferences and thus establishes the truth of the offence the accused is charged with. This raises a number of issues as illustrated by the following hypothetical example:

A witness testifies that he has seen the accused at the scene of the crime, committing a murder by stabbing the victim. A dead body is found and the autopsy report determines that the cause of death was as a result of stab wounds.

The inference seems to be very simple: the accused killed the victim by stabbing him. Nevertheless, psychologists have taught us that perhaps this formal approach, which starts from the evidence in order to draw inferences, is rather simplistic. In reality, the human mind might function quite differently. The story comes first, and then the verification of the story follows, during which evidence – or at least information – is gathered and objects may be seized. In such a scenario it is the story, rather than the evidence, which influences the prosecution and will be reflected in the charges brought against the accused.

However, instead of the starting point being the evidence provided by witnesses, one could also look at the matter from the other perspective and query what in the story finds support in the evidence that is available. One question to be asked is: what is the weak part of the story? What part of the story of the witness is not supported, or even perhaps contradicted, by other evidence? In the example above, the weak part is the witness who *says* that the accused stabbed the victim. A knife and a corpse are found and there is a *post-mortem* stating that the person died of stab wounds. This type of evidence is, in the context of our hypothetical case, stronger than the evidence of the witness. In normal circumstances, it could be assumed that the evidence is what a witness states. But this step involves presuming many other elements, such as, whether the witness could actually see the crime taking place. The circumstances under which the witness observed the killing remain to be established, such as whether

it was late at night or during the day, what was the distance from which he could observe the crime, etc. Further, could the witness have reason to not tell the truth? Notwithstanding the fact that what he says is well-confirmed by the findings in the autopsy report, it should be noted that the knife has been found which is available for examination.

There are several ways of approaching the problem. The first option is to establish in detail the circumstances under which the witness observed the commission of the crime, by asking further questions as noted above, such as the distance of the witness was from the event. Another option would be to explore potential alternative ways of establishing, totally independently from the witness, whether it was indeed the accused who used the knife to stab the victim. For example, a DNA test could be conducted on the knife. If the DNA found on the handle of the knife matches the DNA of the accused, the witness would be viewed as more credible since there is other evidence that corroborates his statement. Even if this is the case, it would still be worth verifying how well the witness could see the commission of the crime, as the reliability of that evidence is, of course, not a given. It should, however, be borne in mind that the mere fact that a witness' evidence is unreliable does not necessarily mean that the accused is not the perpetrator.

In normal circumstances, the hypothetical example would allow for the conclusion that this particular accused committed the murder. But testing the evidence and looking at every single detail of the story not only allows us to find positive indicia for conviction, it might also result in finding contradicting or inconsistent evidence, as that which may result from a DNA test. In such a case, this reinforces the need to ask further questions of the witness so as to subject his testimony to further scrutiny, such as whether the witness could actually see the crime being committed.

Sometimes, inferences are very easily drawn from the evidence. However, in practice, this should be carefully considered, as demonstrated by a case that came before the International Criminal Tribunal for the former Yugoslavia ('ICTY').¹ This case involved the discovery, in a drainage canal, of several dozens of bodies, with bullet wounds in them, near to each other, and stretched over several hundreds of meters. Most of these people had been arrested by the opposing party to the conflict, de-

¹ *Prosecutor v. Haradinaj et al.*, IT-04-84-T, Judgement, 3 April 2008. See in particular paras. 336–359.

tained, and questioned. The inference seemed to be relatively simple and logical: if someone is detained, his body found a couple of days later, and such an operation repeated many times, always targeting the opponents of one party to the conflict, it would be very easy to conclude that the members of the other party to the conflict were guilty of this crime. However, in this ICTY scenario, some evidence was brought to the attention of the Chamber, which showed that one of the victims, whose body had been found in the drainage canal, had been arrested and detained, but that she had then been released. She then went to a small town to buy a cell phone. She was raped there and killed by persons who knew that many other bodies were deposited in the drainage canal. And that is likely how the victim's body ended up in that canal. This example highlights the need to be very cautious when drawing any inferences from a situation, even though such inferences may seem obvious at first sight.

3.3. Witness Evidence

Witness evidence appears to be most vulnerable when the relevant events occurred a long time ago. It could well be that the relevant information has been exclusively stored in the mind of the observer, but it could also be that it has been recorded or documented closer to the time of the events. Rumours, interference with the witness, mixing up personal observations with information gained from others, to name but a few ways, all create considerable risks when it comes to the reliability of a witness' evidence. Two such influencing factors will now be examined in greater detail.

3.3.1. Issues of Intimidation and Collective Recollection of Events

It is a horrible situation that witness intimidation takes place, but it does take place. Before the ICTY, there were several contempt cases involving attempts to intimidate or bribe witnesses, even involving some defence team members. It is a totally unacceptable situation and such instances should be investigated and brought to court so that impunity is not allowed to reign.

It is important to establish whether a witness relies upon collective recollection rather than on what he observed himself. Often witnesses reproduce what they say was common knowledge in their village or region, where it is unclear what the source of knowledge of such common

knowledge is. Even worse, a witness may reproduce what they have been told the truth should be. One should try to fully explore the existence of other ways of verifying whether the witness' individual stories are true or not. This may require giving the witnesses such protection that they feel confident enough to come forward and testify, rather than to reflect what 'everyone knew' or what has been dictated to them by others as being the truth.

3.3.2. Questions on the Probative Value of Witness Evidence

The use of witness testimony involves many assumptions regarding its probative value. Just because a witness says "A, B or C happened", that does not mean necessarily that the said incident happened. This is true even if there is every reason to believe that the witness thinks he is telling the truth. Was he able to observe what he said he observed? Does the witness have any reason to say something different from what he actually observed? It is not necessarily due to the bad faith of the witness. It may be that the witness was really present and that he saw the commission of the crime, but that he had not more than half a second to see the perpetrator and the circumstances were bad in terms of being able to observe the event. From a psychological point of view, there are certain ways of testing evidence when asking the witness whether he recognises A, B, or C as the one whom he saw at the scene of the crime. Again, this is not part of the law of evidence. This relates to how the perception of a witness works and how judicial evaluation of evidence is performed. It is important to determine whether the evidence was recorded at an early stage. If the evidence was recorded at a point in time closer to the occurrence of the event, it may enable the comparison of a witness statement given almost immediately after the event, with the evidence of the same witness given in court 40 years later.

In this respect, it is interesting to note that Article 8(6) of the International Crimes Tribunal for Bangladesh Act (1973) ('ICT-BD Act') provides that: "The Investigation Officer may reduce into writing any statement made to him in the course of examination under this section".² The ability to do so certainly affects the reliability of the above-mentioned statement, as in such a situation a comparison of what the witness says

² International Crimes Tribunal for Bangladesh Act (1973) ('ICT-BD Act'), Art. 8(6).

immediately after the event, with his later testimony, becomes more difficult.

Even if the statement is unreliable, it does not mean that the witness lied but rather that this needs to be further explored so as to discover the exact explanation for its shortcomings. So if, on the basis of an early recording, discrepancies are found, this does not automatically mean that old evidence is, by definition, bad evidence. Nor is it that fresh evidence is necessarily good evidence. For instance, some research was conducted in universities where lectures were suddenly disturbed by a violent event. Some people entered the lecture room and attacked some of the students, who had no idea that it was all in fact staged. However, when the students were interviewed about what had happened, no more than one hour after the event, they recalled the incident quite differently. Therefore, fresh recollection is not always better recollection. Rather, one should be very careful when dealing with the recollections of persons who have – and this is especially important for international crimes – made their observations under very stressful circumstances. Such circumstances may influence their ability to observe and to recall what really happened.

3.3.3. Impact of the Circumstances around Evidence Collection

If a statement was taken at an early stage after the event occurred, apart from focusing on the content of the statement itself, it is important to know whether it was recorded and collected by a professional. At the ICTY, there have been some instances of witness statements being collected by non-professionals, such as non-governmental organisations ('NGOs'). Such evidence cannot always be relied upon.

Article 19, Section 4 of the ICT-BD Act provides that:

A Tribunal shall take judicial notice of official governmental documents and reports of the United Nations and its subsidiary agencies or other international bodies including non-governmental organisations.³

When this Article is applied, the fact that NGOs might overlook certain important elements of the events, because they are not professionals trained in the taking of statements, should be borne in mind. Often, such persons have not had any legal training, which means that they may

³ *Ibid.*, Article 19, Section 4.

pay far more attention to certain less important aspects of the events that occurred, while forgetting elements which are essential for the legal evaluation at a later stage. Finally, as illustrated by the example given above relating to the students in the lecture room, it is important, when the witness' statement is taken, to be aware of the degree of stress the witness underwent. It could be that the witness was still shocked by the event.

3.3.4. Technical Aspects of Witness Identification

One technical aspect to be considered relates to the identification of a person. Professor Cohen's chapter describes the 'Ivan cases'. One of the results of the Israeli case against Mr. Demjanjuk was the publication of a book by Professor Wagenaar, in which he set out 50 essential rules for identification procedure.⁴ For example, the photo spread or line-up identification of a perpetrator by a witness, who already knew one of the persons presented to him from previous encounters, is useless. If a witness claims to see his next-door neighbour committing a crime, what is the need of giving him a photo spread? If the witness has seen the person he identifies as the perpetrator before, it is a rather useless exercise. This is because he has already established in his mind who the perpetrator was. He would then, of course, select his next-door neighbour not on the basis of recognition of the person he saw at the crime scene, but because he recognises him as the next-door neighbour he knows so well.

There are, therefore, a number of rules that must be borne in mind so as to ensure the integrity of this process of identification. For instance, a session of photo-identification during which the witness is given only one picture will result in a totally unreliable identification. In the same way, if the witness is given a photo spread of six persons who all look very different – *exempli gratia*, one is an African and the other one is a Caucasian or a European – then of course, even if he cannot recognise that person's facial features, he might recognise the skin tone of the person he saw. And once such misleading identification has been made during the course of investigations, repeating the exercise is also totally useless. Once the witness has identified one particular photo, he will not point to another one the next time, as he will remember which person he

⁴ Willem A. Wagenaar, *Identifying Ivan: A Case Study in Legal Psychology*, Harvard University Press, Cambridge MA, 1988, pp. xii and 187.

identified previously. So once the identification process has been wrongly conducted, the opportunity has been lost and it cannot be remedied.

Another set of questions to be raised in relation to witness evidence concerns the very specific elements that a witness can observe. For example, in the former Yugoslavia, women were often totally unable to identify which kind of uniforms the perpetrators were wearing, let alone any insignia which might identify the individual as a member of unit A, B, or C. In this regard, one should be aware of potential bias, especially in the adjudication of international crimes. In the former Yugoslavia, almost everyone is known as either a Serb, a Muslim, or a Croat. Further, almost everyone is to some extent affiliated to a party to the conflict, which may create a very different kind of bias from what we often find in domestic adjudications.

3.4. Expert Evidence

Sometimes, old evidence loses its probative value. For instance, examining a corpse 15 years after it has been buried may result in hardly any conclusions being drawn since all the weak parts of the body would have disintegrated, preventing a person from seeing what kind of injury the person might have endured. A shot wound in a skull would still be visible, but that would not necessarily allow for a single conclusion. Especially in the case of mass graves, it would be hard to determine whether the bullet found next to the body was the bullet which killed person A, to the left, or person B, to the right. Similarly, well-preserved old evidence can benefit from new technological methods. For example, a body or some tools used during the crime could have been found 25 years ago, when there was no DNA expertise available yet. However, such DNA expertise could now be applied to the body or the tools, and the relevant tests conducted. The availability of such technology will, however, be of no help if the evidence has not been properly preserved.

There were also situations before the ICTY where the Prosecutor only managed to have bodies exhumed for DNA testing many years after a witness gave his statement regarding that person or grave site. It has also happened that instead of finding a male body where the witness has said the body was buried, only a female one was finally found, which could mean that the male body was removed from that site after the event which the witness observed occurred. In such instances the absence of

properly preserved and timely evidence makes it more difficult to further test the reliability of the witness' evidence. Therefore, as far as old evidence is concerned, perhaps what matters most is to not to miss any opportunity to test such evidence. Old evidence is not necessarily bad evidence, but when such testing opportunities are lost doubts may arise in relation to the reliability of such evidence.

3.5. Interpreting the Evidence

Apart from the technicalities described above, the human factor in the interpretation and evaluation of the evidence cannot be ignored. The evidence is presented by the parties. The better the analysis provided by the parties, the more the judges are assisted. Parties should, however, in their presentation and analysis of the evidence, not pretend more than they are actually able to achieve. A very specific and unique feature in the adjudication of international cases is that counsel are sometimes unable to distance themselves from their own background. It is well known in my country, the Netherlands, that many counsel after World War II were reluctant to defend accused who had acted against the interests of the Netherlands. It was an unpopular job to undertake, and only courageous defence counsel were willing to serve justice by acting as defence counsel in cases of alleged war criminals or *Quislings*. Further, such reluctance to assist and support the accused in his defence was also due to the risk of the appearance of siding with the accused. Counsel belonging to the same faction as the accused risk losing the professional distance required to defend their client.

Bearing this in mind, counsel without any affiliation to the warring parties, often from abroad, can add to the quality of the adjudication of cases. This is in addition to the also important requirement of familiarity with the local circumstances and the history of the armed conflict. This would be a reason not to bar foreign counsel from appearing before a Bangladesh court.

The same issues also apply in some ways to judges. They should ask themselves to what extent they are affiliated to any movement in society which has undertaken to end impunity by prosecuting its opponents. These are usually particular social groups, or even the wider society, which stand in opposition to the perpetrators' groups. Even if this objective of ending impunity is to be praised, and even if judges are said to be – and are – independent and impartial, a door should be left open to allow

the composition of the court to be challenged.⁵ At the ICTY, for instance, there are judges from all over the world, so there is, *a priori*, no reason to think that they would be affiliated with one of the parties that was involved in the conflict in the former Yugoslavia. Nevertheless, the possibility has been left open for a judge to be recused; the disqualification of a judge can be sought. As a matter of fact, my disqualification was sought on a couple of occasions, once even successfully. This was not because I was found to be not independent or impartial, but because any appearance of partiality or a lack of independence should be avoided. A confident legal system, which believes in the quality of its judges, should be open to the possibility of having the court's composition challenged, not on political grounds but on personal grounds. Once my disqualification was sought in a case in which the operations of Dutch Bat played a role. Dutch Bat was a United Nations force in Srebrenica where genocide was alleged to have taken place. And since I was Dutch, it was alleged that I could not be an impartial or an independent judge. I did not mind that my disqualification was sought because the best thing to do is to consider it, and to say, "Well, this is your argument, let's look at it: what does it mean that I am Dutch, what is my background, did I have any affiliation?" It could be, for example, that a family member of mine was a member of Dutch Bat and who had been wounded. Such a circumstance would change the situation entirely. So I am only happy that these kinds of motions, seeking the disqualification of a judge, are openly discussed.

In Bosnia and Herzegovina, for instance, if there is a panel of three judges – one Bosnian, one Croat and one Serb – it is understandable that people may think, for example, that if the accused is a Croat, both the Serb and the Bosnian Muslim judges could make a majority finding and easily convict the accused. Therefore, to restore the balance – as was also the case with the Extraordinary Chambers in the Courts of Cambodia – international involvement was considered to be desirable.

3.6. Concluding Remarks

To conclude, we will now come back to the illustration that was given in the introduction. In 1946, Mr. X was first prosecuted for collaboration; he was given a life sentence, which was reduced by partial pardoning in the

⁵ Such a possibility is currently impossible under the ICT-BD Act. *Supra* note 2, Article 6 (8).

1990's. The two instances of killing were only used as evidence of his collaboration; he was not charged with those actual killings. In the late 1980's, when looking through his case file, the German authorities thought that his involvement in the killings was clear and that they could consider prosecuting him for having murdered the German deserter. They exhumed the deserter's body and found that the impact wound was such that the weapon would have been discharged at a distance of no more than twenty centimetres from the head, so not the ten or twenty meters, as stated by the witness. They also found that the medical report from the time to be incorrect, because the shot wound – the impact wound – was not to the left but rather to the right of the head, which also considerably affected the story. As a matter of fact, the doctor was not experienced in making a distinction between the exit wound and the entry wound. Similarly, the person who took the statement was not a trained police officer. Finally, the story of Mr. X – which he had upheld all those many years – that the victim was not surrendering but he was using his pistol, raising his hand, to shoot himself, turned out to be the most likely event. So it turned out that it was easier to establish what had happened 30 years after the event, when the body was exhumed, than to determine it at the time the event took place.

As for the second incident, the sketch happened to be – by pure coincidence – exactly the place where my primary school had been. My recollection could immediately establish that the sketch was wrong. Every street on the sketch was wrongly situated and that could be easily proven, even after so many years had passed. Therefore, in the end, the evidence was very much wrong. Mr. X was not guilty and could not reasonably have been convicted for murder, if he had been charged with murder. But he was still guilty of collaborating with the enemy.

This is just an illustration of the theoretical analysis of the use of old evidence, as considered throughout this chapter. For Mr. X, the old evidence of a fresh recollection of a witness and a contemporaneous medical report, upon being thoroughly tested decades after the events, turned out to be completely unreliable. The evidence that had been newly obtained, and therefore the fresh evidence, had better probative value.

Old Evidence in Core International Crimes Cases in Kosovo

Agnieszka Klonowiecka-Milart*

As a preliminary statement, one should always keep in mind that the standard of proof in attributing individual criminal liability is beyond a reasonable doubt. This concerns all the material elements of crime. The standard of proof, beyond a reasonable doubt, therefore, is on the onus of the prosecution to prove both the broad contextual elements, high level politician and commander liability for policies or silent approvals, and to prove the identity and actions of the low level soldier who kills, rapes or tortures.

Yet, different evidence is being used in proving contextual elements of international crime and the actual acts of the perpetrator – what constitute the *actus reus* and *mens rea* in the individual charges. Moreover, different means of evidence are employed to prove crime based in command responsibility and different to prove direct execution of the crime. Each of these areas might give rise to specific problems, especially when they are encountered by a young court. And especially when it is old evidence.

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4.1. Old Evidence of the Criminal Context

4.1.1. A Balanced Approach to Old Evidence

Is it possible, as a premise, to start with the praise of old evidence? As already discussed, witness evidence can be compromised by memory loss, a re-characterisation of what happened helped along by express or implicit pressure from peers and interested groups, or not available at all. Physical evidence, if any, is very likely to have encountered degradation, loss due to its inherent temporary nature, or be omitted from the chain of custody. Archives might have been broken or evacuated, as it happened in Bosnia, or evidence ‘booked’ in file drawers and boxes that are taken with the international forces who are repatriated, as in Kosovo.

At the same time, however, there are some benefits of approaching the crime from a long ago perspective. The passage of time makes available the established historical record. Some elements are at least ascertained – maybe partially – in the public conscience: the parties who stood on each of the good and bad sides, who started, or encouraged the armed violence, when did it start, and when did it end. There is a plethora of reports, analyses and commentaries, approaching the problems from all angles and proving, sometimes, opposing theses. Facts that make up contextual elements of international crimes have been argued upon by generations. Even if conflicting versions of the past continue to exist, their differences are more substantively articulated and as such easier to verify and where it is necessary, the courts may find it easier to choose among the alternatives.

Should old evidence therefore be considered as an advantage or a danger? The notion of ‘collective memory’ is an important element in this present discussion.

The body of evidence for core international crimes derives primarily from victimised societies and groups. In mostly illiterate societies, witness ‘stories’ and recounting repeated through oral tradition will in fact be the main source of collective knowledge, whereas in highly literate societies – such as Bangladeshi society and Cambodian urban societies – the passage of time brings about a proliferation of secondary sources such as books, media articles, and government documents. There may be TV documentaries and even movies. One can for instance think to “The Killing Fields”, an epic picture by Roland Joffe on the 1975–1979 events in

Cambodia, which, when released in mid-1980s, sparked a great interest for the Khmer Rouge tragedy in Europe. In the last decades, images and information – old evidence of the future – instantly reaches smartphone holders all around the globe. These various materials contribute to, and form, people’s perceptions. They also constitute general knowledge about the context of international crimes, in the mind of those who deliver evidence and those who hear it.

This process therefore happens through the media, and through word of mouth. In these modalities, the *quantum* of knowledge, or opinion, is accumulated, layered, and settled over a period of time. Against this background of facts accepted as true, there is a question of individual criminal responsibility that needs to be demonstrated and ascribed into that context in the criminal process.

Interestingly, the statements of the mechanisms of collective knowledge formation hold true also for statements about the legal framework. In particular, where the plane of reference is customary international law, the subjective element, *opinio juris*, that is, the perception and knowledge of what is law, is shaped and becomes fact with time, as scholars and activists over the time develop legal theories. Areas of disagreement are identified and narrowed down and ultimately the practice confirms the emergence of the norm. The context in which transitional justice is discussed and dispensed is usually characterised by political struggle and accompanying dynamic changes affecting the legal framework, the legal cadre, academia, rights activists and other stakeholders in justice systems. In this climate legal notions may be hijacked to serve different interests. Similar to the transmittal of international norms into domestic governance that often occurs through the work of ‘norm entrepreneurs’, who “attempt to convince a critical mass [...] to embrace new norms”¹, activism plays a role in the subsuming of the facts under the notions of international criminal law, entering the sphere of legal discourse, legislation and jurisprudence, especially where incentives are created by the jurisdictional relationship between domestic and international institutions.

¹ William W. Burke-White, “The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina”, in *Columbia Journal of Transnational Law*, 2008, vol. 46, p. 306.

It is noteworthy that, as victimised societies express a particular need for their suffering to be acknowledged, this is sometimes put forth through the demand that the oppressive and traumatising events concerned be qualified as an international crime. In particular there is often a popular demand for the qualification of genocide to be attributed to the historical record of the victimised society. Contrary to what lawyers say², genocide is commonly perceived as the most egregious of international crimes; there is a particular emotional charge that it carries. Such a demand was for instance formulated and addressed to internationalised courts in Kosovo³ and Cambodia.⁴

² M. Cherif Bassiouni, *Introduction to International Criminal Law*, Transnational Publication, 2003, p. 119. Bassiouni notes:

Neither conventions nor the writings of scholars establish a hierarchy among international crimes, except with respect to *jus cogens* [...]. Presumably, one can assume that all other international crimes are of equal standing and dignity, irrespective of the international interest they seek to protect and the international harm they seek to avert”.

International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Duško Tadić*, IT-94-1-A, Judgement in Sentencing Appeals, Separate Opinion of Judge Cassese, 26 January 2000, para. 7. Cassese notes:

In short, one cannot say that a certain class of international crimes encompasses facts that are more serious than those prohibited under a different criminal provision. *In abstracto* all international crimes are serious offences and no hierarchy of gravity may *a priori* be established between them.

³ See comments about the judgment in the case of *Miroslav Vucković* of September 2001, available at <http://news.bbc.co.uk/2/hi/europe/1530781.stm>, last accessed on 9 October 2012. The report notes that:

A United Nations court has ruled that Serbian troops did not carry out genocide against ethnic Albanians during Slobodan Milosevic's campaign of aggression in Kosovo from 1998 to 1999. The controversial ruling by the UN-supervised Supreme Court in the Kosovan capital, Pristina, has angered Albanians, and some U.N. officials are reported to be preparing to challenge it.

⁴ See the exchange between Gregory Stanton, William Schabas, and Suzannah Linton about whether what happened in Cambodia is to be qualified as genocide. William Schabas, “Should Khmer Rouge Leaders Be Prosecuted for Genocide or Crimes against Humanity?”, in *Searching for the Truth*, Documentation Center of Cambodia, issue 22, 2001, pp. 37–43; Gregory H. Stanton, “The Khmer Rouge did Commit Genocide”, in *Searching for the Truth*, Documentation Center of Cambodia, issue 23, 2001, pp. 32–33.; Suzannah Linton, “An Internationalized Domestic Tribunal?”, in

In legislation that seeks to respond to past atrocities, the targeted inclusion of the categories of international crimes poses a challenge to the principle of legality. In accordance with the principle of legality, no one can be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.⁵ Accordingly, the enumeration of international crimes in statutes of the courts established to adjudicate past crimes is not itself a source of criminalisation of conduct and, as such, does not constitute an autonomous basis for entering convictions.⁶ For that matter, I note that the Law establishing the International Crimes Tribunal for Bangladesh ('ICT-BD') contains the description of acts underlying crimes against humanity that are broader than it would result from applying the Nuremberg Principles, judgments of the National Military Tribunals or other documents defining international crimes. While the ICT-BD law establishes *a priori* jurisdiction over the acts so listed, the actual exercise of its jurisdiction is subject to determining the definition of crimes against humanity as it stood under international law at the time of the alleged criminal conduct. Yet, one should bear in mind that the jurisdictional provision alone has the potential of forming perceptions

Searching for the Truth, Documentation Center of Cambodia, issue 25, 2002, pp. 37–38; see also Al Jazeera, Julia Wallace, "Justice in the doct of Khmer Rouge Trials", Al Jazeera, 30 September 2012. Wallace reports: "Equally devastating for many Cambodians is the decision of the judges to hear just a few charges at a time against the three defendants [...]". She also reports on the concerns of victims: "I am so concerned about this, because the court is prosecuting only one issue, not all the issues", says Soum Rithy, 59, a survivor of torture in a Khmer Rouge prison, and a plaintiff in the case. "And the issue they are prosecuting isn't even the most serious compared to other crimes like genocide and torture. They need to take those first". Available at <http://www.aljazeera.com/indepth/features/2012/09/2012925141556917463.html>, last accessed on 7 October 2012.

⁵ International Covenant of Civil and Political Rights, 23 March 1976, Article 15.

⁶ See, e.g., Report of the Group of Experts for Cambodia established pursuant to General Assembly resolution 52/135, (hereinafter 'Commission Report'), 18 February 1999, para. 60. The relevant portion of the report states:

[...] any review of the law in a report such as this is oriented only towards determining whether the evidence justifies, as a legal matter, the inclusion of certain crimes within the jurisdiction of a court [...]. [T]his section does not make recommendations regarding which crimes should be included in the jurisdiction of a tribunal, but only as to which crimes appear to us legally justifiable for inclusion.

and expectations, especially when fostered by politics or activist movement.

For example, the long-time taboo of acknowledging that rape was being systematically used as a tool in attacks against civilians has been lifted after the problem received due attention in the mid-1990s and led to the articulation of rape as a form of crime against humanity in the jurisprudence of the *ad hoc* Tribunals and then in the ICC statute. This relatively recent focus of the activist movement may at times manifest itself as a pressure to have rape emphasised not only in the factual panoply of charges but also in legal descriptions that, if accepted, would pre-date the emergence of rape as crime against humanity.⁷

Certain decisions of the internationalised panels in Kosovo exemplify the incursion of categories of international criminal law into the jurisprudence.⁸ These examples concern the application of international customary law concepts directly in the sphere of domestic proceedings, contrary to the imperative provisions of the applicable legal framework which allowed the attribution of criminal responsibility solely pursuant to the statutes.⁹ Such decisions cannot be readily explained by unfamiliarity with the applicable law. Rather, what could have occurred seems more likely connected to the congruence of self-interest in enhanced visibility and popular demand attaching to the finding of an international crime. While the instances were corrected upon appeal, they illustrate the ten-

⁷ This was an, outright demand for attributing responsibility for sexual crimes in a pending case in Panel Recommendations to ECCC following a truth-telling forum. *True Voices of Women under The Khmer Rouge Regime on Sexual Violence*, Cambodia Defenders Project, Phnom Penh June 2012. The publication states: “After having severed case 002, include sexual crimes in the first trial and hold the accused liable under the enemy policy for sexual crimes”.

⁸ District Court of Gijlan, *Prosecutor v. Momčilo Trajković*, P Nr 68/2000, Judgment, 6 March 2001. In this case, a conviction was entered for crimes against humanity, which was not foreseen under the applicable criminal law; District Court of Priština, *Prosecutor v. Latif Gashi et al.*, P Nr 425/2001, Judgment, 16 July 2003. In this case, a finding on command responsibility was made pursuant to a mode not foreseen by the applicable law. Applying a sentence not foreseen by the statute in invoking “international standards”. Each of these cases was quashed on appeal.

⁹ See Michael Bohlander, “The direct application of international criminal law in Kosovo”, in *Kosovo Legal Studies*, 2001, vol. 7.

dency that favours international crime qualification over more ‘mundane’ options of the domestic law.¹⁰

Another example emerged when appeal against *Case 001* was brought before the Extraordinary Chambers of the Courts of Cambodia. During the appellate hearings, the Court encouraged the parties to make submissions regarding the legal framework to be applied in assessing the acts attributed to the accused, in particular with respect to the definition of crimes against humanity. A defence counsel when referring to the nexus element at the time of the commission of the crime, stated that “everyone knows that nexus was dropped by then”. This was actually not so universally accepted, as shown by the concurrent decision of the Pre-Trial Chamber, in which it expressed an opposite opinion¹¹ but indeed reflected views circulated fifteen years earlier, during the period of discussion over the court’s creation.¹²

This example illustrates well how discussions and statements about the law can over time settle and form the reality of the trial, reinforced by the passage of time and the repeating of information. There is therefore a strong potential for people’s perceptions, especially when used by the politics, to exert pressure on judicial decision-making where international crimes are concerned. This phenomenon needs to be addressed with a measure of caution, with compassion for the emotions involved but with

¹⁰ Compare with the practice and legal framework in the Solomon Islands, where after the “Times of Tension” internal armed conflict of 1998–2003 ended and the Regional Assistance Mission to the Solomon Islands (‘RAMSI’) arrived with advice and assistance for prosecution and defence, the Penal Code’s murder, abduction, and accomplice liability provisions were used. The Penal Code does not contain any provision prohibiting war crimes, crimes against humanity, including genocide. The Solomon Islands has bound itself to the Geneva Convention but has not ratified or acceded to the ICC’s Rome Statute.

¹¹ Extraordinary Chambers in the Courts of Cambodia, *Pre-Trial Chamber Decision on Ieng Thirith’s and Nuon Chea’s Appeals Against the Closing Order*, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 145 and PTC 146), D427/2/12, 13 January 2011, para. 11(1); Extraordinary Chambers in the Courts of Cambodia, *Pre-Trial Chamber Decision on Ieng Sary’s Appeal Against the Closing Order*, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 75), D427/1/26, 13 January 2011, para. 7(1); Extraordinary Chambers in the Courts of Cambodia Pre-Trial Chamber Decision on Khieu Samphan’s Appeal Against the Closing Order, Case File No. 002/19-09-2007-ECCC/OCIJ (PTC 104), 13 January 2011, para. 2(1).

¹² Commission Report, *supra* note 6, para. 71

respect for the letter of the law, in order to ensure the legitimacy of the decisions.

4.1.2. The Effects of Collective Conceptions on the Criminal Procedure

4.1.2.1. The Subject of Proof

If indeed largely accepted as true, some common conceptions may develop to the level of public notoriety, which may give rise to procedural consequences. First, national laws may exempt these facts from proof requirements. Let us recall the relevant provision of ICT-BD Act: “A Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof”.¹³ The term ‘common knowledge’ denotes facts that are commonly accepted or universally known, such as general facts of history or geography, or the laws of nature. In the application to municipal crimes the question of notoriety may not be universally approached but does not carry a potential for major problems and is a useful tool for expediting the proceedings.

For that matter, to use a provision of which I am quite familiar on a professional level, the Polish code of criminal procedure contains a provision that has similar effect to the one in the ICT-BD Act, although it also discloses differences typical of systems based on the doctrine of ‘objective truth’. Thus, the Polish law permits a judge to accept facts commonly held as true without proof,¹⁴ nonetheless, certain conditions must be met. The court must give notice to the parties, and allow them to contest its decision to admit the said facts on the basis of public notoriety. In other words, the parties may challenge the court’s proposition that the said facts are commonly accepted as true. In this case, the opposing party is allowed to offer a proof to the contrary. Our Supreme Court held that, considering far-reaching consequences of the far-reaching finding of public notoriety, the interpretation of what constitutes public notoriety must be strict. In particular, the court must not accept as notorious facts that are

¹³ Article 19(3) of the ICT-BD Act: “A Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof”.

¹⁴ Article 168 of the Polish Code of Criminal Procedure: “Facts commonly known shall not require proof; nor shall facts known ex officio, although the attention of the parties should be directed to these facts. It shall not exclude evidence to the contrary”.

known only to a limited circle, such as to specialists in a given subject area. The notorious facts must be reasonably beyond dispute. The source of common knowledge of the fact is immaterial; rather, common knowledge means that a reasonable and experienced person under the jurisdiction of the court should ordinarily arrive at this knowledge from variety of sources.

The existence of such a ‘public notoriety’ test therefore helps preserve the expediency and the economy of trial proceedings, but is accompanied by conditions which prevent the privileging of convenience over the interests of the party.

More problematic is the application of the public notoriety construct in the adjudication of international crimes. In particular where relevant historical facts, such as the existence armed conflict or attack against civilians, are in themselves the elements of crime and as such are contested. The ICT-BD provision resembles the language of International Criminal Tribunal for the former Yugoslavia (‘ICTY’) and the International Criminal Tribunal for Rwanda (‘ICTR’)’s Rules of Procedure and Evidence,¹⁵ on the basis of which a considerable body of jurisprudence has been developed. This jurisprudence may be of relevance for the work of the ICT-BD.

The *ad hoc* Tribunals held that taking judicial notice of the facts of common knowledge is a matter of an obligation and not discretionary¹⁶ and that whether a fact qualifies as common knowledge is a legal question and so the deferential standard of appellate review to the trial court’s assessment of evidence had no application.¹⁷ In determining what constitutes common knowledge the ICTR held that these are facts that are “so

¹⁵ Rule 94 of the Rules of Evidence and Procedure for the ICTR (‘the ICTR Rules’) and its equivalent in the Rules of Evidence and Procedure for the ICTY (‘the ICTY Rules’) provides as follows: (A) A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof; (B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

¹⁶ See *e.g.*, International Criminal Tribunal for Rwanda, *Prosecutor v. Semanza*, ICTR-97-20-A, Appeals Judgment, 20 May 2005, para. 194

¹⁷ International Criminal Tribunal for Rwanda, *Prosecutor v. Karemera et al.*, ICTR-98-44-AR733(C), Decision on Prosecutor’s Interlocutory Appeal of decision on Judicial Notice (‘*Karemera* decision’), 16 June 2006, para. 23.

notorious, or clearly established, or susceptible to determination by reference to readily obtainable and authoritative sources that evidence of their existence is unnecessary”.¹⁸ It further elaborated that common knowledge concerns facts that are “generally known in the tribunal’s jurisdiction”¹⁹ and are “reasonably indisputable”.²⁰ The requirement of reasonable indisputableness excludes the application of judicial notice to facts that, albeit widely accepted as true, could be challenged on the basis that they have support in sources whose accuracy and objectiveness could be called into question. This interpretation prevents the use of judicial notice for the exercise of ‘victor’s justice’ through accepting one-sided versions of historical events, no matter how popular.

Notwithstanding the agreement as to these elements of the doctrine, the practical application of judicial notice at the ICTR has resulted in diverse decisions regarding the same or similar factual propositions²¹, demonstrating in this way that the facts in question had not been “reasonably indisputable”. The general trend that emerged, however, seemed to be that the Chambers were more inclined to find beyond reasonable dispute such facts when they constituted a more remote premise for the charge than those that in themselves were the elements of crime; were clearly identifiable events rather than clusters of facts and value judgments; and were plain facts rather than their legal assessment, such as, the occurrence of genocide.

The criminal procedure in Kosovo, heavily marked by the tradition of the active role of the court in establishing of the ‘objective truth’, initially did not explicitly provide for the judicial notice of facts commonly known.²² The internationalised panels nonetheless applied it to a limited

¹⁸ International Criminal Tribunal for Rwanda, *Prosecutor v. Semanza*, ICTR-97-20-I, Decision on the Prosecutor’s Motion for Judicial Notice and Presumption of Facts Pursuant to Rules 94 and 54 (“Semanza Decision on Judicial Notice”), 3 November 2000, para. 25.

¹⁹ *Ibid.*, para. 23.

²⁰ *Ibid.*, para. 24, cited with approval in *Karemara* decision, *supra* note 17, para. 22.

²¹ James G. Stewart, “Judicial Notice in International Criminal Law: A Reconciliation of Potential, Peril and Precedent”, in *International Criminal Law Review*, 2003, vol. 3, p. 251.

²² Law on Criminal Procedure, Official Gazette No. 4/77, in 2004 replaced by UNMIK Regulation on the Provisional Criminal Procedure Code of Kosovo. On this occasion a proposal from international judges and prosecutors to introduce judicial notice concept in Kosovo was adopted, *see* Art. 152, para. 3.

extent in relation to facts, such as to NATO strikes against former Yugoslavia in March 1999²³, U.N. Security Council Resolutions, the time of the sunset in January²⁴, the existence of agreements between UNMIK and the Council of Europe and Interpol published on the official website.²⁵ Accepting without proof of broad statements concerning the origin, the nature and the course of the armed conflict in Kosovo, or facts alleged only locally and directly relevant for the specific accusations, was not adopted as of mid-2000. At the end of 2003 the Supreme Court of Kosovo cautioned specifically:

[T]here is a possibility for the court to accept certain circumstances as generally notorious [“judicial notice”] thus not requiring formal proof. The Supreme Court realizes that until an objective research on the facts of the armed conflict in Kosovo is documented and confirmed, notoriety can apply only within a narrow range. Circumstances such as, *e.g.*, that there were NATO strikes against former Yugoslavia in March 1999, and was a mass outflow of Kosovo Albanian population during the armed conflict, are popularly acknowledged as historical facts. In evoking general notoriety, however, especially in cases involving conflicted ethnic groups – like the case subject to this proceedings – courts need to ascertain that a claimed notoriety is genuine, *i.e.*, common to both groups concerned. The Supreme Court also appreciates the role of judicial proceedings in the process of a creation of such notoriety and therefore stresses the importance of thoroughness in establishing historical facts in landmark war crimes proceedings.²⁶

Still, such a resignation from the production of evidence in favour of judicial notice offers the opportunity to expedite trial proceedings in the interest of all parties involved. Since the main risk involved in judicial notice lies in lifting the burden of proof contrary to the presumption of innocence, the agreement of the accused as to the facts encompassed by common knowledge is of practical significance. Even though legally not required, such an agreement confirms that facts accepted are common

²³ *Momčilo Trajković*, *supra* note 8, p. 4: “(3) the state of war was declared by the Yugoslavian government on 24 March 1999”.

²⁴ District Court of Priština, *Zoran Stanojević*, P 43/2000, 18 June 2001, para. 196.

²⁵ Supreme Court of Kosovo, *Bashkim Berisha*, PN-KR 335/2005, 30 January 2006.

²⁶ Supreme Court of Kosovo, *Anjelko Kolasinać*, AP-KZ 230/2003.

knowledge and are indeed beyond a reasonable dispute. As such it appeases concerns about the fairness of proceedings.

This consideration brings us to a related but separate area of admitted or agreed facts. The question is whether other than judicial notice of facts commonly known, the law may relieve from the requirement of proof based on admission of facts by the parties. Such a construct is typical of proceedings in the civil procedure, but less usual in the criminal procedure, in particular of the continental type. The issue was also disputed in the jurisprudence of the *ad hoc* Tribunals.²⁷ Eventually, it seems that the pragmatism of accepting agreed facts as proven prevails and provisions that allow resigning from the production of evidence have been adopted in the legal frameworks of the courts that adjudicate core international crimes.²⁸ Regarding the contextual elements of crime, the accused may give such admissions willingly as he will rather focus on negating his own role in the events charged than question the context of the events. This actually often happened in Kosovo as part of defence tactics; unless the defence adopted stance based on negating everything, the accused in-

²⁷ ICTY Rule 65ter (H) does not explicitly authorise the acceptance of agreed facts as proven, it states: “The pre-trial Judge shall record the points of agreement and disagreement on matters of law and fact. In this connection, he or she may order the parties to file written submissions with either the pre-trial Judge or the Trial Chamber”, similar language is found in ICTR Rule 108(C) concerning the Pre-Appeal Judge. On contradictions in the application see, James G. Stewart, “Judicial Notice in International Criminal Law: A Reconciliation of Potential, Peril and Precedent”, in *International Criminal Law Review*, 2003, vol. 3, pp. 267–268.

²⁸ International Criminal Court, Rules of Procedure and Evidence, Rule 69. This Rule states:

The Prosecutor and the defence may agree that an alleged fact, which is contained in the charges, the contents of a document, the expected testimony of a witness or other evidence is not contested and, accordingly, a Chamber may consider such alleged fact as being proven, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims.

In Kosovo, the possibility of accepting a guilty plea as basis for conviction has been introduced in PCPCK as part of the criminal law reform in 2004, PCPCK, Arts. 315 and 359. Similarly, the Cambodian Law on Criminal Procedure applicable to proceedings before the ECCC which largely follows the French law, does not foresee basing a judgment on a guilty plea or agreed facts alone. The ECCC Internal Rules however allowed accepting the agreed facts as proven. ECCC Internal Rules, revised 12 August 2011, Rule 87(6).

voked the conditions of an armed conflict or a widespread attack against civilians to argue exigent circumstances or as demonstration of general openness and co-operation.²⁹ Again, just like many of the continental criminal procedures, the procedure applicable in Kosovo, traditionally did not foresee dispensing with the production of evidence based on agreed facts, although it allowed explanations of the accused as source of evidence. Changes exempting agreed facts from proof have been introduced fairly recently, as part of guilty plea arrangements. Still, any plea and/or fact agreement is not binding on the court.³⁰ In any event, where the accused is silent about the elements of the context it would be up to the court to solicit a clear representation as to whether the facts concerned are admitted or not. Ultimately the court decides what need to be proven through formal evidence.

Judicial notice and admission of facts may greatly assist in establishing the factual context of international crimes. Yet, the politicisation accompanying the adjudication of international crimes may lead to *de facto* lowering the standard of substantiation of these elements. Even if material facts are dubious or contested, they may be accepted as proven without sufficient evidence, while insufficient weight is given to evidence to the contrary. Experience in Kosovo shows that it may happen that the court accepts secondary sources, such as reports, journal articles, or books, without attempting to collect and consider primary sources of the evidence. Here again, the lapse of time impacts on the quality of evidence in two ways: historical research and secondary sources pile up whereas the availability of direct evidence, especially the witness testimony, diminishes with the time.

4.1.2.2. The Importance of the First Case

The first case heard by the court necessarily carries the greatest burden of establishing the historical context of the crimes concerned. Subsequent cases, to a lesser or greater extent, may rely on the evidence adduced through primary sources in the first case.

²⁹ In the case of *Latif Gashi et al.*, factual circumstances of an internal armed conflict in Kosovo in the period preceding the NATO strikes against Yugoslavia, were largely adduced through the explanations of the accused.

³⁰ PCPCK, Arts. 315 and 359.

The furthest going reliance is enabled when the law allows taking judicial notice of adjudicated facts. Such authorisation is included in the Rules or Procedure and Evidence of the ICTY and ICTR.³¹ The scope of this provision turned out to be highly controversial, especially regarding the taking of judicial notice of facts which constituted elements of crime. Certain chambers, for example, accepted adjudicated facts only in so far as to confirm the existence of authentic documents, the contents of which was subject to evaluation. Eventually, the Appeals Chamber of the ICTY affirmed that, in consideration of the right of the accused to hear and confront the witnesses against him, it is appropriate to exclude from the judicial notice of adjudicated facts those relating to the acts, conduct, and mental state of the accused.³² Pursuant to this approach it results, *a contrario*, that deriving from prior cases' findings regarding the contextual elements of international crimes would be allowed. In any event, the existence of adjudicated facts provides, at minimum, the record of available human and documentary evidence to be sought for the direct production in a trial.

The burden on the first case or the initial wave of cases should be taken into consideration in any time-line or in any prosecutors' preparation strategy, namely, it may be reasonable to expect that in the first case, the contextual element will need to be proven through primary sources.

In Kosovo, the internationalised panels had to struggle with this issue. In one of the early cases, *Prosecutor v. Mladenović*, the prosecution put forth several suppositions pertaining to the presence of an armed conflict, without however any evidence in support to it.³³ In the case *Prosecutor v. Bešović*³⁴, where the court needed to examine and prove that the circumstances of armed conflict, with not much evidence being presented by the prosecution, the court eventually decided to cut and paste into its opin-

³¹ Rule 94 of the Rules of Evidence and Procedure for the ICTR and its equivalent in the Rules of Evidence and Procedure for the ICTY: (B) At the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings.

³² *Karemera* decision, *supra* note 17, para. 50.

³³ District Court of Pristina, *Prosecutor v. Mladenović*, P 26/2001, Judgement of 23 November 2001, paras. 15–21

³⁴ District Court of Pec/Peja, *Veselin Bešović* ('Bešović case'), C/P 136/2001, Verdict, 26 June 2003.

ion substantial fragments of reports by Human Rights Watch and the Organisation for Co-operation and Security in Europe, the latter was entitled “As seen, as told”, readily signalling the reliance on hearsay. The case was reversed by the Supreme Court of Kosovo³⁵, on the basis of contradiction in evidence indicative of the actual participation of the accused in the events. Therefore, the question of whether it is enough to have only the mentions of reports, which are secondary sources, remains unresolved. This question was even more pregnant in this case as there was no any other case law yet produced in Kosovo nor was there ICTY jurisprudence on Kosovo.

In 2005, however, the District Court hearing the case of *Prosecutor v. Runjeva et al.* was capable of finding the internal armed conflict proven using not only the same reports but also a well-documented ICTY material, direct witness evidence, and the record of stipulated facts, that is, facts agreed as undisputed between the parties.³⁶

A decade after the establishment of the international judiciary in Kosovo there have been several proceedings instituted at the ICTY for acts which arose, at least partially, from the events in Kosovo.³⁷ The material gathered in these cases, even absent legal authorisation to accept adjudicated facts or institutional co-operation between the ICTY and Kosovo judiciary, is an extremely valuable record of evidence. The use of this potential, however, depends on the availability of primary evidence and access to ICTY case files, and there is a need for balance between evidential rigour of ICTY and evidential availability of the Kosovo courts to be struck adequately.

It would have been optimal if the Kosovo Court could establish the historical truth on the basis of direct or primary evidence, rather than relying upon reports of others that are not tested by cross-examination where the authors are not required to explain their methodology and analysis in

³⁵ Supreme Court of Kosovo, *Veselin Bešović* (‘Bešović appeal’), AP-KZ NO.80/2004, Appeals judgement, 7 September 2004.

³⁶ District Court of Pristina, *Runjeva et al.*, P No. 215/04, Judgement, 12 May 2005

³⁷ International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Slobodan Milošević*, IT-02-54-T; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Milutinović et al.*, IT-05-87-T; International Criminal Tribunal for the former Yugoslavia *Prosecutor v. Haradinaj, Balaj, and Brahimaj*, IT-04-84-T; International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Đorđević*, Case No. IT-05-87/1.

an adversarial oral process. By doing so, the Court would have been shaping history instead of allowing history to shape the Court's truth.

4.1.3. The Need for Co-operation across Public Authorities of the State and Beyond

My experience in Kosovo shows that it may be difficult for a national court to gain access to primary sources of evidence. Such access requires governmental support and the existence of various related mechanisms, such as explicit and effective subpoena powers. This is necessary in order to facilitate the production of the high profile witnesses to testify on organisational structures, hierarchies, strategies and policies. Even so, this assumes that the witnesses concerned are all willing to testify and participate in this specific process.

There is also a need for access to archives and databases, which is not always available. These might have been broken, misplaced or evacuated abroad. Primary sources have sometimes been destroyed though copies may be available elsewhere. Government support may be required for the court to access these archives and databases and to obtain resources to effectuate a meaningful search. The availability of old files – administrative decisions, written policies and guidelines, complaints, investigative files or any records and official documents – drawn up pursuant to old established procedures may be invaluable.

Finally, the court might also need to gain access to documents, including archival materials through international co-operation. A broad range of documents are needed, even those of seemingly neutral character, like law texts, administrative acts, and organisational graphs. Particularly important are those documents that enable the assessment and establishment of lines of responsibility for command that would facilitate the determination of command responsibility or civilian responsibility. Another area is journalist material, which, even if already put in the public domain, is often unavailable to be reproduced in trial under the caveat of compromising journalist access to the conflict zone in the future.

There is therefore a need to put in place inter-State co-operation mechanisms to enable access to evidence located in other States. In this regard, the court in Kosovo encountered many difficulties. Insufficient regional co-operation persisted throughout the decade of the presence of UNMIK, hampering access to the accused who had fled and who were

wanted for trial.³⁸ Moreover, UNMIK internationalised judiciary could not count on co-operation even within the international ‘family’.

In the *Simić* case³⁹, for instance, the Red Cross was reluctant to render its documents to the Court, even when the documents required were of a neutral nature and not related to access to the zone of war and conflict. The court had to resort to obtaining political support to subpoena the person concerned and obtain the disclosure of evidence that was entirely exculpatory, providing documentary evidence that impeached critical prosecution eyewitnesses by showing they were hundreds of kilometres away from the crime scene.

Even the ICTY was very reluctant to share information with the Kosovo internationalised court, as its teams were investigating cases in the area at the same time, and the records needed were not in the public domain. In one case, when the Kosovo court eventually obtained access to the relevant material, it had been so substantially redacted that retained little probative value.⁴⁰

Similarly, the international military presence in Kosovo, the Kosovo Force (‘KFOR’), despite a decade of efforts aimed at streamlining the co-operation with UNMIK in the area of evidence gathering, did not manage to develop a modality for providing information to UNMIK internationalised judiciary. The crucial missing element was an inability to convert intelligence into evidence that could be admitted in court. The international community remained divided on this issue for several years, engaged in designing bureaucratic structures aimed to serve as filter and relay institutions. Meanwhile, however, KFOR refused to disclose infor-

³⁸ As noted by the OSCE:

Insufficient regional co-operation has also hampered the process of trying war crimes cases. It is possible that some persons accused of war crimes have fled Kosovo and can be tried in another jurisdiction. However, in order to broaden this process and try the suspects who have fled Kosovo, prosecutors and investigators outside of Kosovo would need access to witnesses and evidence in Kosovo. That would require official co-operation between officials inside and outside Kosovo, which does not currently exist.

OSCE Report “Kosovo War Crimes Trials: an Assessment Ten Years On”, May 2010, p. 22.

³⁹ District Court of Mitrovica, *Igor Simić*, P 44/2000, Judgement, 1 April 2001.

⁴⁰ District Court of Priština, *Stanojević*, P 43/2000, Judgement, 18 June 2001.

mation even on issues as harmless as the Kosovo Liberation Army's command structures. Here again, this had to be adduced through back channels and information sought in official sources after publication. Frequent changes of command and great turnover among the military legal advisers effectively precluded institutionalising a direct co-operation within the time needed for the production of evidence. This is a particular instance of accelerated 'aging' of the evidence

4.2. Contemporaneously Adduced Evidence

The typical feature in proving core international crimes is that their evidence originates from the time of conflict and armed violence. And this bears two different sets of problems.

4.2.1. Physical Availability

The first problem concerns the physical availability of old evidence. The best opportunity to record and preserve this evidence arises during or in the immediate aftermath of the conflict concerned. However, such situations are characterised by an inevitable crisis of institutions, regress of legal procedures, and unavailability of expertise, in particular of forensic expertise.

Subsequently, there may be an opportunity to do so when transitional justice mechanisms are established. However, such mechanisms again operate in circumstances of institutional deficiency, in which those responsible for collecting evidence and statements – military police, national guards, summary courts, *ad hoc* commission – do not necessarily have the required qualification to do so, the necessary impartiality, nor the adequate training or equipment. Moreover, an inadequate legal framework may complicate the determination of what is to be considered necessary evidence and what is not; it may not be clear what needs to be preserved and kept. All this requires a certain degree of institutional organisation, technical knowledge and prospective vision. Even if evidence is available, it can be overlooked or lost due to the lack of infrastructure, for instance, as well as the lack of realisation of its significance in the context.

To illustrate the problem: in Kosovo, where the possession of weapons, especially during the early years, was commonplace, in over 30 initiated war crime cases that resulted in suspect arrest, there was not one where the suspect weapon would have been seised and secured.

The already mentioned *Simić* case⁴¹ well illustrates the type of issues that can arise from the paucity of physical evidence. A Kosovo Serb Igor Simić was accused of having killed 26 Kosovo Albanian civilians in an execution-style paramilitary slaughter of civilians. Years later, when the UNMIK and Kosovo police regained primacy for criminal investigations, the NATO military presence in Kosovo, KFOR, acted then as an *ad interim* law enforcement agency. On the crime scene, in 1999, a “ski-mask,” containing within it some hair, had been found, secured, and booked into the KFOR Gendarmerie premises on the KFOR military base in Mitrovica. The accused had allegedly abandoned it at the occasion of the commission of the act. Unfortunately, when the case came to trial a year later, that Gendarmerie unit had been rotated back to France, and with it, the mask disappeared, along with other physical evidence. The *ad hoc* evidence room had been lost. Many of the relevant files were either lost, or were considered military intelligence, thus classified and thus not made available to the prosecution or courts.

4.2.2. Credibility of the Evidence

The credibility of the evidence also depends on the context of the crime, which may not yet be revealed or disputed as groups are struggling for power to claim the inception of history. These groups gradually begin to frame the context, the mind-set of the witnesses, and finally that of the general public.

An interesting example of this phenomenon can be found in the case connected to the ‘Račak massacre’ of 43 Kosovo Albanian civilians⁴², which was allegedly committed by the Serb armed forces. This case, and the related judgement of the Priština District Court of Kosovo, shows very well how the early days following the perpetration of potentially international crimes can shape a crime’s context and public perceptions.

Each body was quickly examined and photographed by a team composed of a doctor and a nurse.⁴³ In their written report, they concluded that half of the victims had been killed execution-style and thrown into

⁴¹ District Court of Mitrovica, *Igor Simić*, P 44/2000, Judgement, 1 April 2001.

⁴² District Court of Priština, *Stanojević* (‘Račak case’), 143/2001, Judgement, 18 June 2001.

⁴³ *Ibid.*

the ditch. The report further identified that death resulted from shooting and mutilation: eyes had been gauged out and wounds caused by bayonets or other blunt force on the heads of the victims, evidencing bestiality. Later, three other autopsies were conducted on the bodies. These findings were inconclusive. Some of the mutilations or wounds found by that doctor were however qualified as caused by animals which had access to the corpses. The court noted:

Dr. Bajrami, admitted in the trial that team had had neither the necessary time, nor the necessary forensic expertise and equipment, which would make the findings accurate and reliable. Regardless of this, the report was later presented in a scientific symposium in Pristina. The photographs taken on the spot of the event were subsequently used in publications circulated in Kosovo and displayed in a public exhibition in Pristina.⁴⁴

Moreover, the court found “discrepancies and contradictions in witness evidence”⁴⁵ and “doubts as to the reliability of the witness testimony”⁴⁶, who had undergone great stress during the events. There was also evidence of ethnic hostility from the witnesses towards the accused.⁴⁷ All the witnesses had seen the exhibition and the report of the doctor. To this regard, the Court found that:

[...] findings of the report by Dr. Vezir Bajrami and photographs taken by his staff achieved local notoriety. It seems some of the witnesses might have accepted as true such rumors and widespread information, and consciously or not, let such distort their recounting of the critical events.⁴⁸

There are also numerous instances of eyewitness testimony in trials that were proven to be significantly inconsistent with prior statements, demonstrating the role of societal pressure on the witnesses. For example, in *Bešović*, the Court has recognised that “having accepted that with the passage of time people naturally forget facts, the trial court should apply particular scrutiny where a pattern of increasing inculcation is detected in the witness testimony, particularly where the recognition of the accused is

⁴⁴ *Ibid.*, para. 101.

⁴⁵ *Ibid.*, para. 153.

⁴⁶ *Ibid.*, para. 149.

⁴⁷ *Ibid.*, paras. 150–151.

⁴⁸ *Ibid.*, para. 152.

built into the testimony only in subsequent hearings".⁴⁹ Many of these cases due to repeated remanding for re-trial could never reach finality.

4.2.3. The Actual Production of Evidence

Evidence is also vulnerable to politics in the aftermath of conflict. A number of cases in Kosovo demonstrate how political actors, including non-governmental organisations, sought to impact collective consciousness and memory through the influencing of witness testimonies and the establishing of certain versions of events. These actors sought to advocate prosecution by submitting requests to the investigating judges. There were instances of such collective action aimed at building cases against particular ethnic groups in Kosovo.

The UNMIK international judiciary recorded and evaluated such instances of evidence submission by civil society actors or non-governmental organisations. In the case of *Kelanović*, the International Prosecutor was confronted with a report submitted by the Council of Human Rights and Freedoms, a local NGO comprised of an ethnic Albanian unanimity, that specifically identified an ethnic Serb as the specific individual responsible for killings.⁵⁰ However, the International Prosecu-

⁴⁹ *Bešović* case and *Bešović* appeal, *supra* note 34 and 35. The Supreme Court went on to instruct the District Court: the District Court should in its evaluation of the incriminating testimony relate in a more detailed way to the defence's claims about the fabrication of the charges, bearing in mind such factors as: that it was undisputedly established that there had been repeated attacks on the house of the accused; that there was evidence of a theft from the forest belonging to the accused; that war crime complaints against the accused were brought following his acquittal from a robbery charge; that the accused alleged specific motives on the part of some of the witnesses, in particular Haxhi Kastrati, which does not appear to have been disproved; that the record of the investigative hearing reflects that Haki Gashi threatened to kill the accused and finally that some of the witnesses who inculpated the accused in the events pertinent to the instant proceedings had not reported his involvement in their earlier statements .

⁵⁰ Office of the Public Prosecutor of Mitrovica, *Case of Kelanović*, Decision on Rejection of Charges, 13 July 2002, p. 2. The decision notes:

That Albanian journalist Murat Muslim is the Coordinator for the Council of Human Rights, and he wrote with others the Report of the Council, which cites Mr. Arugi and others blaming Dejan Kelanovic with killings in Skenderaj/Srbica on that date. In that earlier journalist's story, obtained by the international prosecutor from the journalist who took it directly from his computer drive

tor investigating Kelanović found during that investigation that his own witnesses in that case contradicted their earlier statements to the police, and in the end declined to file an indictment.

The Council for the Human Rights and Freedoms had more persuasion in the case of *Radivojević et al.*⁵¹ where five Serbs were charged with a war crime by the District Prosecutor who sought to initiate investigation and arrest based entirely on evidence gathered by the Council. This material consisted entirely in rumours. The panel of international judges passed a decision refusing to initiate an investigation.

Even a more advanced case of evidence production concerned the case of *Mladenović*. The District Court found:

The coincidence of Mladenovic's arrest and the phenomenon of all injured parties filing their claims against him raises suspicion that it was an action resulting from a collective decision, or even a conspiracy. These fears are fortified by the fact that virtually none of the injured parties, including those who claimed to remember events from two years before in utmost detail [such as exact time in hours and minutes], could state from whom had they learnt about Mladenovic's arrest. [...] On the other hand, there is evidence that an agitation against Mladenovic was carried out by Hasim Salihu and his party among the witnesses. Ibrahim Haziri was told that there were already 15 witnesses ready to testify against the accused and therefore he decided to join them; the same concerned Besim Isuf Jashari.⁵²

from his office, the original version of the murder Mr. Aruqi [did not implicate Dejan Kelanovic as he said he had not seen the perpetrators who wore masks and the murder happened out of his sight anyways]. This journalist interview which does not identify the shooters pre-dated the police interviews and pre-dated the media reports of Dejan Kelanovic's arrest for unrelated charges.

⁵¹ District Court of Priština, *Radivojević et al.* Hep 386/2001, Decision of the Investigating Judge on Refusal of Investigation and Referral to the Panel of Judges, 14 December 2001.

⁵² District Court Pristina, *Prosecutor v. Mladenović*, P 26/2001, Judgment, 23 November 2001, para. 94.

4.3. Concluding Remarks

There are a number of important conclusions that can be drawn from the developments outlined above with respect to the use of old evidence in core international crimes cases. First, my tentative conclusion is that the evidence used for low level criminal actions and to prove those perpetrators' identities, tends to be eyewitness testimony, while the evidence used for contextual elements and for high level command and political liability tends to be documentary or closer to a historical consensus or the focus of reports and studies that are sometimes accepted by the courts. Thus, in general old documentary evidence holds up with age more reliably than eyewitness evidence.

Second, the previous developments lead us to considering the role of the civil society. There are powerful arguments for the involvement of civil society and victims. It benefits victims to the degree that they actually want to be involved. Non-governmental organisations may be helpful in identifying victims and disseminating information about the proceedings and the law. But this carries a degree of danger when the engagement of the victims and civil society actors purports to take over State functions, such as investigation and punishment. So the decision about victim and civil society involvement calls for careful development, regarding its role and competences, so that it does not impede the process, both logistically and in the terms of perceptions and the presumption of innocence. Old evidence is as it is: it is difficult, but it is important that it be tested in accordance with the principles of fair trial. This implies adversarial procedure and neutrality. Hence, means of enhancing adversarial and neutral procedure should not be dismissed lightly.

Third, Bangladesh has made the choice to establish the International Crimes Tribunal as a national court without the use of international judges – and there is no good reason why it should not do so. But taking into account historically charged circumstances in which justice is to be done, and is to be seen to be done, perhaps makes some room for some foreign input in the function of the defence to be given some thought.

Dealing with Old Evidence in Core International Crimes Cases: The Dutch Experience as a Case Study

Martin Witteveen*

5.1. Introduction: Our Increased Appreciation of Evidential Difficulties in the Investigation and Prosecution of International Crimes

The criminal investigation of international crimes¹ is no longer an exception today. It has in fact become accepted, and is increasingly carried out at the national and international levels. The international community has established internationalised courts, such as the International Criminal

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¹ I will refer to these crimes by using the generic term of 'international crimes'. They include genocide, war crimes, crimes against humanity, and torture.

Tribunal for the former Yugoslavia ('ICTY'), the International Criminal Tribunal for Rwanda ('ICTR'), the International Criminal Court ('ICC'), and a handful of other tribunals and special chambers. Most recently, we also have the Rome Statute and the International Criminal Court.² Apart from these more recent endeavours, one should recall the number of international treaties since World War II.³ Many countries have initiated investigations into international crimes that took place on their territory.⁴ Others have adopted laws that permit them to exercise extra-territorial or even universal jurisdiction over these international crimes.

It is noteworthy that there have been a number of acquittals before national and international courts.⁵ The prosecution has at times failed to prove, based on evidence presented in court, that the accused person is guilty beyond a reasonable doubt. This chapter examines reasons associated with the 'age' of evidence presented to and considered by courts, particularly witness testimony. The next two sections highlights a number of features commonly associated with international crimes that greatly increase the need for, but also the instability of, using old evidence in prosecutions. The fourth and fifth sections respectively deal with how trauma, commonly associated with international crimes, impacts the different stages of memory and witness testimony itself. The sixth section examines the roles played by different professionals in general, and the last section evaluates the Dutch authorities' experience specifically.

5.2. The Reality and Facts of International Crimes

International crimes cannot be compared with ordinary crimes. They are of an incomparable scale and seriousness. The word 'unimaginable' often used in the context of these crimes should be taken literally. In my own experience, I recall reading accounts of witness testimony of crimes

² Officially the Rome Statute of the International Criminal Court, a treaty agreed and established on 17 July 1998, that entered into force on 1 July 2002.

³ The most important ones being the Geneva Conventions (the four treaties agreed in 1949 and the two additional protocols), the Genocide Convention 1948, and the Torture Convention 1984.

⁴ Countries like Guatemala, Argentina, Chile, East Timor and States formerly being part of Yugoslavia such as Bosnia and Herzegovina and Serbia.

⁵ The best overview to monitor the results of the criminal trials around the world is at the website of Trial, available at <http://www.trial-ch.org>, last accessed on 27 June 2012. There seems to be a low number of acquittals in national jurisdictions.

committed or events having taken place where my immediate reflexes were: this cannot have happened.

One characteristic of these crimes is that they are very complex and involve multiple acts. Often we are dealing with a series of events that took place in one single day or even only part of a day, during which hundreds of people are attacked and killed or mutilated. Moreover, these killings and attacks always involve a multitude of perpetrators. Often the attacks are carried out by groups of people, consisting of tens of people or more. The attacks are rarely well organised or structured as in a regular army. Chaos is the proper way of describing these attacks and crimes committed within their context. Consequently, the victims of such attacks and crimes were in total disarray while the crimes were committed and the attacks were carried out. The initial reaction of a victim or target of an attack is to flee and escape. The victims run around seeking shelter wherever they can find a place to hide and often go from one place to another. They usually have no idea what exactly is going on or who is doing what. Their focus is survival.

These crimes also impact their victims in the most horrible of ways. People are shot by guns, while others are hacked to death with machetes or knives. During some attacks, spears and clubs are used to kill people. Saddam Hussein used mustard gas or nerve gas in Iraq against the Kurdish population. Victims went through a gruesome death process, watched by loved ones and neighbours in the village of the attacks. Rape is rampant at crime scenes, and women more often fall victim to this crime than others. In any event, victims and witnesses of these events always experience an unprecedented agony in their lifetime. Trauma is most likely the lasting effect impacting victims and witnesses.

Special attention needs to be drawn to the perpetrators usually involved in international crimes. The crimes are perpetrated by accused persons acting in groups, rather than as individuals. Sometimes the structures of the groups are quite loose and badly documented. Sometimes the perpetrators are senior figures in an army or a paramilitary group with a well-defined structure and meticulous documentation. Tribunals, as a policy, aim their efforts at prosecuting the most responsible for the crimes under investigation, most likely the leaders of these military or paramilitary groups. National systems, although they base their jurisdiction on the nationality of the defendant or on their physical presence in the territory of that state, are also faced with leadership cases. More often these most re-

sponsible persons or leaders were not involved in the crimes directly in the sense that they personally killed or mutilated victims. They may have ordered or otherwise instigated the killers and attackers, but often they are military commanders or political leaders, who may have a more indirect criminal responsibility for the crimes. This is a relevant factor for the collection of evidence and thus determines the prospect of a conviction or an acquittal. The countries and areas where these crimes take place and where the organisations operate are not known for their meticulous recordkeeping. And if records were kept they are often destroyed, not available, or kept away from the investigators for reasons of state security. Consequently, in cases where the facts of the field are extended to (para-) military organisations and/or other (political) organisations, the investigation may be impeded from the start.⁶

These features of international crimes make their evidential proof particularly difficult, and this is further compounded by circumstances emerging in the aftermath of international crimes as explained in the following section.

5.3. The Aftermath of International Crimes: Delayed Investigations and Consequent Problems

What happens next in the aftermath of international crimes? Usually, societies focus on more immediate reconstructive demands. The crimes that took place are incredibly complex, and victimised witnesses have undergone intense trauma. Yet, they have not been recorded at the time of events. There is a lack of sufficiently trained personnel to undertake investigations, such as interview witnesses or undertake forensic examinations. Due to a variety of such factors, investigative and prosecutorial efforts are delayed.

5.3.1. The Consequences of Delayed Investigations and Prosecutions

Much time often passes before investigations and prosecutions are initiated. Indeed, it takes at least a minimum of some years before a criminal

⁶ The great exception is that the Nuremberg trials where the Prosecutor almost completely relied on documentary evidence as the Nazis had meticulously documented the genocide on the Jews and those documents were readily available. See Robert Houghwout Jackson, *The Nürnberg Case*, Alfred A. Knopf Inc., New York, 1947; Ann Tusa and John Tusa, *The Nuremberg Trial*, Atheneum, New York, 1984.

investigation begins. At the ICTR and the ICTY, it took at least two to three years before the first investigators got back to the field to unearth the facts and investigate the crimes. Still the first trials before these tribunals did not take place before the later part of the 1990s.⁷ Yet, these first investigations and trials took place under relatively favourable circumstances. Later investigations and trials at these tribunals did not get off the ground until some ten years had gone by.⁸ The circumstances at the ICC are similar. By law, the ICC has jurisdiction over international crimes only from 1 July 2002 onwards. In Uganda and in Ituri province of the Democratic Republic of the Congo ('DRC'), the investigations were announced by the Prosecutor in the summer of 2004. The crimes under investigation had occurred from 2002 until 2004. The investigations into the crimes in Darfur started in 2005 and focused on events in Darfur in 2003 and 2004. The investigations into the crimes in the Central African Republic ('CAR') started in 2006 and concentrated on the events in the CAR in 2002 and 2003. Despite these relatively favourable circumstances, trials have not commenced as regards Uganda and Darfur, and in the case of the DRC and the CAR, they have started not until 2009.⁹ One can wonder what the effect on the witnesses' memory is when witnesses from Uganda and Darfur are called to testify in full court in The Hague many years down the line while their statements to the investigators have been taken between 2004 and 2006.

⁷ The first trial at the ICTR was the case against Jean Paul Akayesu. He was arrested 10 October 1995, but his trial did not commence until 1997. Verdict was given on 2 September 1998. The first case at the ICTY (although not the first verdict) was the case against Duško Tadić, arrested in 1994, but his trial commenced only in May 1996 and verdict was given in May 1997.

⁸ See for example the so called *Government II* case against Bizimungu *et al.*, where the defendants' trials commenced in 2002 and after more than 400 trial days have not been concluded yet. *Summary of The Prosecutor v. Casimir Bizimungu et al.*, International Criminal Tribunal for Rwanda, para. 1, available at http://www.unictr.org/Portals/0/Case%5CEnglish%5CBizimungu%5Cjudgement%5C110930_Summary%20.pdf, last accessed on 9 September 2012.

⁹ The first trial at the ICC is against Thomas Lubanga Dyilo in the DRC situation and commenced with considerable delay in January 2009. Other trials in the DRC situation as well as the trial against Jean-Pierre Bemba Gombo in the CAR situation have commenced.

In national jurisdictions, the situation is even worse although the reason for the time lapse is different. In the Netherlands,¹⁰ justice has been administered in cases of international crimes by the District Court in The Hague, which is the only competent court in the Netherlands to try domestic cases of international crimes, ten to 20 years after the facts occurred or even longer than that. In a recent trial, the defendant was charged with participation in the genocide in Rwanda in 1994. The verdict was given almost exactly 15 years after the genocide while the witness hearings took place between 12 and 14 years after the genocide.¹¹ In other cases, the defendants were charged with their alleged involvement in torture committed by the Afghan Military Intelligence Service under communist rule in the 1980s of the last century, 20 years after the facts occurred.¹² One other case dealt with the alleged involvement of a defendant in the war in Liberia and Sierra Leone in 1991–1996. He was tried some 15 years after the facts¹³ and in one case, a Dutch businessman was charged with supplying Saddam Hussein with precursor chemicals to fab-

¹⁰ In this chapter only the cases in the Netherlands are mentioned. There have been investigations into international crimes in other countries as well. Belgium, for instance, has tried several cases against defendants charged with involvement in the Rwanda genocide in years. In Canada, a recent verdict was given in a case against a Rwandan national convicted for his role in the genocide in Rwanda in 1994. Switzerland tried one defendant for involvement in the genocide, with a verdict in 2001. Several other countries such as Finland have started investigations and trials against Rwandans as well. Finally, Germany tried a couple of former Yugoslav nationals for their involvement in the crimes in former Yugoslavia. These cases were tried in the 1990s.

¹¹ District Court of The Hague, *Case against Joseph Mpambara* ('Mpambara case'), Judgement, LJN BI2444, 23 March 2009. The verdict of the District Court is published in English and can be found at <http://zoeken.rechtspraak.nl/detailpage.aspx?ljn=BK0520>, last accessed on 27 June 2012.

¹² District Court of The Hague, *Cases against Hesam and Jelalzoj* ('Hesam/Jelalzoj case'), Verdict in first instance, LJN AU4347 en AU4373, 14 October 2005; and in Court of Appeal of the Hague, *Cases against Hesam and Jelalzoj* ('Hesam/Jelalzoj appeal'), Appeal, LJN AZ7143 en AZ7147, 29 January 2007; District Court of The Hague, *Case against Faqirzada* ('Faqirzada case'), Verdict in first instance, LJN BA7877, 25 June 2007; Court of Appeal of the Hague, *Case against Faqirzada* ('Faqirzada appeal'), LJN BJ 2796, 16 July 2009. The respective verdicts can be found at the website <http://www.rechtspraak.nl/>, last accessed on 9 October 2012.

¹³ District Court of The Hague, *Case against Guus Kouwenhoven* ('Kouwenhoven case'), Verdict in first instance, LJN AX7098, 7 June 2006; Court of Appeal of The Hague, *Case against Guus Kouwenhoven* ('Kouwenhoven appeal'), Appeal, LJN BC6068, 10 March 2008.

ricate chemical weapons that Saddam Hussein subsequently used against the Kurds in 1986.¹⁴ The case was concluded in 2005, 20 years after the crimes were committed.

The time lapse between the moment of the occurrence of the facts and crimes and the actual investigations and trials has consequences. First of all, evidence will have gone lost. In particular, the possibilities to execute forensic investigations are heavily reduced. Locations of the crime scene will have been rebuilt or completely demolished. Weapons used in the crimes are no longer there or hard to trace back. Burial sites are harder to find and if they are found, exhumations and autopsies have limited use. The use of forensic evidence in the genocide cases before the ICTR has been very limited. The Tribunal has accepted some to prove that genocide did take place.¹⁵ But forensic evidence has played virtually no role in what is the critical part of a trial, which is the determination of individual criminal responsibility: did the defendant play any role in the crimes and if so, in what role and to what extent?¹⁶ Moreover, the passage of time will no doubt lead to the loss of witness evidence as particularly older witness will have died. Other witnesses may have disappeared without the possibility of locating them.

5.3.2. The Failure to Record and Document Crimes

Due to the nature of international crimes, their chaotic circumstances, and post-conflict instability, these crimes are usually not well-documented by their perpetrators or by post-conflict authorities. The last genocide that was well documented was the genocide against the Jews by Nazi Germany, who kept meticulous records of all meetings, conversations, orders, and killings, including a full administration of the extermination camps

¹⁴ District Court of The Hague, *Case against Frans van Anraat* ('van Anraat case'), Verdict in first instance, 23 December 2005; Court of Appeal of The Hague, *Case against Frans van Anraat* ('van Anraat appeal'), LJN BA4676, 9 May 2007.

¹⁵ See for example: *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgement, 21 May 1999, paras. 325 and 412.

¹⁶ Although forensic evidence was not widely used, the prosecutor at the ICTR and ICTY did conduct forensic investigations in the former Yugoslavia and in Rwanda. In particular, mass graves were unearthed and exhumations were performed on the remains of bodies. For a personal account, see generally, Clea Koff, *The Bone Woman: A Forensic Anthropologist's Search for Truth in the Mass Graves of Rwanda, Bosnia, Croatia, and Kosovo*, Random House Trade Paperbacks, 2005.

where the Jews were gassed. In fact, the Prosecutor at the Nuremberg trials, Robert Jackson, rarely used witnesses to prove the charges brought against the top-level Nazi leaders who had remained to stand trial. Instead, he presented hundreds of documents, not only to convince the tribunal that genocide had taken place, but also that the defendants had taken part in the genocide and were criminally liable for their participation, a truly unique situation. The masterminds of the more recent atrocities in the former Yugoslavia, East Timor, Sierra Leone, Liberia, Cambodia, and South America did normally not keep many records of the crimes being committed, let alone about the individual involvement of a particular person. An exception must be made for crimes committed by armies and army-like organisations like rebel groups that have assumed a military structure. The most extreme situation in this respect can be found in Rwanda, where hardly any relevant document exists on the execution of the genocide on the Tutsis and the roles of individuals therein. Even video footage of the killings and related events are extremely rare. The oral culture in Rwanda (and other parts of the region) will be the main determining factor in this circumstance.

Therefore, due to such lack of documentation, trial judges have to rely practically exclusively on witness testimony. In most cases, this means that trial judges have to determine the guilt or innocence of an individual charged with the most serious crimes known to mankind based on individual witness accounts which are given five, ten, sometimes 20 years or even longer after the facts have occurred. Given this dependency and vulnerability, it is worth focussing attention on issues related to witness testimony. This in turn gives rise to problems associated with the passage of time on the memory of witnesses, as is addressed in the next two sections below.

5.4. The Different Phases of Memory: The Encoding, Retention, and Retrieving of Information

This section examines the different stages of a witness' memory. Such a step-by-step consideration is important because what is finally produced, as witness statement or testimony, depends on how a memory is encoded, retained, and then retrieved. It has been scientifically shown that the hu-

man memory is fallible.¹⁷ There are three phases in a memory's life span: the 'encoding', during which the information is recorded in a person's memory; the 'retention', during which the information is stored in a person's memory; and the 'retrieval', the moment during which the witness reproduces the information, for instance during a witness statement or witness testimony. Each phase has its unique challenges.¹⁸

5.4.1. The Encoding Phase of Human Memory: The Selection, Impression, and Storage of Memory

Part of the human memory is the autobiographic memory. Information we personally have experienced and which relates to time and place and persons is stored in our brains and can be distinct from other, more general information we have without knowing where we accrued this knowledge.¹⁹ When being heard as a witness, he or she is invited to use his or her autobiographic memory. The problem with autobiographic memory is that information is only stored in a person's memory as far as it is relevant and needed. Once the memory becomes obsolete, it will disappear and be replaced by more recent information. Thus, after years, much of the memory will have disappeared. This may be problematic in view of the need during witness' hearings or testimonies where the witness is invited to recall details that occurred long before.²⁰ Some witnesses I have personally heard during sessions, when confronted with questions on details about events the witnesses were questioned about, responded by saying: "I could never have imagined someone would come from that far to ask me that question after so many years". The answer may be indicative of the above-mentioned phenomenon of renewal of memories based on relevance.

Research has revealed that a sequence of events is best recorded in a person's brain. The recording in a person's memory of *where* the events

¹⁷ For this paper, scientific publications in the Netherlands on witness memory were researched. There is an abundance of foreign literature. A leading study in the United States can be found in: E.F. Loftus, J.M. Doyle, and J. Dysert, *Eyewitness Testimony: Civil and Criminal*, fourth edition, Lexis Law Publishing, Charlottesville, 2008.

¹⁸ E. Rassin, *Tussen Sofa en Toga: Een Inleiding in de Rechtspsychologie*, Boom Juridische Uitgevers, Den Haag, 2009, p. 87.

¹⁹ Hans F.M. Crombag, Peter J. van Koppen and W.A. Wagenaar, *Dubieuze zaken: de psychologie van strafrechtelijk bewijs*, Contact, Amsterdam, 1994, p. 271.

²⁰ *Ibid.*, pp. 271–272.

happened and *who* was involved in it is much less reliable. *When* an event happened is recorded the worst.²¹ However, the *when*, *where* and *who* questions are particularly relevant during a criminal investigation and subsequent trial to assess a witness' reliability. Equally problematic is the fact that a victim of multiple crimes is less likely to recall the details of these crimes because he or she has difficulty distinguishing them. Someone who has been tortured once is most likely able to recall that torture in every detail: the date, the place, the person who tortured and how it was executed. Someone who has sustained multiple tortures over time is less likely to recall those details. They have become a blur.²² I have heard a witness who testified that he was, as part of a group, chased on a hill in Rwanda for more than two weeks by Hutu killers. Many of his fellow refugees were killed. The witness was well able to recall the first day of the attack on the hill and to a lesser degree the second day. The witness' memory on the rest of the two weeks was blended together into a vague memory of snatches of attacks without recalling dates, places and persons. The multiple occurrences of attacks affected clearly the memory of that particular witness in the way described above. Although a level of detail in a witness statement is necessary to assess the credibility of that information, the lack of details does not necessarily constitute an insurmountable hurdle in assessing the truth.

We observe selectively and we store our information selectively. Everyone has a natural bias in recording what we see and hear. More importantly, our registration of events is partly because our sense organs are not capable of capturing everything we see, hear and smell, *et cetera*. Our capability to concentrate is limited.²³ Special and remarkable events are recorded and stored more accurately than normal, everyday events. Moreover, special events are more likely to be discussed and recalled shortly after they have occurred which improves the recollection. On the other

²¹ Peter J. Van Koppen and Hans F.M. Crombag (eds.), *De menselijke factor: psychologie voor juristen*, Gouda Quint, Arnhem, 1991, p. 159; Peter J. Van Koppen, D.J. Hessing and Hans F.M. Crombag (eds.), *Het hart van de zaak: psychologie van het recht*, Gouda Quint, Deventer, 1997, p. 319.

²² Rassin, 2009, p. 38, see *supra* note 18.

²³ *Ibid.*, p. 45.

hand, this results in the danger of a personal memory blending with stories of others, which cannot be disentangled so many years after it occurred.²⁴

A too strong focus of our sense can lead to an impediment of our observations.²⁵ A widely described phenomenon is the ‘weapons focus effect’. Victims of armed robbery and the like appear to be able to describe the weapon used during the robbery in great detail, while completely unable to describe the person who robbed them, including his or her features such as the length, the colour of hair, and the clothes the person wore. The trauma that victims of crimes like robbery sustained does not seem to impair the victim’s recollection of such detail or of other details.²⁶ The District Court in The Hague took notice of this phenomenon recently in its verdict against Joseph Mpambara, who was convicted of participating in the Rwanda genocide in 1994 and observed that trauma itself cannot lead to the conclusion that the witness’ observation becomes unreliable *per se*.²⁷

In sum: the observation of a person is determined by the combination of impression on the senses of the observer and the personal features of the observer.²⁸ Clearly, a weapons expert will remember different things when fallen victim to a robbery or shoot out than a victim who is the owner of the shop that was robbed.²⁹ Equally, physical impairments can heavily effect a witness’ observations. A witness in the *Kouwenhoven* case³⁰ was not assessed as a reliable witness by the Court of Appeals in The Hague when he stated without explanation that he read the name on a ship when it turned out he was illiterate.

²⁴ Van Koppen *et al.*, 1997, p. 390, see *supra* note 21; Ingrid Candel, Harald Merckelbach and Ineke Wessel, “Traumatische herinneringen”, in P.J. van Koppen, D.J. Hessing, H.L.G.J. Merckelbach and H.F.M. Crombag (eds.), *Het Recht van Binnen: Psychologie van het Recht*, Uitgeverij Kluwer BV, Deventer, 2002, p. 420.

²⁵ Rassin, 2009, p. 46, see *supra* note 18.

²⁶ Van Koppen *et al.*, 1997, p. 290, see *supra* note 21.

²⁷ *Mpambara* case, *supra* note 11, Chapter 6, para. 18.

²⁸ Van Koppen and Crombag, 1991, p. 160, see *supra* note 21.

²⁹ *Ibid.*, p. 162.

³⁰ *Kouwenhoven* appeal, *supra* note 13, paras. 9–15.

5.4.2. The Retention Phase of Human Memory: Remembering Over Time

Human memory is a process, stretches over time, and its content is influenced by how we interact with it over time, not only at the initial encoding stage. For example, as shown by research, our memory only records fragments of events we have observed. Yet, when we reproduce the events from our memory, we do so as a story as if we have remembered all of what has happened. Unwittingly, we fill the gaps with information from other sources, mainly by using logical inferences based on our knowledge, expectations, or even biases.³¹ The involvement of a person in a certain event, recalled and reproduced by a witness, may then well be the result of a bias the witness holds against that person instead of what the witness in reality can recall as the person's involvement.

This effect is exacerbated when the circumstances under which the witness saw the events happen were not optimal, because it was dark, rainy, or there were obstacles between him and the event unfolding before his or her eyes.³² For these reasons, it is recommended that the witness recalls and reproduces these events shortly after the events took place. This will not likely be the case, as I have pointed out earlier, during investigations into international crimes. Associated with this effect is what is called the 'bystander effect': the witness recalls a person as the perpetrator of a crime or an act while in reality the person was merely there.³³

The correct and complete observation and storage of a crime or event is not sufficient for a reliable recount of the crime and event. What is needed is that the information is properly retained in the memory of the witness until it is needed for reproduction. General recollections of events by witnesses become less reliable for this reason when the time between the event and the reproduction is longer.³⁴ The examples I have given earlier indicate that this is likely the case in investigations of international crimes. First of all, memories of a crime or event can have disappeared altogether or in the event the information is still stored, it cannot be retrieved for reasons of time lapse. Therefore, using the right techniques to

³¹ Rassin, 2009, p. 43, see *supra* note 18; Peter J. Van Koppen, "De Goede Getuige die af en toe Faalt", in *Tijdschrift voor Criminologie*, 2007, vol. 49, no. 4, pp. 411–412.

³² Van Koppen and Crombag, 1991, p. 159, see *supra* note 21.

³³ Van Koppen *et al.*, 1997, p. 390, see *supra* note 21.

³⁴ Van Koppen and Crombag, 1991, p. 163, see *supra* note 21.

retrieve that information is critical. It may be that several attempts have to be undertaken before the information is remembered and reproduced.³⁵ Inconsistencies in different statements from the same witness do not necessarily mean the witness is unreliable. When the sought after information is associated with reoccurring events, the retrieval of that information can be performed by using schemes.³⁶ When a murder took place during the weekly market in the village, which the witness witnessed while visiting the market as he usually does every week, the witness will not recall the visit to the market that particular day, but he will remember the odd event when he is confronted with his usual market visits.

During the retention of the information between the event and the reproduction of the information by the witness, for example, during an interview or hearing, ‘source blending’ may occur.³⁷ The witness who was at a crime scene or an event may have acquired only limited information during the crime or event itself. It is not unlikely that after the crime or event, the witness will hear more about the crime or event from other sources. He will probably speak about it with others, who also may have been at the same place as the witness or the witness may read about it in the news. When giving his statement or testimony, he will reproduce what he has seen and heard, attributing his information to his eye witness status while in reality he has acquired the information from *post hoc* sources. This is particularly relevant in a criminal judicial process where it makes a world of difference whether the information produced by the witness is based on hearsay or eye-witness testimony. The need to ensure that information remembered is produced effectively and adequately by witnesses leads us to consider issues of information retrieval.

5.4.3. The Retrieval Phase of Human Memory: Reaching Back into the Past

A memory phase particularly relevant to this anthology’s topic of concern, old evidence, is the retrieval phase. This is because even though a witness has observed an event accurately and recorded it accurately, there is still a need to ensure that his or her observations are accurately retrieved and presented after a significant passage of time.

³⁵ Rassin, 2009, p. 47, see *supra* note 18.

³⁶ Crombag *et al.*, 1994, p. 276, see *supra* note 19.

³⁷ Rassin, 2009, pp. 48–49, see *supra* note 18.

The retrieval of the information from the witness is a vulnerable process and full of pitfalls. Investigators, prosecutors and judges alike always want a chronological narrative of an event by the witness with sufficient focus on time, place, persons, who-did-what-when, *et cetera*. And that is hardly ever the result of a witness statement or testimony. Always the information needs to be aroused or triggered by what is called 'retrieval cues'. As the psychology of a human works, this can be done by any means that arouses the sense organs.³⁸ Giving pieces of information to the witness or bringing a person to the crime scene or the place where the event took place can trigger the memory; even a specific scent can do that.

Normally during criminal investigations, it is the question posed to the witness that triggers the witness' mind and memory.³⁹ The witness hardly ever produces information spontaneously. I remember when asking a witness in the *Rwanda* case the question: "Can you tell me what happened during the attack on April 16th 1994?", the witness just responded by saying: "The Hutus came and attacked us. They killed all of us". In reality the attack during that day lasted the whole day and the situation was so complex that it would have been easy to write a book about that attack alone. Obviously, further questioning is necessary to retrieve the information. How these questions are asked to the witness is critical. The most common pitfall in questioning witnesses is to ask suggestive questions, commonly known as leading questions. Leading questions are not only suggestive because the answer is included, but witnesses are also inclined to affirm leading questions.⁴⁰ A research has shown for example that when eye witnesses had to estimate the speed of a car during a collision, they indicated a higher speed for the car when they were asked what the speed was when the cars *banged* on each other than when asked what the speed was when the cars *touched* each other. Obviously the witnesses were led by the suggestion incorporated in the use of the word "banged".⁴¹ Leading questions have not been banned at tribunals, certain-

³⁸ Van Koppen *et al.*, 1997, pp. 319–320, see *supra* note 21.

³⁹ *Ibid.*, p. 320.

⁴⁰ Crombag *et al.*, 1994, p. 383, see *supra* note 19; G.P.M.F. Mols, *Getuigen in strafzaken*, Kluwer, Deventer, 2003, p. 230.

⁴¹ E.F. Loftus and John C. Palmer, "Reconstruction of Automobile destruction", available at <http://www.garysturt.free-online.co.uk/loftus.htm>, last accessed on 29 July 2009.

ly not during cross-examination as ruled by the Appeals Chamber in the *Akayesu* case.⁴²

Using the right ‘retrieval cues’ is critical to retrieving as much information as possible from the witness. It may be that multiple attempts to ask the same question to the witness using several and different ‘retrieval cues’ are necessary to retrieve the information necessary from the witness’ memory. The danger of course lies in the leading nature of the questioning and the ‘retrieval cues’ used which can lead to reproducing false or unreliable information.⁴³ Giving the name of the suspect or defendant in the on-going investigation to the witness is certainly within the category of risky ‘retrieval cues’. In two of the cases of international crimes before the District Court in The Hague, this became an issue. In the *Faqirzada* case,⁴⁴ a particular witness, when heard in a related case, had not mentioned the name of the defendant of the concerned case. When the same witness was heard once more, now in the case of the concerned defendant, he was given the name of the defendant by the interviewing police officers and was asked: “What do you know about him?” The witness responded by saying this was the person who tortured him. This discrepancy was the reason for the Court to disqualify the statement as insufficiently reliable.⁴⁵ In the recent case against *Joseph Mpambara*,⁴⁶ a similar problem occurred. Five witnesses, both during the statements to the police as well as during their testimonies before the investigation judge, gave extensive information on the role of the defendant during an attack on a hospital complex in Kibuye province in Rwanda on a particular date after

⁴² *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Appeal Judgement, 1 June 2001, paras. 320–326.

⁴³ Van Koppen *et al.*, 1997, pp. 306 and 319–321, see *supra* note 21.

⁴⁴ *Faqirzada* case, *supra* note 12.

⁴⁵ *Ibid.*; the Court states:

Because of the procedures regarding [P1]’s testimonies, and the ever changing statements made by this witness and the fact that no supporting evidence is available, the Court did not come to the conclusion that [the defendant] was the person who indeed committed one or more of the acts of violence or other criminal acts as charged. As for being a co-perpetrator regarding the charged offences, it needs to be proven that these actions were carried out by [the defendant] consciously and in cooperation with [P3] and/or [P4].

⁴⁶ *Mpambara* case, *supra* note 11, Chapter 10, paras. 71–74, see *supra* note 11.

having heard the name of the suspect or defendant. However, they had also given testimony and statements to the ICTR and even in trials in the United States and Canada on the same attack. None of the witnesses had ever mentioned the defendant's name at all in those statements or testimonies which were taken or performed prior to the statements and testimony in the Dutch case. The witnesses were all given the opportunity to comment on the discrepancies, and based on their testimony, the Court put their information aside as being insufficiently reliable in respect of the alleged participation of the defendant in the attack.⁴⁷

Finally, research has shown that the most reliable statements are given when the witness is able to freely narrate the story of what has happened without much intervention of the interviewer. They do not make many mistakes in their statement if they are at ease and not under pressure. If, however, pressure is exerted on witnesses to come up with answers and they are thus forced to tell as much as possible, mistakes in their account will be on the increase.⁴⁸ Certainly when leading questions are repeated over and over again by the interviewers, the impression is easily established with the witness that he or she should affirm the assertions implied in the questions.⁴⁹ Interviewers and investigators can thus try to ensure as accurate and effective an information retrieval process as possible by being aware of these issues and adopting certain procedures. An awareness of the different stages of memory, how they work, and their individual challenges, will help in the design of such procedures.

5.5. Memory and Witness Testimony in the Context of International Crimes

The section above examined how the different phases of memory work. Here, I apply this framework to analyse issues commonly faced when interviewers and investigators are dealing with witnesses who are victims of international crimes. These witnesses have undergone significant trauma, speak different languages, and come from different cultural backgrounds. These issues impact the phases of memory in particular ways, and give rise to specific problems that need to be addressed to ensure accurate and adequate witness testimony.

⁴⁷ *Ibid.*, paras. 75–135.

⁴⁸ Van Koppen *et al.*, 1997, pp. 300–301, see *supra* note 21.

⁴⁹ *Ibid.*, p. 307.

5.5.1. The Impact of Trauma on Witness Testimony and the Requirements of a Criminal Trial

Victims of international crimes are usually greatly traumatised by their experiences. However, I believe there is no scientific proof that witnesses who suffer from trauma are incapable of credibly recounting what they have witnessed. Even for the assumption that trauma victims are less reliable as witnesses in criminal proceedings, I have not found scientific evidence. Certainly they will have difficulty recounting all details of the events they went through but I believe they are in fact very well capable of supplying key elements of the events.⁵⁰ General conclusions about the reliability of witness statements by traumatised victims cannot be given, as the ICTY and the Court in The Hague also found.⁵¹ However, many trial judges in criminal cases have used the argument of the assumed traumatic experiences incurred by the witnesses as a reason for the impeded memory of witnesses so as to explain shortcomings or inconsistencies in the witnesses' recount of the events. A witness in the *Karera* case at the ICTR, for example, made different statements in different interviews about his hiding place during an attack. Firstly, he stated he was hiding in the bushes. Later, he stated in full detail and extensively about hiding in a banana farm. Again later, he said he had been hiding in the grass. Finally it appeared he hid in a ditch. Confronted with these inconsistencies, he stated he had been so afraid that he could not concentrate on where he had been hiding. The Trial Chamber in the case accepted this explanation with a reference to the assumed trauma and the inconsistencies were smoothed out.⁵² The question remains however why the witness had concretely stated his hiding place while in fact he could not remember because he was too frightened to pay attention at the time. In the same way, the Court of Appeals in The Hague in the *Hesam and Jalazoy* case⁵³ has accepted discrepancies in statements by referring to the "dra-

⁵⁰ A. Zahar, "Witness Memory and the Manufacture of Evidence at the International Criminal Tribunals", in C. Stahn and L. van den Herik (eds.), *Future Perspectives on International Criminal Justice*, TMC Asser Press, The Hague, 2010, pp. 606–607.

⁵¹ International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Furundžija*, IT-95-17-T, Judgement, 10 December 1998, para. 102; and *Mpambara* case, *supra* note 11, Chapter 6, para. 18, see *supra* note 11.

⁵² International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Karera*, ICTR-01-74-T, Judgement and Sentence, 7 December 2007, para. 304.

⁵³ *Hesam/Jelazoy* appeal, *supra* note 12.

matic events” without giving an explanation as to how these dramatic events had impacted the memory of the witnesses. This is even more interesting as the causal relationship between trauma and incorrect statements has never been proven.⁵⁴

There is a higher likelihood that the traumatic events under investigations and the trauma incurred by witnesses have a profound impact on witnesses when statements are taken or when witnesses testify in court. No doubt witnesses will become emotional when they have to again experience the events that caused their trauma, even more so when they have to tell their stories time and time again as often happens in these investigations when only few witnesses have survived. This can trigger the prosecutor or investigator not to (re-)interview the witness or even not to ask certain questions to the witness in order to protect the well-being of that witness.

Furthermore, research⁵⁵ has shown that witnesses⁵⁶ frequently are unable or unwilling to answer whole categories of questions that are crucial in criminal investigations and trials that can be referred to as the ‘what’, ‘who’, ‘where’ and ‘when’ questions. I often refer to these questions as the ‘quantitative’ questions that one can answer by giving a number or a short factual description. The questions are mostly simple in nature and crucial in terms of truth finding. They are also critical because they offer opportunities to assess the reliability of the witness statement because the information can be cross-checked. The extensive study by Professor Combs gives an abundance of examples of questions that are extremely easy to answer for Western witnesses but where international witnesses have failed: witnesses could not mention their age and made many mistakes when it came to dates, times, distances, and other numerical estimates. I can confirm many of this from my own experiences. I re-

⁵⁴ Zahar, 2010, p. 206, see *supra* note 50.

⁵⁵ My observations are, apart from my own experiences, to a great extent based on a research conducted by Nancy Combs, Professor of Law at William and Mary Law School in Williamsburg, VA, U.S. Her study “Factfinding Without Facts: The Uncertain Evidentiary Foundations for International Criminal Convictions” has been published in 2010 and is the first in its kind that thoroughly analyses the use of (witness) evidence by some of the tribunals. Nancy A. Combs, *Fact-finding without Facts: the Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge University Press, Cambridge, 2010.

⁵⁶ Mrs. Combs’ research is limited to the work of the ICTR, the Special Court for Sierra Leone (‘SCSL’) and the Special Panels in the Dili District Court in East Timor.

member asking a witness to estimate a certain distance in the context of what the witness had seen during an event and how far he was from what he had described. When the witness responded by saying it was two kilometres, I asked him to estimate the same distance from where he was sitting during the hearing to an object of his choice outside the room that we could all see. When he pointed to the object, a flag post in the garden of the building in which the hearing took place, my estimate was that the very distance was not more than 100 meters. There is an endless list of such examples. Similarly, any identification of time, be it dates, hours, years, and any estimation of duration, appears to be problematic for many witnesses. A clock or watch is not common everywhere in Africa or other places in the world. Many times the witness could give an estimation by indicating how high the sun was up or by giving a reference to where the sun was above the tree or house. Asking the witness to give a precise location is often too complicated. Many witnesses asked to elucidate their account of events by means of a map or a sketch declined to draft one or read from it. It does not make sense to them.⁵⁷ I remember I struggled with witnesses for a long time to find out which room in a certain building the witness was hiding. When asked to describe where the witness entered a building and how he went along from room to room or hall to hall, the witness was not able to put together a comprehensive picture. Left, right, forward, backward, in or besides, or other prepositions were difficult to explain or maybe difficult to translate. On top of the inability of witnesses to provide such factual or quantitative type of answers, the answers also often lack description and detail. A vague account void of details or description is an account that cannot be cross-checked and that will be difficult to challenge by the defence.

5.5.2. Language Disconnects and Misunderstandings

The questioning of a witness in international crimes is never smooth and straightforward. Many times witnesses do not understand the question or have no clue as to what information is sought. Much of the terminology

⁵⁷ See for example: *Prosecutor v. Elizaphan and Gérard Ntakirutimana*, ICTR-96-10 and ICTR-96-17-T, Transcript, 19 September 2001, p. 9; *Prosecutor v. Kamuhanda*, ICTR-99-54-T, Transcript, 14 February 2002, p. 4–7; *Prosecutor v. Fofana and Kondewa* ('Civil Defense Forces case'), SCSL-04-14-T, Transcripts, 4 November 2004, p. 38; *Prosecutor v. Marques et al.* ('Los Palos case'), 09/2000, Case Notes, 26 July 2001, p. 78.

we use is unknown to witnesses in Africa or other areas in the world. It is extremely difficult to bring a witness to a time order or chronology. And once the witness has a reference point of time and starts narrating what has happened, there is a good chance that the witness has left the chronology within the next three to four questions and answers these questions in a completely different time frame which is two or three months earlier or later while the interviewer still believes the witness is answering the question in the original time frame. The quality of the questions is paramount here. Misunderstandings are always looming and when they appear, it takes time to straighten them out. At the end of the day, these challenges do not categorically impair the truth finding, provided there is a check and double check with the witness and time to do so is available abundantly.

Many of the inabilities and difficulties described here can be attributed to the education, illiteracy and life experience of the witnesses or the lack thereof. It is a reasonable assumption that the lack of education and limited verbal capabilities impair the ability of many international witnesses to express themselves accurately in answering the questions posed to them. If a witness never went to school and did not learn how to read and write, how can he or she be expected to give detailed information about distances, heights, times, *et cetera*, and be asked to give accurate estimations? For the same reason, the witness will probably not know how to read a map which needs explanation, learning, and practising.

5.5.2.1. Language Challenges: Translation and Rare Languages

Special mention must be made of language issues and translation challenges that can impair the veracity of the witness statement, at least as it is recorded.⁵⁸ When the witness has truly and accurately observed the events, recorded what he or she witnessed in his memory unimpaired, and is able to retrieve and reproduce that information to the interviewer or judge during witness testimony in court, it is all in vain when the translation fails. At best the evidence becomes nebulous and the defendant is acquitted. But what if the wrong translation contributes to a guilty verdict

⁵⁸ Apart from examples within my own experiences, a comprehensive analysis of language issues in international criminal law can be found in: Robert Cryer, "Witness Evidence before International Criminal Tribunals", in *The Law and Practice of International Courts and Tribunals*, 2003, vol. 2, no. 3, pp. 411–439; and the study by Professor Nancy Combs, mentioned above. Combs, 2010, see *supra* note 55.

and the defendant is sentenced based on this faulty assessment of guilt? Language interpretation is not unique to international courtrooms or cases of international crimes. Since societies have become multi-ethnic and multinational, interpreters have entered the courtrooms and every judge in any national system acknowledges that, however professional their work and that of the prosecution and police is, they are totally at the mercy of the interpreters. And judges equally depend on the quality of interpreters used by the law enforcement in the investigations. I do not know of any scientific or even non-scientific research conducted on the quality of the translations in the justice process in national systems.⁵⁹ In the Netherlands, the situation has evolved from one where practically anyone could practise the profession of interpreter in a court of law to one existing today where rules apply to the use of interpreters and quality standards are imposed on anyone who wants to work as interpreter. That has certainly raised the level of quality of the interpreters. However, it is uncertain how many mistakes are made and what the effect of this is on the judicial outcome of a trial.

These observations apply to situations in domestic courtrooms where circumstances are relatively favourable. The prevailing situation in international tribunals is, however, far worse than that of national systems and the same is true for the adjudication of cases of international crimes in national systems. The languages used in these cases and before the international tribunals are rare to extremely rare,⁶⁰ and it is often difficult to find appropriate interpreters for these languages. The tribunals still have the advantage of having English and French, common languages in the world, as their official court languages. But what if these rare languages spoken by the witnesses have to be translated into Dutch, Finnish, German or a national language of even smaller countries? Where can one find such translators? Often this leads to using double translation to obtain a translation into the target language. Double translation also occurs in international tribunals. Moreover, taking witness statements and conducting witness hearings in court trials are excruciating and long for interpreters.

⁵⁹ With the exception of the limited research mentioned by Nancy Combs in her study, see Chapter 3B and the research mentioned in footnotes there. Combs, 2010, Chapter 3B, see *supra* note 55.

⁶⁰ By way of example, in Northern Uganda, where the ICC operates, each tribe involved in the conflict has its own language: Iteso, Lwo and Langi. Similar situations appear in Eastern DRC and in Darfur. In East Timor, at least ten different languages existed.

Often, one and the same interpreter conducts the translation throughout the whole process with the risk of being worn out and losing concentration, which will have a negative impact on the quality of the translation. Obviously, some of the languages spoken by international witnesses in cases of international crimes pose huge challenges to the translation as shown below.

5.5.2.2. Translation Mistakes and a Lack of Vocabulary

First of all, translation errors occur on a regular basis. Infamous is the example of German speaking witnesses used during the Nuremberg trials in 1946 who started their answer by saying “Ja”. Interpreters would translate this word by “Yes” as an affirmative, which is technically correct. In reality, the witnesses used the word as a filler word which should have been translated by “Well”, or “Uhm”, meaning they were pondering the answer to come.⁶¹ In the *Mpambara* case, a witness used an expression which was translated as “neighbour” without placing it in the cultural context. When questioned about the use of the word “neighbour”, the witness explained that he meant anyone living in his neighbourhood and village even persons up to 30 minutes away from him.⁶² In Nancy Combs’ study, a whole list of examples of erroneous translations is mentioned.⁶³

Apart from these errors, it has appeared in various situations before tribunals and in national systems that some languages simply do not have the same vocabulary as Western languages do. Often that is the case for legal terminology and phrases. This was encountered during the ICC investigation in Northern Uganda in which I participated. There were no analogous words in the local languages for judge, court, International

⁶¹ Joseph E. Persico, *Nuremberg: Infamy on Trial*, Penguin, New York, 1994, p. 263.

⁶² *Mpambara* case, *supra* note 11, para. 54. The quote from the witness statement is:

You ask me if I call him a neighbour. I have used this word to let you know I know the man. [...] I can use the word neighbour for a person who is located somewhere else. [...]. You explain that in The Netherlands a neighbour is someone living directly next door to you. I am sorry, that hardly exists here. If someone lives in a place which is 30 minutes’ walk from you, you call him neighbour. When something happens to someone, for example a wedding or death, then you can obtain that information easily. That why we say “neighbour”.

⁶³ Combs, 2010, Chapter 3B, see *supra* note 55.

Criminal Court, defendant, and the like. Solutions had to be found to circumvent these problems and determine a phrase or explanation that was closest to the original meaning. Combs in her study points out that in East Timor, witnesses and defendants had no understanding of the judicial concepts of equality for the law and the like. That is particularly disturbing as it prevents judges and the defence from explaining to the defendants what are the charges being brought against them and ascertaining with them if they understand their rights and if their arrest was legally executed.

At the ICTR trials, in an early stage it was determined that in Kinyarwanda, the language of Rwanda that the witnesses spoke, there was not a good translation for the word 'rape'. Reversely, the expressions used by the witnesses were translated with the word 'rape', but in reality, it was debated whether or not the wording used by the witnesses did include the use of force inherent to rape. At the end, the Trial Chamber determined in the *Akayesu* case⁶⁴ that it was correct to translate using 'rape' in light of the contextual elements.

There is a long list of examples that brings to light the dilemmas of translations in a cultural context that investigators and judges are unfamiliar with.⁶⁵ Suffice it to say that these dilemmas often disrupt the quality of the translation in these cases, certainly when the contexts and dilemmas are not recognized and understood. The various trial chambers of the ICTR have on numerous occasions showed their awareness of the disturbing effects of language differences and differences on the veracity of the witness statements. The Trial Chamber in the *Rutaganda* case ruled that:

[...] many of the witnesses testified in Kinyarwanda and as such their testimonies were simultaneously translated into French and English. As a result, the essence of the witness' testimony was at times lost. Counsel questioned witnesses at times in either English or French and these questions were simultaneously translated into Kinyarwanda. In some instances it was evident after translation that the witness had not understood the question.⁶⁶

⁶⁴ *Prosecutor v. Akayesu*, paras. 152–154, see *supra* note 42.

⁶⁵ See for more examples: Combs, 2010, Chapter 3C, see *supra* note 55.

⁶⁶ *Prosecutor v. Rutaganda*, ICTR-96-3-T, Judgement, 6 December 1999, para. 23.

I have not seen similar reflections in similar cases in national systems, although it is likely that situations like these have occurred.

5.5.3. Cultural Differences

Lastly, cultural differences hugely impact witness statements and witness hearings during trial and thus have to be considered when administering justice in cases of international crimes. Culture and differences from our Western style culture is very much determined by the region of the world where the crimes have taken place and the investigation is carried out. There are a number of cross cutting issues though, that apply throughout the situations that have been or are under investigation by international tribunals and national systems.

5.5.3.1. The Influence of Education, Social Identity and Customs on Witness Behaviour

First of all, in many cultures in Asia and Africa or within communities from these continents, people have not been educated or brought up to be independent and self-reliable individuals with opinions of their own. Instead, their culture determines that they are part of a homogeneous group, built on ethnical, national or religious features, with the objective of supporting the rules and values of that group. Most of the time, it comes at the cost of their individual identity and the ability to define their own identity and opinion. When confronted with witnesses with those cultural backgrounds, more often than not the witnesses have an inclination not to contradict the interviewer but instead affirm what he or she is putting to them in their questions or simply supply the information the interviewer is seeking. This effect is often exacerbated by the fact that in many countries where these types of investigations take place, the authorities, including police and judicial officers, are feared. Witnesses do not want to create conflicts with those officers and will try to please them by giving the information they believe is sought by the officers.

In combination with the above described and explained dangers of asking leading questions, the blending of sources in the memories of witnesses and the inability of many witnesses to spontaneously recall and recount events before police or judicial authorities in the course of criminal investigations, the need to ask open questions to witnesses is paramount. The question “was the suspect present during the attack you were a victim

of?” may seem like quite a neutral question in our Western style investigations. Yet, in light of the notions just described, a witness from a different culture will not often respond by saying “No” as it may be sensed by that witness that the answer will disappoint the interviewer, which the witness will want to avoid. On the same notion, I sensed during some of the hearings I conducted that the witnesses wanted to know in which case and against which defendant I came to conduct the hearing. Some witnesses even asked me. This could be indicative of the process just described and is all the reason to be cautious.

Another important consequence of cultural differences can be the behaviour of witnesses during witness statement or hearings, which can be misinterpreted by the interviewer or the judges when assessing the credibility and reliability of the witness and the information provided. In many cultures, direct eye contact is considered a sign of disrespect, which will be avoided when a witness from such a culture is heard as a witness, certainly when there is a hierarchy between the witness and the person leading the hearing. In Western culture, avoiding eye contact can be taken as signs of insecurity. Misunderstanding these differences can thus easily lead to the assessment that the witness and/or his or her testimony is unreliable while in fact it is culturally determined. In other cultures, people communicate with much aplomb or assurance, and they testify or give their statement with positiveness. Doubt is seen as a sign of weakness. Certainly in cultures where masculine behaviour is dominant, men can be extremely direct and strong in their communication and behaviour. Depending on how the person expresses him or herself and behaves during his or her testimony or statement taking, this can either be taken as a sign of a reliable statement or as strange and aggressive behaviour and thus as a sign of an unreliable person or statement. I have heard a former Afghan general as a witness in a criminal investigation. The general held a high position during the communist regime in the 1980s. His testimony was taken by a foreign judge who was hosting the hearing. On my first question, he requested the local judge’s permission to make a statement, which was allowed. What followed was a long and complex monologue, performed standing, where his honour and integrity as a former army general of Afghanistan was pivotal. The scene could easily be taken as a way of avoiding answers by the witness, while in fact what the witness did was very consistent with his culture. Having an understanding of these cultural

features and showing respect to the general and his (former) position could lead to his willingness to answer the more factual questions.

5.5.3.2. The Need for Cultural Sensitivity to Avoid Misinterpretation

As shown above, cultural differences impact translations and how the wording of the witnesses should be interpreted. Interviewers can easily be duped by the witness about what the witness says or means to say. I remember interviewing a witness in the framework of the ICC investigation in Northern Uganda, to establish whether or not she was the biological mother of her son. In the one day interview, the witness consistently spoke about her son and recounted all the highlights of her son's birth and life: his birth, his baptism, his school, *et cetera*. A day later, it turned out that she was not his biological mother. Instead, she was the co-wife of her husband and the son was in fact the son of the wife of that man. When the real biological mother died, as culture prescribed, the co-wife had assumed the role of the mother as if she was the son's biological mother. Practice has shown us multiple such examples.⁶⁷

Similarly, our obsessive attention to factual and precise details is not understood in many cultures, where exaggerations are not a sign of inaccuracy or even lies but a way of expression. Our continuing and persistent questioning about exact distances, times, description of places is clearly not understood by witnesses from other cultures and these questions often lead to impossible answers or unreliable indications as witnesses want to avoid the embarrassment of admitting they do not know the answer. A trial judge at the ICTR was sceptical towards a witness and the reliability of the answer when the witness told the judge that the perpetrator, who had raped her, had been on top of her for four hours. Questioned by this time estimation, the witness answered: "For me it was about four hours or maybe one year because the suffering was too much".⁶⁸ Here the time indication was in no way meant to be precise but an expression of the intensity of the suffering.

Cultural norms and taboos can also lead to a reluctance to give information at all. In many cultures, there are taboos certainly towards representatives of other cultures or persons people are not familiar with. Victims of rape are often not forthcoming about what has happened to them

⁶⁷ Combs, 2010, Chapter 3C and 3D, see *supra* note 55.

⁶⁸ *Prosecutor v. Musema*, ICTR-6-13-A, Transcript, 11 March 1999, p. 48.

and questioning the details of a rape case is an extremely sensitive undertaking from the interviewer's perspective. If victims of rape come forward and decide to speak about what happened, they run the risk of being stigmatised by their community who will certainly learn about this. I remember a situation in Northern Uganda where a victim of a rape was being interviewed and who completely denied having been raped while there were clear indications she was. It appeared the presence of her father during the interview, following a policy decision in the Office of the Prosecutor, caused huge embarrassment for her as she had not yet told her parents about the rape. Policies in tribunals dictate that victims of sexual crimes are first assessed before being interviewed and that counsel is present to assist the witness when necessary. Victims of sexual crimes are often offered a choice to be interviewed by a male or female interviewer.

5.5.3.3. Being Aware of Traditions of Oral Culture: A Lack of Sourcing

A last feature of the cultural differences already indicated above is the lack of sourcing by the witness of the information given during his or her statement or hearing. Certainly in oral cultures, the distinction between what the witness eye-witnessed and what he or she heard from others is routinely not made. In oral cultures, the knowledge of one person is the truth for all.⁶⁹ Even when explicitly requesting the witness about whether the witness saw what was described or whether the witness had heard it from others, often the distinction is still not made. Here, however, and that is also my experience, when the interviewer respectfully but clearly and persistently requests the witness to tell whether what the witness told was seen with his or her own eyes or told by others, the witness is very well capable of doing so.⁷⁰ The Court of Appeal in The Hague in the *Kouwenhoven* case observed that witnesses "have seemingly difficulties in being able to distinct between their own visual observations and what they have heard from third persons. Also for that reason a general picture emerges wherein reality and imagination seem to blend together".⁷¹ The

⁶⁹ See for concrete examples of witness testimony alluding to this phenomenon: *Prosecutor v. Kamuhanda*, p. 41, see *supra* note 57; and *Prosecutor v. Musema*, para. 103, see *supra* note 68.

⁷⁰ *Prosecutor v. Akayesu*, ICTR-96-4-T, Transcript, 4 February 1997, pp. 39–40 (expert witness Ruzindana).

⁷¹ *Kouwenhoven* appeal, *supra* note 13, paras. 9–15, see *supra* note 13.

judges in the *Mpambara* case considered in the framework of how to assess reliability of the witnesses that the court will “examine whether the witnesses have been able to distinct between what they saw themselves and what they heard from others”.⁷²

In the *Akayesu* case, before the ICTR, the trial judges were presented with an expert witness on language and cultural facets of Rwanda.⁷³ The judges took this expert testimony into considerations by ruling: “According to the testimony of Dr. Ruzindana, it is a particular feature of the Rwandan culture that people are not always direct in answering questions, especially if the question is delicate. In such cases, the answers given will very often have to be ‘decoded’ in order to be understood correctly. This interpretation will rely on the context, the particular speech community, the identity of and the relation between the orator and the listener, and the subject matter of the question”.⁷⁴

Witness testimony poses certain challenges when investigating international crimes because these witnesses are traumatised, speak different languages, and come from different cultural backgrounds. To effectively address this, there is a need to be aware of and to understand the underlying reasons, as set out above. There is a need for judges to openly recognise this and transparently discuss this so as to avoid further misunderstanding, and this calls for a high level of professionalism and awareness on the part of adjudicators.

5.6. The Role of Professionals in Processing Witness Testimony in the Investigation and Prosecution of International Crimes

The various sections above discussed evidential difficulties associated with the investigation and prosecution of international crimes, specifically with respect to retrieving statements or testimonies from witnesses. There are a number of professionals involved in this process, which comprises several stages. It is important to be aware of the different challenges encountered by different professionals at various stages of the investigative and prosecutorial process. There continues to be insufficient discussion on the role of the individual professional involved in the criminal procedure leading up to the trial of a defendant and the critical determinations that

⁷² *Mpambara* case, *supra* note 11, Chapter 6, para. 17, see *supra* note 11.

⁷³ *Prosecutor v. Akayesu*, pp. 39–40, see *supra* note 70; expert witness Ruzindana.

⁷⁴ *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement, 2 September 1998, para. 156.

the judges have to make, namely, to determine the guilt or innocence of the defendant. This should be remedied because the mind-set of, and work done by, these professionals are critical to the outcome of the investigations and prosecutions of international crimes.

5.6.1. Investigators of International Crimes: The Taking of Witness Statements in a Sensitive and Unbiased manner

Investigators are usually the first who encounter the witnesses and request their information during the interview and the taking of the statement. How they will conduct an interview may determine the outcome of a case. A witness who possesses crucial information for the case is not a guarantee for a successful prosecution if the information is not professionally taken by the investigators and recorded in a statement. It is obvious that investigators interviewing witnesses in this context need to be aware of the challenges and pitfalls as described above. If they fall into one or more of these pitfalls, the result can be devastating. If they manage well, there may be a basis for at least establishing the truth and a successful prosecution.

Investigators can suffer from bias. Certainly, during investigations in national systems the target or suspect is known from the beginning. It is often the only reason why the investigation is carried out as the person of the suspect triggers the jurisdiction either in his or her role as a national or person residing in a territory. The strong focus on the individual suspect by investigators, even unwittingly, *vis-à-vis* the crimes that have been committed, can lead to a preoccupation during an interview that influences the witness and leads to unreliable information. A question made to the witness early on during an interview that “We are investigating the role of Mr. X in the crimes that have been committed in this area. What can you tell us about his role?” is clearly a disastrous question in light of the witness issues described above. But mistakes in this respect can be more implied than given in the example. Furthermore, investigators need a host of other skills and qualities: excellent writing skills; cultural sensitivity; a genuine care for the witnesses, including for their safety and social and psychological wellbeing; gender awareness; and knowledge of the field of operations and its political and social context. These are all crucial to obtaining a high quality witness statement.

5.6.2. Prosecutors or Trial Attorneys of International Crimes: Case Consolidation from Witness Interviews

Prosecutors also play a very important role. Prosecutors must effectively direct the investigators, including those who conduct the interviews, to avoid misunderstandings and mistakes. The prosecutor needs to set clear guidelines as to the topics to be covered during witness interviews and the information needed to build the case. The prosecutor is the pivotal individual professional in constructing the case from a legal perspective while ascertaining the information needed to build that case is acquired, for example, from witness interviews. Investigators who conduct witness interviews must have received instructions and training about the legal requirements of the case and how to collect information based on these requirements. Finally, the prosecutor needs to present the case to the trial chamber convincingly, which presupposes the prosecutor's complete knowledge of the case and how to translate factual information into the legal charging of the defendant.

5.6.3. The Role of the Judges in Adjudicating International Crimes

Judges exercise several important functions in any case, one of which is ensuring the defendant's due process rights. International law guarantees certain rights of the defendant, and the exercise of these should be protected by the judge. These rights include the right to cross-examination or questioning of the witnesses presented by the prosecution and the presenting of exculpatory evidence to the judges. There are various ways in which these rights are exercised in conformity with the respective legal systems. In tribunals, the witnesses are brought before the trial chambers and questioned by the judges, the prosecution and the defence. In some national systems, the same rules apply, but in other countries, the trial judges take depositions in the field, more specifically at the location where the witness lives or resides.⁷⁵ In other, more civil law countries, an investigation judge or examining magistrate, who cannot be part of the trial proceedings, is in charge of hearing the witnesses in preparation of

⁷⁵ An example of a trial judge taking depositions in the field can be found in the *Prosecutor v. Désiré Munyaneza*, Verdict 22 May 2009, Case No. 500-73-002500-052, at the Superior Court, Montréal, Canada. The case was adjudicated by a single judge, the Honorable André Denis, J.S.C. who conducted a number of hearings in Rwanda and Tanzania. Munyaneza was sentenced to life imprisonment on 29 October 2009.

the trial and conducting these hearings either in his office or in the field, in cooperation with the state where the witness is located. In any event, these hearings and cross-examinations are critical for the outcome of the case. In all cases, these hearings will test the witnesses. Discrepancies in witness hearings and earlier statements form the brunt of the deliberations by the judges in their rulings⁷⁶ which can lead to the disqualification of witnesses or their acceptance with reasoning as to why the discrepancies were no reason for disqualification.

Suffice it to say that these hearings are problematic for the witnesses as they have to be re-traumatised again for the purpose of the adjudication of the cases. Moreover, all the challenges described above also apply to these hearings. Consequently, the participants in these hearings, the judges, the prosecutor and the defence need to be cognisant of these challenges and have the capability to deal with them. Clearly there is a crucial role to play by the judges – both trial judges and investigating judges, if applicable, – in securing both a fair trial and securing the rights for the defence as well as ascertaining that the exercise is faithful to truth finding with respect for the witnesses, as truth finding forms the basis of the main responsibility of the judges which is to determine the guilt or innocence of the defendant.

5.7. The National Jurisdiction: The Dutch Effort

5.7.1. Introduction

The challenges described above can only be faced and properly addressed when there is an awareness of these challenges and a well-developed system, wherein these challenges can be assessed, analysed and addressed.

Tribunals, generally, are well designed to meet those challenges and within their institutions, resources have been created to organise the proper response to meet the challenges. National jurisdictions widely vary in scope, size and quality and therefore, in my view, they are much more vulnerable to failing to meet the challenges described. Yes, national jurisdictions feel the need and obligation to establish universal jurisdiction for these crimes and start investigations, prosecutions and trials of international crimes, but they often have to acknowledge that these efforts come

⁷⁶ Combs, 2010, Chapter 7, see *supra* note 55.

with a responsibility and realize that the journey overwhelms them. Can they meet the challenges? Let me lead the reader into the Dutch effort.

5.7.2. Universal Jurisdiction

As has been mentioned above, many national jurisdictions have established some form of universal jurisdiction for international crimes, thus enabling the prosecution and adjudication of these crimes in their courts.

This complements⁷⁷ the universal jurisdiction, established by the Rome Statute, which forms the basis of the ICC, aimed at bringing the most responsible persons for these crimes to justice.

There is no doubt that these provisions are a critical and determining factor in bringing about a credible deterrent for perpetrators of these crimes, wherever they are. Not only will the higher levels of perpetrators know that they run a substantial risk that they will end up in the dock in The Hague to respond to charges of international crimes; but any person who has been involved in international crimes can be prosecuted in any country that has established universal jurisdiction over these crimes.

5.7.3. The Dutch Effort

5.7.3.1. Overview

The Dutch government established universal jurisdiction for some of the international crimes in the aftermath of World War II, when the first international treaties were established. By implementing these treaties in their national law, limited universal jurisdiction was created for the crime of genocide, from 1970 onwards; for torture, from 1989 onwards; and for war crimes, from 1952 onwards. Until the beginning of the new century, no significant investigations or trials were initiated.

With the signing of the Rome Statute and the obligations that ensued from the signing of the Rome Statute, things shifted dramatically. This event, but above all, the fact that the seat of the ICC was established

⁷⁷ In fact the Rome Statute in its Preamble calls on all States to establish jurisdiction for international crimes, listed in the Rome Statute and explicitly emphasizes that the ICC shall be complementary to the national criminal jurisdiction. More importantly, the principle of complementarity is made an admissibility issue in Article 17 of the Rome Statute, thus emphasizing that the first responsibility for ending impunity and is with the States that created and signed on to the Rome Statute.

in The Hague, made the Dutch government realise they should be the forerunners in implementing the Rome Statute in their national legislation, but this also meant they had to be serious in enforcing the law, meaning that they needed to take measures to ensure that investigations were carried out and trials could be held in the Dutch courts.

On 1 October 2003, the International Crimes Act became effective. For crimes committed before that date, the older laws, mentioned above, remained applicable.

Since the beginning of the century, a new and specialised investigation team became operational and has carried out multiple investigations. Trials ensued in the years thereafter. Until this date, the courts have rendered a dozen verdicts. The cases ranged from members of the Afghan regime in the seventies of the last century, to Dutch businessmen charged with complicity for the delivery of weapons or chemicals, to Rwandan nationals regarding the Rwandan genocide, and to the alleged leadership of the Tamil Tigers of Sri Lanka in the Netherlands.

5.7.3.2. The Legal Toolbox

Any credible national system, capable of handling cases of international crimes, starts with a comprehensive and usable set of legal provisions. A filled legal toolbox is a precondition for criminal investigations that match the seriousness of the crimes that actually took place and an effective prosecution.

Before the International Crimes Act became effective in 2003, only the crimes of torture, genocide and war crimes could be tried in Dutch courts and with a limited jurisdiction. Although the implementation laws for war crimes and torture did not limit the universal jurisdiction for these crimes, the Supreme Court of the Netherlands, in the application of these laws, has limited the universal jurisdiction for these crimes to cases where the defendant and/or the victim had Dutch nationality or where the defendant physically was present on the territory of the Netherlands. The universal jurisdiction for genocide was by law limited to cases where the defendant or the victim had Dutch nationality.

All this changed when the International Crimes Act became effective in 2003. Now basically all the crimes mentioned in the Rome Statute and the crime of torture were punishable within the Dutch jurisdiction. The universal jurisdiction was limited by law in the sense that only when

the defendant or victim was a Dutch national or the defendant from any nationality was physically present on Dutch territory, was the Dutch court competent to try these cases, therewith creating the legal opportunity for the prosecutor to initiate a criminal investigation and use all investigative methods regulated by Dutch law.

This situation was short-lived when, in 2006, a Rwandan national, living in the Netherlands was arrested for his alleged involvement in the Rwandan genocide. There did not seem to be a *prima facie* jurisdiction in his case as the man, not a Dutch national, was charged with acts committed before the coming into force of the International Crimes Act, and the Act was not made to work retroactively. Nevertheless, the prosecutor charged him with, among other things, direct perpetration in the genocide in his area of operation, using various and complicated legal reasoning to circumvent the fact that there was no direct basis for jurisdiction to charge him with genocide. The Supreme Court of the Netherlands rejected claims by the prosecution that they were competent to try the accused for genocide and consequently the defendant was charged with war crimes and torture. The District Court in The Hague convicted the accused for torture, whilst acknowledging that the man *de facto* had participated in the genocide.⁷⁸

Although the Court of Appeal reversed the ruling and convicted for war crimes, the peculiar situation led the government to amend its legislation in this respect after it barely had existed and made the genocide provisions in the International Crimes Act retroactive back until 1970, the year the implementation law of the Genocide Convention finally became effective.

Another major development was the incorporation into the International Crimes Act 2003 of the crime of enforced disappearance as a separate crime on 1 January 2011.⁷⁹ By making this crime punishable as an international crime, the Dutch government fulfilled its obligation under the International Convention for the Protection of All Persons against Enforced Disappearance.⁸⁰

⁷⁸ *Mpambara* case, Chapter 6, para. 17, see *supra* note 11.

⁷⁹ Since the International Crimes Act became effective in October 2003, the crime of enforced disappearance was punishable as a crime against humanity.

⁸⁰ The International Convention for the Protection of All Persons against Enforced Disappearances, U.N. Doc. A/61/488, 20 December 2006.

Certainly it can be concluded that the legal toolbox under Dutch law is considerably filled.

5.7.3.3. Organisation and Resources

5.7.3.3.1. Police Organisation

The existence of the legal possibility to charge defendants with international crimes does not make a system effective. It comes down to enforcement or real time criminal investigations at a professional level that enables the prosecution to lay charges and start the process of prosecution in a court of law.

After a difficult start, that is exactly what the Dutch authorities have been able to do, fulfilling the obligation it felt after deciding to host the ICC and implementing the Rome Statute expeditiously.

The investigation team, which is conducting the criminal investigations in international crimes, is a separate unit within the Criminal Investigations Division of the Dutch National Police Force, known by its acronym, KLPD. The unit has approximately 30 staff members and consists of a variety of criminal investigations expertise which is needed to be able to investigate the full scope of the international crimes. Apart from regular investigators, the team included financial investigators, forensic experts, analysts, and even a historian. Being part of the greater Investigation Division, the team enjoys the support of other investigative expertise, such as surveillance and technical surveillance including the capacity to intercept telephones, other conversations, undercover operations, *et cetera*.

5.7.3.3.2. The Prosecution Service and the Role of Victims

Cases of international crimes are the responsibility of the national office of the Public Prosecution Service in the Netherlands.

It, also, has a special team responsible for the criminal investigations and prosecutions of cases of international crimes and all related matters, such as international mutual legal assistance. The team at this moment has two specialised and senior public prosecutors, two legal assistants, a subject specialist, and administrative staff.

I should also point out that the position of victims in criminal proceedings in cases of international crimes is paramount for the way the truth is investigated and the charges are brought. Traditionally, the posi-

tion of a victim in a criminal proceeding is non-existent, or at best, weak. But recently, his or her position has been strengthened. In Dutch criminal proceedings, victims can lodge a claim against the defendant for compensation for harm inflicted upon them, albeit under restrictions. Secondly, more recently, victims are granted the right to appear in court and address the court about the way in which the crime has impacted their personal life. However, they are not allowed to speak about the evidence presented, the charges or any other topic. In court proceedings where cases of international crimes are adjudicated, victims have indeed used these rights. One of the conditions, however, for a trial judge to decide upon a victim's claim for compensation is that the claim may not be complicated because it would delay the criminal proceedings. In recent international crimes cases the trial judges have ruled that the claims brought against the defendant were complicated and therefore denied these claims.⁸¹ In reality victims of international crimes have no access to criminal proceedings for their compensation claims and have to rely on excruciatingly slow civil court cases. As far as victims having a role in criminal proceedings to influence the scope of the case or truth finding, national systems are averse to accepting such a role, while at the level of the ICC, victims are given such a role in the Rome Statute, which provides for a progressive system of rights for the victims. Case law will have to show what the actual role of the victims will be.⁸²

5.7.3.3.3. Cooperation with Other Services

More important than resources or the number of staff in a team is the idea that effective investigations and prosecutions cannot take place without cooperation with other services.

One of the most valuable partners in investigating international crimes is the Dutch Immigration Service, known by its acronym, 'IND'. All requests for asylum in the Netherlands are handled by this service and the IND creates a file for every single asylum seeker in the country.

⁸¹ The Supreme Court of the Netherlands has confirmed rulings on this issue by the lower judges in this respect. The Supreme Court of the Netherlands, Hoge Raad, *Van Anraat*, LJN BG4822, 30 June 2009.

⁸² In the ICC case against Thomas Lubanga, the victims have successfully pleaded to the trial judges to expand the scope of the case to other crimes than charged by the Prosecutor.

Following the rules in the Dutch immigration law, based on the 1951 Convention relating to the Status of Refugees, any person against whom there is a suspicion that he or she has committed an international crime is exempted from entering the process of asylum seeking. The IND creates a file of any of these cases and is under the obligation to transfer these files to the Prosecution Service for review.

Needless to say that these files create a wealth of information about possible cases of international crimes and are often the basis for initiating a criminal investigation and prosecution.

Recently, the Prosecution Service has formed a Task Force for international crimes in which the Prosecution Service, the Police, the Ministry of Justice and the IND are represented and where all issues regarding international crimes and how to cooperate are discussed.

5.7.3.3.4. The District Court

Under the provisions of the International Crimes Act, the District Court in The Hague is exclusively competent to try cases of international crimes. The investigation judge, who cannot, by law, participate in the trials, is part of the District Court in The Hague. The law made the District Court of The Hague uniquely competent in these cases for two obvious reasons: one court is more capable of developing experience and expertise in these matters, and The Hague is the international city of justice. It would be strange if the government of the Netherlands had chosen another city in the country, whose court would handle these cases.

Within the District Court in The Hague, there is not one chamber that is dedicated full time to the trials of cases of international crimes. There just are not sufficient cases to have a permanent chamber. Instead, the District Court has chosen to select two chambers with the most experienced and knowledgeable trial judges who are appointed for certain cases and trials, once the prosecutor has brought the case before the court by bringing charges against the defendant.

Once the case is brought to court, the pre-trial judicial investigation, conducted by the investigation judge, commences and it is not before a date for the trial is set that the trial judges are taken out of their roster obligations and start preparing the trial by reading the files in the dossier. Normally, trial judges are freed of their regular duties for about six months for a case of international crimes, including the trial itself and the

drafting of a written verdict. This may not seem like a lot of time, but it puts a tremendous burden on the rest of the trial judges, who adjudicate all other cases.

The trial judges have a number of court clerks available to handle all organisational matters surrounding the trial and one legal officer, specialised in international criminal law. Once the case is in appeal, the Court of Appeals in The Hague retries the case⁸³ and if necessary, additional investigations can be performed, normally by the investigation judge. Similar arrangements are available for the trial judges in appeal as described for the trial judges in first instance.

The District Court in The Hague over the years has acknowledged that the investigation judge, whose responsibility it is to investigate the cases pre-trial, which entails the hearing of most of the witnesses outside the trial, often in the country of their residence, is a specialised function which requires a full time judge to perform these responsibilities. Since 2008, such an investigation judge is appointed⁸⁴ and he or she has a staff of two legal officers, two clerks and one administrative assistant to organize the work. Apart from requiring sufficient resources, the position of trial judges under Dutch legal rules can also be problematic in some respect. They are not competent to view the crime scenes in the countries where the crimes occurred because the law does not permit them to travel outside their jurisdiction and view the crime scene. Nor do they hear witnesses themselves in those countries but rely on the work of the investigative judge. Again, this position very much follows from the provisions in the law and may be different in each country even within Europe, irrespective of whether they have a common law or civil law system. For instance, in 2009, the court in Finland tried a suspect allegedly involved in the Rwandan genocide in 1994. For this purpose the court heard most of the witnesses themselves in Rwanda and moved the whole court to Rwanda.⁸⁵ Naturally, the way in which trial judges are involved in truth finding during trial impacts on the outcome of the case, one can assume.

⁸³ Under Dutch criminal procedural law, the case in appeal is not limited to legal considerations, but the evidence is reviewed by the trial judges in full range. New evidence can be introduced by the parties.

⁸⁴ I was the first person appointed as such, before that several investigation judges heard witnesses in the same case.

⁸⁵ BBC News, "Finnish genocide trial in Rwanda", 16 September 2009, available at <http://news.bbc.co.uk/2/hi/8258113.stm>, last accessed on 27 June 2012.

5.7.3.3.5. Defence

Truth finding, as it stands under the Dutch legal rules, is very much the responsibility of the police investigators and the investigation judge. The defence does not play an active role. I do not envy the defence attorneys in cases of international crimes. They will feel the need to find exonerating evidence for their client to balance the investigation of the police. This evidence can only be found under the same circumstances and with the same challenges as applicable to the police investigators and the investigation judge.

This means automatically that the defence will have to get into the countries where the crimes have taken place and will need time to investigate. Under Dutch law, the defence's resources are very limited. Normally the defendant is entitled to one defence attorney and regulations do not provide for long, extensive investigative trips to far away countries. As a matter of fact, the regulations concerning defence rights do not distinguish between the types of cases, and do not provide for more than a defence attorney in international crimes cases as in any other case. Consequently, the defence attorney will not be able to travel and investigate unless their clients provide the money to do so. This is not the situation in every country though, as every national system has its own rules. In the recent case in Canada,⁸⁶ the defendant was provided with three counsels – funds for rogatory commissions, normal disbursements, transcription services, and expense money for the attendance of defence witnesses at trial. These provisions were provided by the Attorney General of Canada based on case law by Canadian Courts.⁸⁷ In civil law countries however, the situation will resemble quite as it is applicable in The Netherlands. It has been pointed out that this situation is quite divergent from the defendants' rights in this respect within the tribunals. There, the defendant is entitled to a defence team including a defence investigator as well as a budget and support from the Registry. In some tribunals, there is a defence office.

It is equally important that the defence attorneys in cases of international crimes are sufficiently equipped and knowledgeable about how to

⁸⁶ Superior Court, Montréal, Canada, *Prosecutor v. Désiré Munyaneza*, 500-73-002500-052, Verdict, 22 May 2009.

⁸⁷ Court of Appeal for Ontario, *R. V. Rowbotham*, CanLII 147 (ON CA), Judgement, 21 March 1988, available at <http://canlii.ca/en/on/onca/doc/1988/1988canlii147/1988canlii147.html>, last accessed on 27 June 2012.

handle these cases and hear the witnesses. In the Netherlands, there are just a handful of qualified defence attorneys capable of presenting a credible defence in cases of international crimes. Often, these attorneys have prior experiences in these types of cases and some even have experience before tribunals.

The International Crimes Act, mentioned here above, does not provide for procedural rules. Instead, the criminal procedural rules, as enshrined in the Criminal Procedure Act, are applicable in cases of international crimes as well. This means that the defence attorneys can exercise defence rights similar to their rights in ordinary cases. They will not be automatically entitled to a budget or a defence team, as there is no basis for these provisions in the Criminal Procedure Act, and their capabilities to present defence witnesses or other exculpatory evidence depends on their personal, hard work in the case and what the court grants them in these particular circumstances. The defence attorneys can address the investigation judge or the court itself to request for additional investigations, which they deem necessary in the interest of their clients, and even then, they are still dependant on what the investigation judge or the trial judges rule on their requests.

5.7.3.4. Expertise

As mentioned before, every participant in the criminal process, leading up to and including the trials, needs specific knowledge, experience and skills to effectively play his or her role in the work, certainly when hearing witnesses. Accruing this knowledge, experience, and skills is necessary, but not easy at the same time.

First of all, it is appropriate to assess that there are no generally agreed and concluded standards of investigations of international crimes. No handbook outlining how to investigate these crimes has ever been published.

Consequently, due to a lack of generally agreed standards, there is no global, authoritative training course where all investigators and any other person with a role or responsibility in international crimes can resort to and get up to standard.⁸⁸ It is equally important to assess that, to my

⁸⁸ It is fair to mention the existence of the International Institute of Criminal Investigations (hereinafter 'IICI'), based in The Hague, which offer courses for investigators of international crimes. Tribunals, however, tend to train their investigators in-house.

knowledge, there has never been a judicial body, no tribunal or national court, which has set any standard of investigations in their verdict, against which they will measure the evidence presented by the prosecution or defence.

Within the Dutch judicial system, there is a struggle to get people trained and develop expertise. The Dutch Police Academy developed a training course for international crimes and combined it with training investigators specialized in terrorism-investigations, but it appeared hard to create the right modules and level of training. The management of the Team International Crimes at the Dutch police at least sends their investigators to the courses offered by the International Institute of Criminal Investigations.

Within the judiciary, the training institute for prosecutors and judges, known by its acronym SSR, developed training for every staff member, including prosecutors and judges, in the field of international crimes, where participants are also trained in judicial aspects of prosecuting and adjudicating cases of international crimes.

Lastly, some of the universities in the Netherlands have developed classes and master studies in the field of international criminal law, with some specializing in the role of the tribunals. The Free University in Amsterdam some years ago initiated a master degree in criminology in the field of international crimes⁸⁹ and organises workshops discussing possibilities where academic research can assist in the prosecution or adjudication of these cases in tribunals or national courts. There is a fair share of cooperation between the Prosecution Service as well as the Court with academics.

5.7.3.5. Challenges

The above picture appears quite positive and yes, the effort that the Dutch authorities have put into creating a credible system of criminal justice to handle cases of international crimes is certainly impressive. However, there remains many challenges for all practitioners involved in cases of international crimes on a national level.

⁸⁹ Available at <http://www.rechten.vu.nl/en/education/graduate-programmes/international-crimes-and-criminology/index.asp>, last accessed on 17 October 2012.

The police struggle to keep their investigators on board and ensure sufficient continuity in their investigations over the longer period of time. In reality, many investigators, for all sorts of reason, leave the team to pursue another career and consequently, the expertise is lost, sometimes even before it is fully accrued.

Investigations of international crimes continue over many years and trials take forever, certainly when it is considered that there is an appeal case in almost every case of international crimes. Although the efficiency record of national systems seem to be a little better than the tribunals, where cases can take up to ten years, the length of the judicial process in these cases leads to all sorts of challenges, including the fact that investigators and prosecutors are replaced in the course of the cases and expertise and knowledge are lost.

The management within the Police Force and Prosecution Service needs to accept that any result will take many years to emerge and will hardly contribute to the favourable statics that nowadays dominate management and politics.

The courts equally face the challenge of working efficiently and producing as many verdicts as possible within a certain year. Cases of international crimes do not help very much to achieve this efficiency. Judges who are taken out of a roster to work on a case of international crimes for an extended period of time, cannot produce a verdict in another case. Management therefore tries to limit the time that judges are given to work on cases like these.

One can genuinely question whether three judges and a couple of assistants can truly process all the information produced in a case. First of all, there are the thousands of pages of transcripts of witness hearings, and then the need to analyse it to the full extent. On top of this, judges in national courts are more often than once confronted with complex legal issues, no different than the ones tribunal judges deal with. Judges in national courts also need to ascertain that they are not only proficient in the national law, but also need to know the state of affairs in international criminal law and the case law of the tribunals, as they will have to interpret their national law with the help of international criminal law and international case law. This is a not a small task and responsibility. It appeals greatly to the intelligence and skills of judges and prosecutors as well and puts pressure on their time-management.

Defence attorneys face equal challenges. Sometimes they work these cases by themselves. In many instances they are funded to work with two attorneys on a case, but it depends on their offices whether they really can free up two defence attorneys continuously for cases like these. Generally, defence attorneys are not supplied with a budget to investigate the case for the defence. On rare occasions, the court will grant them relatively small amounts of money for defence work,⁹⁰ which allows the defence at least to travel and hire an investigator to approach defence witnesses. Needless to say that under national criminal procedure, the defence faces huge challenges to present a credible defence in trial.

Mention must be made of a provision in Dutch criminal procedural law, which does not allow trial judges to view locations where the crimes have taken place if these locations are situated outside the limits of the geographical area for which the court is competent, certainly when the locations are abroad. This leads to the extraordinary situation where the trial judges in the District Court in The Hague, who adjudicate these cases of international crimes, not only do not hear and see the witness testify,⁹¹ but also do not have the chance to see where the crimes took place or any other relevant location in the investigation. Instead, they rely on the transcripts of the witness hearings and how the police and the investigation judge have visualised the locations relevant to the investigations.

All the observations, made here, lead up to the general question of whether the lack of pertinent criminal procedural law impedes a fair and proper trial and the ability of judges, trial judges in the first place, to adjudicate the cases of international crimes at a sufficient professional level.

The government of the Netherlands, when implementing the Rome Statute in the national legislation, more specifically the International Crimes Act, chose not to implement different criminal procedural rules with the reasoning that it was not necessary and that it would confuse the trial judges as they would have to work with two different sets of criminal procedural rules. That is certainly a serious argument, but over the years, with all the experiences in the investigations and trials of international

⁹⁰ In the case before the District Court in The Hague at the time of writing against a Rwandan national facing multiple charges of genocide and war crimes, the defence was granted € 15,000 for their defence work.

⁹¹ Under Dutch law, the investigative Judge will hear almost all witnesses, unless there are specific requests from the parties to hear a witness in court or when the trial judges *proprio motu* decided to hear witnesses in court.

crimes available, I could imagine this issue is again analysed and reconsidered.

5.8. Conclusion

Among others, the last section's discussion leads to the question whether or not in national systems separate procedural law should be adopted to facilitate better proceedings and address the issues described above. It is my assessment that national systems should be reticent in creating a separate criminal proceeding for international crimes that deviates from the ordinary criminal procedural rules. It would create a system in a system and such a system, which would necessarily be divergent from what judges in other criminal cases would apply, would be hard for judges to administer as they are not used to it and would naturally not often apply it as these cases are rather unique. However, I do believe some exceptions should be made. In the framework of the topic of this chapter, the defence, in cases of international crimes, should be given the opportunity to collect information and evidence for the defence; be supplied with sufficient and adequate means; and receive support and facilitation by the court and the government. A proper defence investigation will enhance the quality of the investigation overall and therefore serve the purpose of truth finding to an extent that what is brought to bear in a case reflects the reality to a sufficient degree.

More importantly, this chapter has sought to critically analyse developments in the area of old evidence and evidential proof in the context of international crimes. It notes that there is a higher likelihood that old evidence is used, due to the nature of international crimes and post-conflict circumstances. Such old evidence generally takes the form of witness testimony, which has particular drawbacks in light of what we now scientifically know and understand about the different phases of memory. This chapter has highlighted some of the difficulties associated with delayed witness testimony and suggested how they have to be solved. It has also studied the Dutch national experience of investigating and prosecuting international crimes, underscoring certain pitfalls that need to be avoided and certain proposals to be tried. There is a need to continue learning from our mistakes, to keep our learning curve steep, in the investigating and prosecuting of international crimes, so that we may continue to serve truth and prevent impunity.

Prosecuting and Defending in Core International Crimes Cases Using Old Evidence

Andrew Cayley*

6.1. Introduction

With the prosecution of international crimes gathering pace across the globe, this anthology's topic is both timely and of increasing significance to the challenge of rendering justice for mass atrocity crimes. I have encountered the problem of old evidence at several points in my own career, and indeed, since becoming the International Co-Prosecutor at the Extraordinary Chambers in the Courts of Cambodia, I dare say that I have of necessity developed a certain expertise in this area.

Physicists will tell you that the Second Law of Thermodynamics is one of the most fundamental laws of nature. This law states that the universe tends to move from order to disorder. In layman's terms, things fall apart. As a prosecutor who is currently dealing with cases involving old

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evidence, I can tell you that the Second Law of Thermodynamics also applies to the problem of international crimes. Evidence of crimes is subject to entropy. It will eventually disintegrate and turn to dust.

This disorder can come about in many different ways. Individuals engaged in mass atrocity crimes often go to great lengths to destroy evidence of their culpability. They can do this by operating in extreme secrecy, so that the existence of evidence is minimized from the start. They can burn or otherwise destroy documents and other traces of their acts. They can kill or intimidate witnesses. They can even make efforts to destroy entire crime scenes. But there are many other ways in which evidence ceases to exist over time, many of which do not involve the intentional destruction of evidence.

After mass atrocity crimes, society must rebuild, and the very act of rebuilding can destroy evidence at crime scenes. For example, believers will often be anxious to resurrect a desecrated religious structure, reconstructing it, re-consecrating, and returning it to its original purpose. The imperative for people to live and to produce food can also result in the destruction of evidence, as when mass graves are ploughed over so that the land may be returned to agricultural productivity.

But even without the intervention of any human agency at all, evidence of mass crimes will still inexorably crumble over time. Animals, insects, mildew and rust all consume evidence unless it is carefully preserved – a luxury beyond the means of many developing countries. Tree roots and rain will destroy even solid structures, given passage of sufficient time. Rivers have the habit of not staying put, overflowing their banks in seasonal flooding, and even changing their course, damaging or destroying anything in their path – as Bangladesh knows well. Thus nature itself is one of the greatest threats to the longevity of evidence.

One of the greatest challenges of old evidence in mass atrocity cases is simply finding the evidence in the first place. It can get lost or be hidden. Evidence may be waiting for you in as yet unexplored places – in the basement at the Ministry of Home Affairs; in an old storehouse at the Ministry of Cultural Affairs; in a bunch of dusty boxes, long forgotten in a dark corner of the National Library. Beyond official sources, private individuals often hold on to useful evidence, waiting for the right moment, and the right person or institution to trust, before turning it over. Evidence might be hiding in a sealed metal box or buried under a tree just outside a small village, far from the capital. You just have to find it.

Of course, when we are dealing with cases involving old evidence, a necessary corollary is that we will also be dealing with old defendants. At the Extraordinary Chambers in the Courts of Cambodia, or the Khmer Rouge Tribunal, as it is commonly called, we face precisely such a situation.

In 2009, the Khmer Rouge Tribunal completed its first trial. In 2011, the Trial Chamber convicted the defendant, Kaing Guek Eav, alias ‘*Duch*’, for war crimes and crimes against humanity. The Trial Chamber sentenced Duch to 35 years imprisonment for his role as chief of the Khmer Rouge regime’s secret police. At the appeals stage, the Supreme Court Chamber decided to increase the sentence handed down by the Trial Chamber, sentencing Duch to life imprisonment.¹

In June 2011, the Trial Chamber conducted initial hearings for the court’s second case, involving four defendants.² All of the accused in this case are elderly, in or on the verge of their 80s. Nuon Chea was the Deputy Secretary of the Communist Party and, the prosecution believes, was responsible for the regime’s internal security apparatus.

Ieng Sary was the Deputy Prime Minister and Minister of Foreign Affairs, as well as a member of the communist party’s Standing Committee. At 85, he is the eldest of the accused persons before the Khmer Rouge Tribunal at the time of writing.

Khieu Samphan was the Head of State for Democratic Kampuchea and a member of the communist party’s Central Committee. In many ways, he was the public face of the regime.

And finally, Ieng Thirith who was the Minister of Social Affairs. Last year prior to the commencement of trial in November 2011, the Trial Chamber found that Ieng Thirith was not mentally fit to stand trial and that she should be provisionally released. The OCP appealed that decision to the Supreme Court Chamber arguing that Ieng Thirith should continue with medical treatment and be re-evaluated in six months to determine whether or not she had improved sufficiently to stand trial. The Supreme

¹ For more information about this case, see Extraordinary Chambers in the Courts of Cambodia, “Case 001”, available at <http://www.eccc.gov.kh/en/case/topic/1>, last accessed on 6 October 2012.

² For more information about this case, see Extraordinary Chambers in the Courts of Cambodia, “Case 002”, available at <http://www.eccc.gov.kh/en/case/topic/2>, last accessed on 6 October 2012.

Court Chamber decided that a new assessment of Ieng Thirith's fitness to stand trial should be made six months after medical treatment. That medical treatment did not improve Ieng Thirith's condition and later on 13 September 2012, the Trial Chamber ordered a stay of proceedings and the release of Ieng Thirith on the basis of its finding that she remained unfit for trial.³

These four individuals in *Case 002* were charged with crimes allegedly committed during a regime which was established more than 36 years ago, and which ceased to exist more than 32 years ago. Let me turn now to the matter of how the passage of time has created challenges for the assembling and evaluating of evidence pertaining to those alleged crimes. I will review four areas of evidence, including crime scenes, documents, witnesses, and expert evidence, each of which has its own unique challenges and opportunities in respect of the passage of time.

6.2. Crime Scenes

Crime scenes include the places used to plan criminal acts or to conduct criminal activity, such as torture and execution sites. Of particular interest in this regard are locations where forensic evidence may still exist even long after the event, such as torture centres or mass grave sites.

In Cambodia, prior to the establishment of the Khmer Rouge Tribunal, researchers had identified the locations of more than 200 Khmer Rouge torture and execution facilities, and approximately 20,000 mass graves. However, with a few rare exceptions, after 30 years, these locations have been contaminated to such an extent that, from a forensic perspective, they no longer contain any useful evidence. Even so, the mere identification of the existence of these crime sites allows investigators to establish patterns of abuses so that the mass and systematic nature of these abuses becomes readily apparent.

Probably the most notorious of these types of locations in Cambodia is the infamous S-21 prison in Phnom Penh. Immediately after the regime was overthrown, this site was turned into a museum, and thus it has since been preserved. But it is the only one of more than 200 Khmer

³ For more information about proceedings involving Ieng Thirith, see Extraordinary Chambers in the Courts of Cambodia, "Ieng Thirith", available at <http://www.eccc.gov.kh/en/indicted-person/ieng-thirith>, last accessed on 6 October 2012.

Rouge prisons which has been maintained in more or less its original condition.

Unfortunately, other locations, such as a Khmer Rouge prison in Phnom Srok District, Banteay Meanchey Province, were not maintained. After the regime fell, the building was rehabilitated, and today it is used as the district administration office. No traces remain of its previous use as a prison.

In another instance, a cave, located in Dang Tong District of Kampong Speu Province, was also used as a Khmer Rouge prison. A concrete factory was eventually built on this site. Since then, the entire cave has been ground up and crushed to manufacture concrete. The location no longer exists.

But it does not take only humans to destroy evidence of mass crimes. A site known as Ampe Phnom in Samrong Tong District of Kampong Speu Province contains numerous un-exhumed mass graves. This site sits on the banks of the Prek Thnoat River, and, as happened at Ampe Phnom, wandering rivers can and sometimes do consume mass graves. There are many rivers in Cambodia so this happens fairly often. It also happened on an island called Koh Phal in Kampong Cham Province, which sits in the Mekong River. Koh Phal was the location of a major massacre of Muslim Cambodians, and part of a series of acts which we allege constitutes genocide. But the evidence of a mass grave is long gone.

Many mass graves were exhumed in the immediate aftermath of the KR regime, often by families searching for lost loved ones, and also often by impoverished survivors looking for valuables, such as jewellery sewn into the clothing of victims. Those exhumations were haphazard, non-scientific, and poorly documented or not documented at all, rendering the sites effectively useless from a forensic standpoint.

In preparation for the trials, a local NGO called the Documentation Centre of Cambodia carried out a nationwide survey of mass grave sites in 2002–2003. That project identified several undisturbed sites which were suitable for formal, multi-disciplinary forensic exhumation. The Khmer Rouge Tribunal's Office of Co-Investigating Judges studied this information and ultimately decided that the likely results of a forensic exhumation were not worth the time and expense which would be required to carry it out.

A large execution site near the capital, Phnom Penh, which was used to dispose of prisoners from the infamous S-21 prison in Phnom Penh, was exhumed shortly after the fall of the Khmer Rouge. Many thousands of sets of human remains were recovered here. Those remains were arranged into a memorial. Unfortunately, however, since the remains were displayed in the open air, and exposed to the elements for ten years before they were moved to an enclosed structure, these bones deteriorated to the point where they are no longer useful as a source of forensic evidence. In the southwest region of Cambodia, the Khmer Rouge operated a torture and execution facility known as Sang Prison. We believe that at least 5,000 people were executed at this location, perhaps many more. A similar memorial to the one near Phnom Penh was created at this prison. There were an estimated 2,600 sets of remains in this memorial. By 1995, the Sang memorial had fallen into disrepair, and the roof and doors of the structure had been stolen, so that the bones were exposed to rain, sun and animals. Cows, in particular, like to eat the bones, as they are rich in calcium. So the bones began to deteriorate and disappear rapidly. Within three years, by the end of 1998, the bones in the Sang memorial had reached an advanced state of disintegration. Very few of the bones remained at this point, and those which did remain were literally falling apart.

By 2009, the entire area had been bulldozed and cleared to construct a motor pool for the provincial police department. The previous evidence of mass atrocity crimes at this site – the remnants of the prison, the mass graves, and the exhumed human remains – are now nothing but a memory in the minds of surviving witnesses, except, of course, for photographs of the site that had been previously taken. This suggests the importance of documenting crime sites as soon as possible after the commission of the crimes, as well as at regular intervals thereafter.

In contrast to the previous examples, some crime scenes can survive for decades. For example, the Khmer Rouge used mass forced labour in 1977 at a dam construction site in Kampong Thom Province, Cambodia, which was called the First January Dam. Upwards of 40,000 persons, working almost entirely by hand, built a huge dam that was 52 kilometres long. Due to incompetent engineering, the dam collapsed almost immediately, but the project was so massive that much remains of that effort today.

The Khmer Rouge were proud of their forced labour projects, so those projects were a standard stop on tours for foreign dignitaries. One of our accused persons, Ieng Thirith, led a Laotian delegation on a visit to the First January Dam site on 22 April 1977. In recent years, a small portion of the First January Dam has been re-engineered and reconstructed, so that it now serves as a functioning irrigation system.

Remote sensing utilizing space-based imaging satellites can be useful in dealing with old crimes sites as well. Remote imaging can, for example, be used to identify old mass-grave sites, or to observe the contours of a very large forced labour earthworks project like the First January Dam.

6.3. Witnesses

Let us turn now to witness evidence. Over time, the availability and quality of witness testimony naturally erodes, due to a variety of factors. Witnesses will die. Witnesses will forget, or their memories may become frail and unreliable with advancing age. Witnesses may also lose interest, and no longer be willing to recall traumatic events of long ago.

Over a long period, some witnesses may have told their story many times. Records of those recounted experiences may reveal shifts or contradictions over time in the story told by a particular witness, raising questions which can be exploited by the defence and which can create doubts in the minds of judges.

Another factor that can interfere with the memory of witnesses is their exposure to different versions of the story, told by other people. A variant of this effect that we have observed in Cambodia arises from the fact that the political movement that replaced the Khmer Rouge has ruled Cambodia for more than 30 years. This political movement, the Cambodian People's Party, has its own version of history, and that version of history has been constantly repeated in official propaganda for decades. The average Cambodian person has heard this official version of the Cambodian genocide story many times, perhaps hundreds of times.

Trauma itself, of course, is another issue altogether, one which may be exacerbated with the passage of time. This is particularly likely if traumatic experiences continue to accumulate in an individual's life, through on-going violence, or through forms of structural violence such as

poverty. Trauma can distort memory, and make a victim's recollection of events less reliable.

Despite these challenges, witnesses remain a key source of evidence. Witness evidence in old cases can be recorded, as oral histories or as testimonial evidence, and collected closer in time to the events in question. It is stating the obvious of course but witness accounts gathered closer in time to the actual event will generally be more reliable than those gathered at a later date. These witness accounts may be preserved in the form of writing, audio recordings, or video recordings. Even if a witness is unavailable at the time of trial to authenticate the statement, and/or to be cross-examined regarding their statement, the court may still consider such a testimony as probative and useful to ascertaining the truth.

In Cambodia, a great deal of witness testimony has been recorded over the last 30 years, and we have relied extensively on this old evidence in building our case files. Similar examples here in Bangladesh might be testimony recorded in the book *Women's 1971*,⁴ or in films such as Ananda's *The Village of Widows*.⁵ Another major source of previous witness testimony in Cambodia was the 1979 "People's Revolutionary Tribunal", a local trial which judged Khmer Rouge leaders Pol Pot and Ieng Sary *in absentia* in the immediate aftermath of the regime.⁶ The records of that proceeding are available to us, and we have found some of them useful. Similarly, there were trials in Bangladesh during the mid-1970s, and if the records of those trials are still available, perhaps they could be useful in the war crimes work being done at the time of writing.

Long after a crime has taken place, witnesses can be hard to locate. Travel can be difficult – roads in rural Cambodia are often impassable except on foot or by using traditional means of transportation. Moreover, in Cambodia, people often change their names at significant passages during their life; this can make the tracking of witnesses more difficult. Khmer Rouge cadres changed their names frequently as a matter of policy, and

⁴ Yasmin Saikia, *Women, War, and the Making of Bangladesh: Remembering 1971*, Duke University Press, 2011.

⁵ For a brief account on recent documentaries addressing 1971, see "Bangladesh through Audio-visual Medium", *The Daily Star*, 11 February 2011, last accessed on 6 October 2012.

⁶ Extraordinary Chambers in the Courts of Cambodia, "Have any of the Khmer Rouge senior leaders been tried before?", available at <http://www.eccc.gov.kh/en/faq/have-any-khmer-rouge-senior-leaders-been-tried>, last accessed on 6 October 2012.

they also used code-named aliases, such as “Grandfather 15”, “Mr. Blue”, or “Uncle Fish Paste”. This makes the identification of witnesses that much more challenging. So it is not always easy to find witnesses in old cases.

6.4. Documents

I turn now to documentary evidence. There are many kinds of potentially relevant documentary evidence in trials for mass atrocities, some of which fall into the category of old evidence. For example, there are original documents from organisations or individuals involved in carrying out atrocities; contemporaneous photographs and films; and contemporaneous domestic and international news accounts.

A challenge with contemporaneous but old documents is chain of custody of the evidence. International courts have accepted the realities and had liberal rulings on admission and probity of these old documents, often relying on other evidence to corroborate the documents.

One example of this from Cambodia is the official journal of the Communist Party of Kampuchea, which was called “Revolutionary Flag”. The Party leadership used this publication to convey the “Party line” to rank and file members of the Party, that is, to indoctrinate their followers in the ideology and policy of the revolutionary organisation. Many issues of this publication still exist, and they are invaluable in demonstrating the patterns of criminal activity ordered by the accused persons. While we are definitively unable to prove the chain of custody for some documents, from their date of publication during the Khmer Rouge era up until today we can support and corroborate those documents through other evidence. In Bangladesh, I believe there is a similar party journal, an organ of the Jamaat party known as *Sangram*. Those publications may contain a great deal of material relevant to charges in cases before the ICT, but again, if the parties attempting to introduce the document into evidence at the court cannot prove the chain of custody, it may be subject to challenge.

Another type of old evidence from Cambodia which can be useful is bureaucratic records of organisations engaged in violations of humanitarian law. One example is what we call an “execution log” from the S-21 prison in Phnom Penh written on 23 July 1977. It is a list that records the biographical details of 18 prisoners who were executed on that day, and it is signed by two senior officials of the prison. Handwritten at the bottom

is a notation which states: “Also killed 160 children today, for a total of 178 enemies killed today”. We are fortunate that a large number of documents from S-21 survive until today. At the same time, we are aware that a large number of documents from that institution also have been lost over the intervening years.

Indeed, one victim who filed a complaint at the Khmer Rouge Tribunal accidentally learned the fate of her disappeared father when, after the regime fell, she bought some food from a street vendor, only to discover that the food was wrapped in a page from her father’s forced confession. This led to the discovery that he had been executed at S-21 as an ‘enemy of the people’. This incident highlights the fact that for many societies in which the oral tradition is still strong, and appreciation for the written word is not widespread, documents may not be seen as significant in and of themselves, and instead may be much more valued as, for example, something in which to wrap fish, or to roll tobacco for a cigarette.

Photographs are also a highly probative form of documentary evidence. Bureaucratic records from the S-21 prison were photographs that include the name of the prisoner and the prisoner’s date of arrest, which we can then corroborate with other records from the same institution. In fact, we assembled this kind of data for more than 12,000 prisoners at S-21, allowing us to understand a great deal about how S-21 functioned as an institution.

Photographic evidence is also helpful for means other than identifying victims. One photograph we have shows several Khmer Rouge leaders in a railway carriage, with top Khmer Rouge leader Pol Pot in front. Seated directly behind him is one of our accused persons at the Khmer Rouge Tribunal, Nuon Chea. Pol Pot was known during the regime as “Brother Number One”, and Nuon Chea as “Brother Number Two”. This type of photograph can help to establish hierarchical relationships and visually reinforce the rank of an accused.

Even when the provenance of particular images is unclear, under certain circumstances, they can still be useful as evidence. For example, in one photograph we have, we do not know who took it, but from the buildings in the background we can identify the scene as the capital city of Kampot Province in south-western Cambodia. From the activity of the people pictured, we can also infer that the photograph was taken on 17 April 1975, as the Khmer Rouge were carrying out the forced evacuation of that city.

Another source for obtaining old evidence is in co-operation with third-party states. We have obtained images of Phnom Penh's Central Market, as seen in U.S. Air force surveillance photographs, five days before the evacuation of Phnom Penh and ten days afterwards. In the before photograph, a viewer can see cars, trucks, buses, goods and even people bustling around the market. In the after photograph, the entire area is bereft of vehicles, and people are nowhere to be seen. These images provide strong visual reinforcement of the allegation that the Khmer Rouge entirely emptied the capital of its population.

6.5. Expert Evidence

Lastly, I turn now for a moment to the area of expert evidence. A quick look at the literature on the 1971 Bangladesh war of independence suggests that there is a very wide range of estimates on the number of people who were killed. The numbers I have seen range from a low of 200,000 to a high of 3,000,000. Estimating death tolls in episodes of mass atrocity is a notoriously difficult issue, and inevitably there will be significant margins of uncertainty in even the most carefully constructed estimates.

Something has to be done to provide a clearer picture of the historical record, and the scope of the alleged atrocities. The solution at the Khmer Rouge Tribunal was to bring in a team of independent expert demographers to carry out a focused study of the question. The demographers concluded that the death toll under the Khmer Rouge regime was between 1.7 million and 2.2 million, with between 800,000 and 1.3 million violent deaths. That is still a substantial range of uncertainty, but it is much better than the virtually open-ended estimates that had been previously circulating among the public. Thus we can see the value of expert evidence in attempting to grapple with old and uncertain data.

Finally, another type of expert evidence is analytical evidence, which can be created either by the prosecution or defence, or by outside experts. Analytical evidence can be particularly valuable in old cases, when there are only fragmentary bits of information available regarding certain events, but when there are enough fragments with which skilled analysts can reconstruct aspects of the criminal events which may help judges understand the historical context. Organisational charts of the Khmer Rouge outlining hierarchical structures in a province, for instance, help us to understand exactly who was in charge of particular areas at a

particular time. We have assembled such charts for the entire country during the Khmer Rouge regime.

6.6. Conclusion

By way of conclusion, allow me to draw a few lessons about old evidence from our experience at the Khmer Rouge Tribunal.

First, just because you have not found it yet, do not give in to the temptation to conclude that the evidence does not exist. There is more evidence out there than you may realize.

Second – although this may be of limited use to you now – it is crucial to begin documenting evidence of crimes as soon as possible after they occur, and then to regularly continue to document important sites over time.

Third, merely documenting evidence is not enough; that documentation must be preserved in a form that will permit it to be understood and interpreted, and its original sources as well as its chain of custody proven, at a time long after the evidence has been collected.

Fourth, in the case of old crimes, you will find that various types of interested persons and organisations may have been collecting evidence for a long time, from civil society organisations to governments. You should seek out this previously collected evidence – it can help to reveal the truth in cases of mass atrocity crimes.

Fifth, the use of electronic data systems and other advanced systems to discover, preserve, organize, analyse and disseminate evidence of mass atrocity crimes provides invaluable tools to those who will either prosecute or defend accused persons in such cases.

And sixth, political, bureaucratic, social and other extra-legal considerations and pressures will often impact the survival of evidence in mass atrocity cases, as well on as the ability of investigators to gather that evidence; the best responses to these pressures are diligence and persistence.

There are many similarities and parallels among various instances of mass atrocity crimes, and those similarities make it possible for us to learn across instances in order to do a better job of addressing accountability issues. By the same token, each situation is in many ways unique, and the mechanisms we devise to address them will always vary in some significant ways. We will watch with great interest to see what similarities

emerge before the Bangladesh International Crimes Tribunal, and in what ways it turns out to be unique.

Investigating Core International Crimes in Indonesia Using Old Evidence: The Indonesian National Commission on Human Rights’ 1965–1966 Investigations

Sriyana*

7.1. Introduction

Everyone has the right to pursue and enjoy a safe, serene, peaceful and prosperous life. Hence, men, as one of God Almighty’s creatures, is blessed with a set of attached rights which must be respected, upheld and protected by the State, law, and government. Every individual deserves respect from others by virtue of his or her dignity as a human being.

However, in reality, Indonesia’s history is marked by various events of suffering, misery and social inequality, such as those resulting from unfair and discriminatory behaviour in the period of 1965–1966. This paper explains how victims of this period have claimed their rights through Indonesian domestic processes. It specifically focuses on the investigatory and evidential work done by the National Commission on Human Rights, which is an essential stage in these victims’ fight for justice.

I will first provide an overview of the Commission’s investigative mandate, and its special role *vis-à-vis* Indonesia’s Human Rights Court with regard to the investigation and prosecution of gross human rights violations. Then, I will set out the facts of the 1965–1966 incidents, which will serve as the case study of my paper. I then proceed to explain the investigatory process and methods used by the Commission in this case. My paper will also highlight challenges encountered and the recommendations made so far by the Commission in this case.

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7.2. The Investigative Functions of the National Commission on Human Rights Based on Law No. 6 (2000) Regarding Human Rights Courts

As stated in Article 1(7) of Act No. 39 (1999), the National Commission on Human Rights is an independent agency, whose position is on par with other State agencies, and which is charged with carrying out human rights assessment, research, extension, monitoring, and mediation.¹ It is domiciled in the capital of Republic of Indonesia, and may establish representatives in local areas. Up to now, it has three representatives in West Kalimantan, West Sumatra, Papua and three Representative Offices in Aceh, Ambon, and Palu.

More specifically, the Commission's purposes, as set out under Act No. 39 (1999), are as follows:²

- a) To develop conducive conditions of human rights implementation in accordance with *Pancasila*, the Constitution ('*Undang-Undang Dasar 1945*'), and the United Nations Charter, as well as the Universal Declaration of Human Rights.
- b) To enhance the protection and enforcement of human rights for the entire development of Indonesian people and their ability to participate in various aspects of life.

The Commission's establishment and operations are conducted in line with international standards outlined in the Paris Principles of 1991, and it has been granted an accreditation of Category A from the International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights ('ICC'), Office of the High Commissioner of Human Rights ('OHCHR'). This accreditation status of Category A may be said to amount to an international recognition of the Commission's independence, and enables it to actively participate in each session organised by the United Nations.

In addition to the Commission's general human rights functions outlined above, as set out in Law No. 39 (1999) on Human Rights, the Commission also plays a specific role with respect to Indonesia's human rights courts. The Commission is the only institution authorised to conduct inves-

¹ Republic of Indonesia Legislation No. 39 of 1999 Concerning Human Rights, 23 September 1999 (hereinafter 'Act No. 39 (1999)').

² *Ibid.*

tigations of gross violations on human rights, cases which may then be pursued before a human rights court.

The Indonesian legal system considers gross violations on human rights as extraordinary crimes, which are not to be addressed through laws governing ordinary crimes or by general courts. These cases are to be heard by Indonesia's human rights court.

These human rights courts were first established by Act No. 26 (2000).³ This act is an implementation of Article 104 paragraph (1) of Act No. 39 (1999) on Human Rights, which reads "To prosecute gross violations on human rights, it is established the Human Rights Court within the General Court".⁴ In fact, Act No. 26 (2000) is a successor of Act No. 1 (1999) on the Court of Human Rights,⁵ which has been revoked by the House of Representatives because it was considered inadequate and flawed.⁶

To deal with acts of gross violations on human rights, it is necessary to have investigation steps, prosecution and distinctive examination, so that Act No. 26 (2000) also regulates distinctive legal provisions that are different from handling ordinary crimes. They are mentioned in the articles that exist in the law as follows:

- a) Investigators form *ad hoc* teams, and *ad hoc* investigators, *ad hoc* prosecutors and *ad hoc* judges are appointed (Articles 18–33).⁷
- b) It is clarified that investigations can only be done by the National Commission on Human Rights as an independent institution and not done by the police or the prosecutor's investigative agency for ordinary crimes (Article 18).⁸

³ Republic of Indonesia, Legislation No. 26 (2000) Concerning Human Rights Courts, unofficial translation (hereinafter 'Act No. 26 (2000)').

⁴ Act No. 39 (1999), Article 104(1), see *supra* note 1.

⁵ Republic of Indonesia Legislation No. 1 (1999).

⁶ Government Regulation in Lieu of Act No. 1 (1999) on Human Rights Courts, 8 October 1999. This regulation was made in emergency circumstances to solve human rights violations in East Timor.

⁷ Act No. 26 (2000), Articles 18–33, see *supra* note 3.

⁸ *Ibid.*, Article 18.

- c) The grace period has a different stipulated time limit to the Criminal Procedure Code in terms of investigation, prosecution and examination in court (Articles 22, 24, 31, 32 and 33).⁹
- d) There are victim and witness protections (Article 34), they are not set up for ordinary crimes, and for gross violations on human rights only.¹⁰
- e) In case of gross violations on human rights there is no statute of limitation, whereas in ordinary crimes, there are expiration periods.¹¹

7.2.1. Types of Human Rights Court

There are two kinds of human rights courts: the permanent human rights courts, and *ad hoc* human rights courts which are set up on a case-by-case basis. The permanent human rights courts have the authority to investigate and prosecute incidents which occur after the enactment of Act No. 26 (2000). Based on Presidential Decree No. 31 (2001), dated 12 March 2001, the government has established such courts in Central Jakarta, Surabaya, Medan and Makassar.¹²

Ad hoc human rights courts have the authority to examine and rule on human rights violations that occurred prior to the enactment of Act No. 26 (2000). In other words, it may examine cases on a retroactive basis. At the moment, Presidential Decree No. 53 (2001), dated 23 April 2001, establishes an *ad hoc* human rights court in the Central Jakarta District Court.¹³ There was debate over such retroactivity in relation to the prosecution of gross human rights violations in East Timor in light of Act 28(I) of the Constitution ('*Undang-undang Dasar 1945*'), which is the result of the second amendment of the 1945 Constitution, and which states that an individual is "[...] not be judged on the basis of retroactive law [...]".¹⁴ In addi-

⁹ *Ibid.*, Articles 22, 24, 31, 32 and 33.

¹⁰ *Ibid.*, Article 34.

¹¹ *Ibid.*

¹² Presidential Decree No. 31 of 2001, 12 March 2001.

¹³ Presidential Decree No. 53 of 2001, 23 April 2001. *Ad hoc* human rights courts are to investigate and bring to justice human rights violation cases in East Timor in 1999 and in Tanjung Priok, North Jakarta in 1984.

¹⁴ The 1945 Constitution of the Republic of Indonesia, 5 July 1959 ('*Undang-undang Dasar 1945*').

tion, this violates the principle of non-retroactivity which is a principle of international law.

7.2.2. The Jurisdiction of the Human Rights Courts

Indonesia's human rights courts have the authority to examine and rule on cases of gross violations on human rights which include:

- 1) **Crime of Genocide:** an act committed with intent to destroy or exterminate the whole or part of nations, races, ethnic groups, religious groups, by killing members of the group; causing serious physical or mental harm to members of the group; creating conditions of life that would lead to the physical whole or in part of extermination; imposing measures intended to prevent births within the group; or forcibly transferring children of a particular group to another group.
- 2) **Crimes Against Humanity:** an act committed as part of a widespread or systematic attack directed at a civilian population: murder; extermination; slavery; expulsion or forcible transfer of population; deprivation of liberty or deprivation of other physical liberty in an arbitrary manner in violation of provisions of basic principles of international law; torture; rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation or sterilisation or other forms of equivalent sexual violence; persecution of a group or association that is based on certain similarities political beliefs, race, nationality, ethnicity, culture, religion, gender or other grounds that are universally recognized as contravening international law; enforced disappearances; or the crime of apartheid.

It is noteworthy that the definitions stated above adopt the definitions set out in the Rome Statute. It may be said that Act No. 26 (2000) has adopted several provisions in the Rome Statute. However, the Rome Statute's jurisdiction is not limited to genocide and crimes against humanity, but also includes war crimes and aggression.¹⁵

¹⁵ Rome Statute of the International Criminal Court (hereinafter 'Rome Statute'), 1 July 2001, Articles 5–8.

7.2.3. The Investigative Role Played by the Commission in Bringing Gross Violations of Human Rights before Human Rights Courts

As mentioned above, investigations of gross violations on human rights are only to be done by the Commission. In conducting the investigation, the Commission may establish an *ad hoc* team that consists of members of the Commission and other public constituents. In undertaking its task, the Commission is authorised to:

- a) Conduct an investigation and examination of the events that happen in society which are suspected to be any gross violations of human rights;
- b) receive reports or complaints from individuals or groups concerning violations of human rights, and to pursue statements and evidence;
- c) call the complainant, victim, or the party related to the gross violation on human rights in order to request and hear testimony;
- d) summon witnesses to request and hear testimony;
- e) review and collect information at the scene and other locations as deemed necessary;
- f) call on relevant parties to provide written statements or to submit the necessary original documents;
- g) do these following actions:
 - 1) examination of the letter;
 - 2) search and seizure;
 - 3) examining houses, yards, buildings, and other places occupied or owned by certain parties; or
 - 4) bringing in experts in connection with the investigation.

Upon concluding its investigations, the Commission is to submit the results of its investigations to the Attorney General who is to decide on further investigations and prosecutions.

So far, the Attorney General has brought two cases before the *ad hoc* human rights courts based on investigations submitted by the Commission: in the case of East Timor in 1999, and in the Tanjung Priok Incident in 1984. Another case has been heard before the Human Rights Court in Makassar: an issue that happened in 2001.

The Commission has investigated and submitted a number of other cases of gross violations on human rights to the Attorney General: the incidents of Trisakti, Semanggi I and Semanggi I and II; the *riot* case in May

1998; Wasior and Wamena Issues in Papua; enforced disappearance; and Talangsari issue.

7.2.4. Provisions for the Rights of Victims

Considering that gross violations of human rights are extraordinary crimes, the protection of victims and witnesses is needed. Therefore, the government has issued Government Regulation No. 2 (2002) dated 13 March 2002 on Procedures for the Protection of Victims and Witnesses in Gross Violations on Human Rights.¹⁶ Act No. 26 (2000) also sets up the right of victims to obtain compensation, restitution and rehabilitation.¹⁷ As a result, the government has issued Government Regulation No. 3 (2002) dated 13 March 2002 concerning Compensation, Restitution, and Rehabilitation of Victims of Gross Violations on Human Rights.¹⁸

In addition, Act No. 13 of 2006 on Protection of Witnesses and Victims established the Witness and Victims Protection Agency (*'Lembaga Perlindungan Saksi dan Korban'* – 'LPSK'), which is charged with providing necessary protection to all witnesses and victims at every stage of the judicial process, including the witnesses and victims of gross violations on human rights.¹⁹

Article 5 of Act No. 13 (2006) states that witnesses and victims are entitled to:

- a) obtain the protection of personal security, family, and property, and be free from threats with respect to the testimony that will be, is being, or has been given;
- b) participate in the process of selecting and determining the form of protection and security support;
- c) provide information without pressure;
- d) obtain an interpreter;
- e) be free from a trap question;

¹⁶ Government Regulation No. 2 (2000) on Procedures for the Protection of Victims and Witnesses in Gross Violations of Human Rights, 13 March 2002.

¹⁷ Act No. 26 (2000), see *supra* note 3.

¹⁸ Government Regulation No. 3 (2002) on Compensation, Restitution and Rehabilitation of Victims of Gross Violations of Human Rights, 13 March 2002.

¹⁹ Republic of Indonesia Legislation No. 13 of 2006 on Protection of Witnesses and Victims, 11 August 2006 ('Act No. 13 (2006)').

- f) obtain information about the progress of cases;
- g) obtain information regarding a court decision;
- h) be informed if the convict is released;
- i) get a new identity;
- j) get a new residence;
- k) obtain reimbursement of transportation costs in accordance with the requirements;
- l) get legal advice; and/or
- m) get help with living expenses until the time for protection has expired.²⁰

Furthermore, Article 6 states that victims of gross violations on human rights are not only entitled to the rights mentioned above, they are also eligible for medical assistance and psycho-social rehabilitation assistance.²¹ They also have the right to obtain compensation by applying to the courts.

7.3. Case Study: Gross Violations of Human Rights during 1965–1966

The events of 1965–1966 are a black mark on the history of the Indonesian nation. These events were the result of the State's crackdown against members and followers of the Communist Party of Indonesia ('PKI'), which was considered to be a resistance movement against the nation.

According to reports from the victims and families of victims, the 1965–1966 incidents resulted in various forms of human rights violations, including murder, extermination, enslavement, expulsion or forcible transfer of population, freedom and physical deprivations, torture, rape, persecution, and enforced disappearances.

In addition, victims and families of victims suffered mentally (psychologically), from one generation to another, and were subject to discriminatory acts in the field of civil and political rights, as well as in the field of economic, social and cultural rights.

These victims have made various efforts to seek redress for their violated human rights and to obtain justice. Among others, they denounced these issues to the National Commission on Human Rights.

²⁰ *Ibid.*, Article 5.

²¹ *Ibid.*, Article 6.

In response to the complaints of victims, victims' families, and communities, the Commission established the Soeharto Human Rights Violation Assessment Team to conduct an assessment of issues in Buru Island. The team's mandate and responsibilities were based on Act No. 39 (1999) on Human Rights, namely, to search for data, information, and facts in order to determine whether there was an occurrence of human rights violations.²²

As a result of its assessments, the team concluded that in the Buru Island incident there had been violations of human rights, such as the forcible transfer of population, placing detainees in isolation camps, slavery (forced labour), violence in detention, and other inhumane actions. The team concluded that gross violations of human rights, as defined in Act No. 26 (2000), had taken place in the case of Buru Island.²³

In order to ascertain and confirm whether the case of Buru Island amounted to gross violations of human rights, the team gave their recommendations to the Plenary Session of National Commission on Human Rights for a legal analysis to be conducted on the basis of the team's recommendations and investigations. Following the decision of the Plenary Session, the Commissioner then proceeded to conduct a legal analysis of the issues. Based on the results of legal analysis that has been done, it was concluded that gross violations of human rights did indeed take place in the case of Buru Island.²⁴

The team recommended judicial investigation to the Plenary Session of the Commission according to Act No. 26 (2000) regarding Human Rights Courts. In response to the conclusions and recommendations of the legal analysis team, the Commission, during its next Plenary Session, set up an *Ad Hoc* Team of Gross Violations on Human Rights in 1965–1966 issues, including Buru Island.

7.3.1. Framework of Investigation

The National Commission on Human Rights has conducted these investigations from 1 June 2008 until 2011, but the results have not yet been ratified

²² Act No. 39 (1999), see *supra* note 1.

²³ The Conclusion of Assessment Team Report on Soeharto Human Rights Violation, National Commission on Human Rights, 6 August 2003.

²⁴ The Conclusion and Recommendations of analysis report on Buru Island incident, 5 February 2004.

by the Plenary Session of National Commission on Human Rights at the time of writing. In order to understand the implementation of the investigation, it is useful to refer to the framework used by the Commission (see Annex 1 in Section 7.6.).

To organise its work the *Ad Hoc* Team of Gross Violation on Human Rights compiled a standard operating procedure for its investigations of 1965–1966 incidents and a team-work organisation structure with reference to provisions of positive law in Indonesia as well as basic principles of human rights and international law.

Additionally, before carrying out its investigations, the team also defined the format of interviews and undertook other preparatory steps that would facilitate the implementation of team tasks. The implementation process of the investigation is reflected in Annex 2 (in Section 7.6.).

7.3.2. Implementation of the Investigation

In addition to administrative planning, investigations have to fulfil a number of requirements in Indonesian law. For example, Article 19 paragraph (2) of Act No. 26 (2000) requires that the Commission inform the Attorney General of the investigation's start.²⁵ Accordingly, the Commission informed the Attorney General that the investigation had started regarding the 1965–1966 incidents, by sending a letter on 12 August 2008.

Then, as set out in Article 19 paragraph (1) of Act No. 26 (2000),²⁶ the following investigatory procedures were implemented:

- a) *Receiving Complaints*. Since the formation of the *Ad Hoc* Team of Gross Violation on Human Rights of 1965–1966 incidents, the team received 51 reports or complaints from the public related to these incidents.
- b) *Examination of Witnesses and Victims*. In carrying out its duties, the *Ad Hoc* Team called 359 witnesses to give testimony. These testimonies are recorded by camera, audio recording and sometimes video recording. The investigators use computer technology that is connected to a LCD projector, so witnesses can directly follow the interview in the monitor itself. Upon the interview's completion, the witness is given the opportunity to read the statement. After obtaining

²⁵ Act No. 26 (2000), Article 19(2), see *supra* note 3.

²⁶ *Ibid.*, Article 19(1).

his or her agreement, the interview document is printed and then signed by the witness and the investigator concerned. A copy of the witness' identification is attached to the document.

Witnesses and victims have the right to protective measures, and care was taken to explain to those coming forward that they have the right to request such measures. However, none of the witnesses and victims in this case requested such protection, although it was clearly explained to them that they had the right to do so. The law provides that witnesses have a right to a variety of protective measure, such as the provision of a new identity, residence, and living costs. They also have rights to medical and social rehabilitation. Witness requests for such protection is processed and assessed by the Witness and Protection Unit. All the Commission's staff are generally trained on the rights of victims and witnesses. The Commission has a Memorandum of Understanding ('MoU') with the Witness and Protection Unit, which ensures proper coordination between the two bodies when the Commission makes requests for the protection of witnesses or victims.

In other cases dealt with by the Commission, witnesses have requested for protection. For example, in the case of Ahmadiyah, based on the Commission's recommendations and request to the Witness and Protection Unit, the said witness was placed in a safe house and provided with protection when leaving the house. In the case of murder and torture by the military in Atambua, West Nusa Tenggara, witnesses were accompanied throughout the entire military court process to ensure their safety and a sense of security.

Victims may also request for restitution or compensation. To do so, they will need to apply to, and obtain a letter of support from the Commission explaining that they are victims of gross violations of human rights. Upon obtaining this letter from the Commission, they may submit it along with their request to the Witness and Protection Unit where their claims will be processed.

Witnesses are guaranteed confidentially by law, and for this reason, the full investigative report is not made public. Only an executive summary is made public, which does not make reference to the names of witnesses or victims. When a witness or victim requests protection, we are able to use a code to protect the witness or victim's

identity. Care is always taken to explain to witnesses that they have a right to confidentiality as well as protection. For example, if witnesses object to being video recorded, the investigative team will transcribe the interview or audio record it instead.

To ensure accuracy and in line with the Commission's independent nature, investigative teams are conscious of the need to verify and cross-check information obtained from witnesses. In general, teams first start by interviewing witnesses and victims. The information and data obtained is cross-checked with that subsequently obtained from perpetrators or institutions related to the case.

- c) *Review and Scene Inspection.* The *Ad Hoc* Team reviewed and gathered information from crimes scenes, altogether 30 times, as represented in the chart below.

In general, a single site visit lasts for about five days in total. However, the duration of a site visit may be extended depending on the number of individuals to be interviewed, their location, and other factors. Witness interviews are conducted in a variety of places, depending on the witness' own preference. For example, interviews have been conducted in the homes of witnesses, in hotels, or in the Commission's office.

For this case, the Team determined that excavations were necessary. Excavations, however, may only be conducted with the approval of the Attorney General. A request was made, but the Team had not received a response at the time of writing. Such sites are identified on the basis of witness interviews.

No.	The Scenes
1.	Palembang – South Sumatera
2.	Surakarta – Central java
3.	Solo – Central Java
4.	Maumere – NTT
5	Bali
6	Jakarta
7	Manado – North Sulawesi
8	Medan – North Sumatera

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9	Palu – Central Sulawesi
10	Palembang – South Sumatera
11	Bangka – Bangka Belitung Islands
12	Bangka Selatan – Bangka Belitung Islands
13	Kutai Kertanegara – East Kalimantan
14	Balikpapan – East Kalimantan
15	Buru – Maluku
16	Maumere – NTT
17	Bali
18	Kendari – South East Sulawesi
19	Bukitinggi – West Sumatera
20	Medan – North Sumatera
21	Pekanbaru – Riau
22	Samarinda – East Kalimantan
23	Makassar – South Sulawesi
24	Balikpapan – East Kalimantan
25	Solo – Central Java
26	Jakarta
27	Jakarta
28	Blitar – East Java
29	Surabaya – East Java
30	Bau – Bau – South East Sulawesi

Table 1. Sites identified by the *Ad Hoc* Team.

- d) *Collecting Documents.* Apart from testimonies, the Team also obtained and analysed secondary material, such as historical texts and NGO reports. Historical texts are usually obtained from formal institutions. Reports prepared by local NGOs or grassroots organisations are often collected and studied, such as that by Kontras, Pa-korba, *et cetera*.

- e) *Focus Group Discussion*. In order to obtain optimal results of the investigation, focus groups were organised by the Commission. Team members were organised into teams of 15, according to certain topics or expertise. For example, a group dealt with legal matters and other historical matters. One discussion was organised for each focus group. Group discussions were recorded.

7.4. Results and Findings

Based on data obtained during investigations and the Commission’s synthesis and analysis of this data, the Commission came to the following conclusion on the types of human rights violations that took place:

No.	Crimes	Notes
1.	Murder	At least 1,956 people
2.	Extermination	At least 85,483 people
3.	Enslavement	At least 11,500 people
4.	Forcible transfer of population	At least 41,000 people
5.	Arbitrary arrest detention	At least 41,000 people
6.	Torture	At least 30,000 people
7.	Rape, sexual slavery	At least 32 people
8.	Persecution	At least 85,000 people
9.	Enforced Disappearance	At least 32,774 people

Table 2. Results and findings of the Commission based on investigations.

The Commission’s analysis of raw data was facilitated through its use of the Case Matrix system. The Matrix system helps by organizing and providing easier access to the data concerned. It highlights where more information is needed in order to prove whether or not there are gross violations in 1965–1966 incidents.

Upon completing these various investigatory and analytical processes, the Commission then prepared its report.

The report comprises of two parts: 1) the final and complete report which describes the investigative process and results in detail; and 2) the executive summary of investigation results. The final report is confidential,

and may only be used by the Attorney General in the implementation of further investigations. The executive summary is made for the benefit of public information and can be disseminated to the public.

As this chapter went to press, the Commission had completed its report, but it was still in the process of being discussed by the Plenary Session of the Commission. For this reason, the author is unable to describe the result of the Commission's investigation into the 1965–1966 incidents.

7.5. Closing

Based on the international regulatory framework applicable to gross violations of human rights, such violations should be followed up by investigation and punishment. Investigation and punishment of such violations are a must for human beings; it may be said to be an obligation *erga omnes*.

Such investigation and punishment is an effort to break the chain of impunity and deliver justice to the victims concerned. It is an obligation that must be done as a commitment to international law. Therefore, if a State or government does not investigate and punish those who commit such violations, the international community should assume the responsibility of investigation and punishment.

Despite existing limitations, the Indonesian National Commission on Human Rights has done its utmost to implement its functions and duties as mandated in the Act No. 39 (1999) on Human Rights and Act No. 26 (2000) regarding human rights courts. This has particularly been so in its investigations, disclosure, and resolution of the case related to 1965–1966 incidents.

The Commission is aware that in performing its functions and duties, we still fall short of meeting the expectations of society, especially that of victims. Therefore, all suggestions, criticism and input that will improve the quality and quantity of performance of the Commission are welcome. The promotion, protection, enforcement and fulfilment of human rights are for everyone.

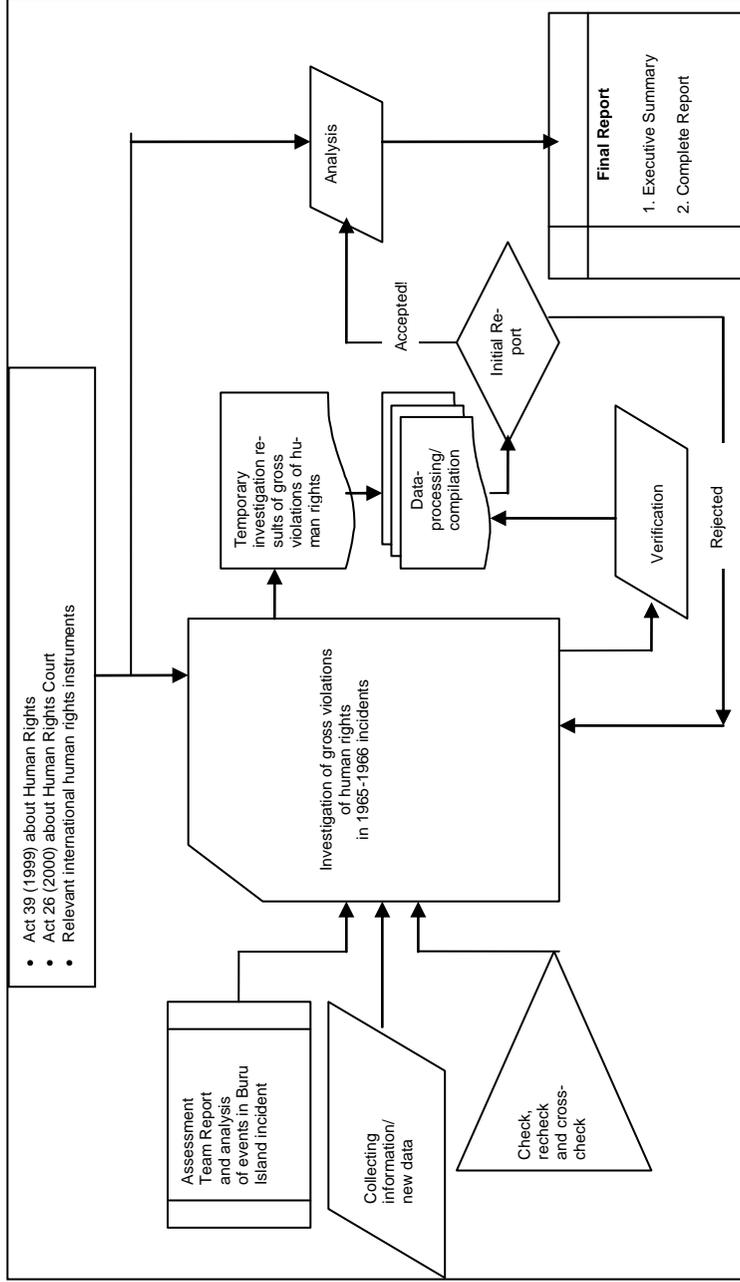
Finally, I would like to point out and underline the message made by former U.N. Secretary General Kofi Annan regarding the International

Criminal Tribunal for Rwanda: “No peace without justice and no justice without respect for human rights and rule of law”.²⁷

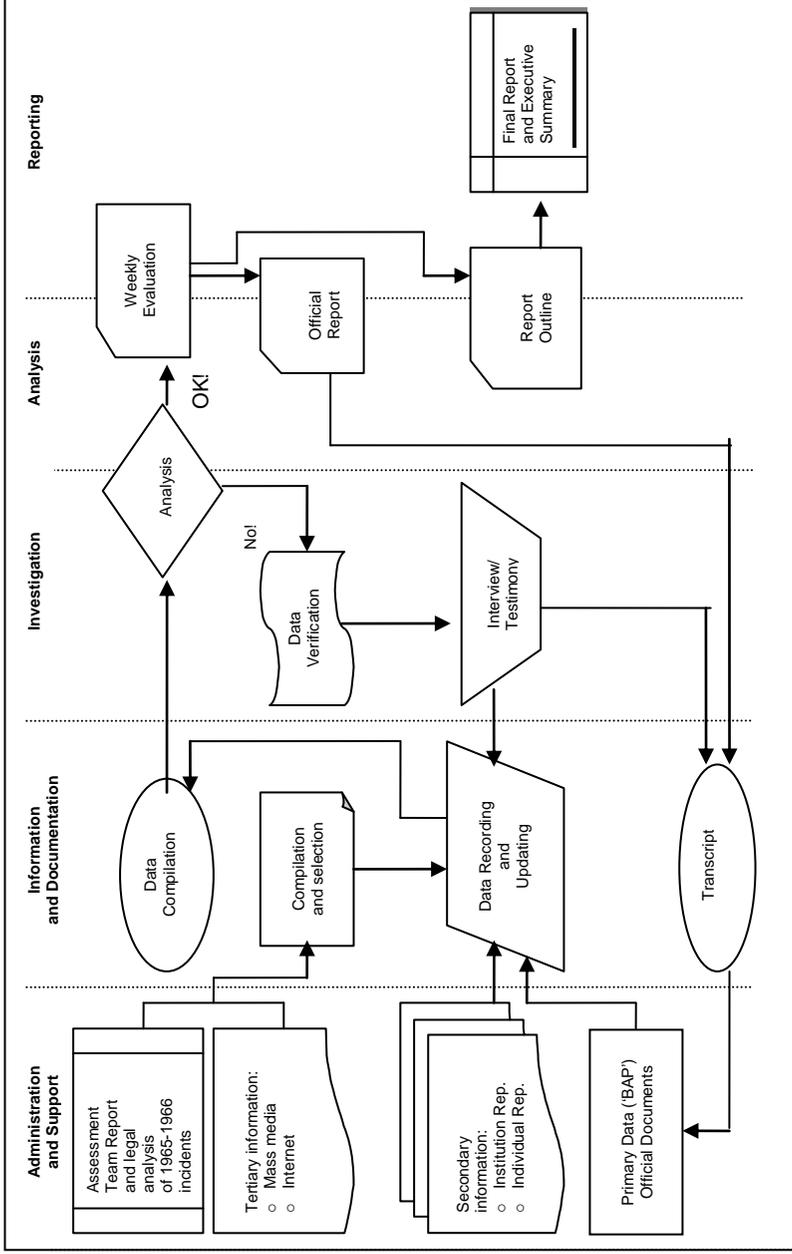
²⁷ “Secretary-General Welcomes Rwanda Tribunal’s Genocide Judgement as Landmark in International Criminal Law”, U.N. Press Release, 2 September 1998, available at <http://www.un.org/News/Press/docs/1998/19980902.sgsm6687.html>, last accessed on 9 October 2012.

7.6. Annexes

Annex 1. Framework of investigations (Indonesian National Commission on Human Rights)



Annex 2. Implementation process of investigations (Indonesian National Commission on Human Rights)



Old Documents and Archives in Core International Crimes Cases

Patrick J. Treanor*

“The past is a foreign country: they do things differently there”.¹ This well-known line reminds us of the truth that the past, even of our own countries, is often unfamiliar to us. We therefore need to make an effort to learn about the past just as we do to learn about foreign countries. Another truth, however, is not illuminated by our quote. Namely, with the past as with foreign countries, most people think they already know something, or even a lot, about them. In fact, they very often simply share common misconceptions about both. Everyone in the world knows that in America the streets are paved with gold; and every American at least knows that the young George Washington chopped down a cherry tree. Unfortunately, neither piece of common knowledge is true.

So it is in international crimes cases. In the former Yugoslavia, everyone ‘knew’ that Slobodan Milosević was ‘in charge’ and therefore guilty. Unfortunately, what everyone knows is not evidence. As Louise Arbour, the then Prosecutor of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’), lamented:

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¹ Leslie Poles Hartley, *The Go-Between*, New York Review of Books, New York, 2002, p. 17.

This “general knowledge” is our worst enemy. I am told all the time, “why didn’t you indict this man or that man? Everybody knows he is guilty”. It is a long way from what everybody ostensibly knows to an indictment for crimes listed in the Statute of the Tribunal that will withstand the test before the court. When the accused are not famous personalities nobody asks us, “Why haven’t you indicted them?” In those ostensibly notorious cases, there is always a suspicion that something is amiss if we don’t act in accordance with the general perception.²

The Bangladesh of 40 years ago was, if not a distant place for its own people, assuredly a far different one than today. The investigation and prosecution of international crimes will thus be confronted with the challenge of learning about important elements of the country’s past. Failing to meet this challenge could prove costly in the courtroom. Fortunately, the experience of other jurisdictions shows that this challenge can be successfully met through the use of old documents.

The study of the past, or history, relies on the record of things said and done. This record, however, is imperfect. Not everything is recorded, some records are inaccurate, others have been destroyed, yet others are otherwise unavailable. Available records, or primary sources, typically include live witnesses, written documents, archaeological evidence, and audio and video recordings. I will here deal with old documents, or written records, and their use in international crimes cases. I will explore the purposes these documents can serve, how they may be obtained from archives or in the field, how their analysis should proceed in the office, and how they may be presented in court.³ I will conclude with a few remarks that emphasize the importance of trained personnel, while recognizing that conditions and requirements vary between jurisdictions.

The exposition below draws on my own experience of over 29 years working on cases of international crimes in two specific contexts. In both instances, however, we faced problems of distance in space and/or time. At the Office of Special Investigations (‘OSI’) of the U.S. Department of Jus-

² “Why Did Prosecution Fail To Prove What ‘Everybody Knows’”, Sense Tribunal, The Hague, 7 April 2008, available at http://www.sense-agency.com/icty/why-did-prosecution-fail-to-prove-what-%E2%80%98everybody-knows%E2%80%99.29.html?cat_id=1&news_id=10841, last accessed on 15 November 2011.

³ What is said here about written documents naturally applies, *mutatis mutandis*, to the other types of records mentioned.

tice, I worked as a Historian and Senior Historian from 1980 to 1994. In this role, I investigated and litigated cases involving Nazi persecution of racial, religious and other minorities in Europe from 1933 to 1945. When this office was established in 1979, these crimes lay up to 46 years in the past, but its efforts still continue today, 82 years after the establishment of the Nazi regime. The locus of these crimes, of course, lies an ocean away from America, with cases scattered all across Axis Europe. The OSI investigated and litigated each of these cases individually pursuant to U.S. immigration law. Although many of these cases were interrelated, they involved a myriad of different security, military, and political organisations.

I also worked at the Office of the Prosecutor ('OTP') of the ICTY as a Research Officer for over 15 years, dealing with cases beginning only three years before the Tribunal's creation in 1993, but which has now stretched to over 20 years. For us, the alleged crimes were, however, originally much more distant in place than time. Not only is the former Yugoslavia located in a part of Europe far removed from the seat of ICTY in The Hague, but its international judges, prosecutors and investigators are also almost totally unfamiliar with its political and economic systems, language, culture and history. Such contextual unfamiliarity adversely impedes the interpreting of old documents.

8.1. Purpose

The primary purpose of 'old documents' in international crimes cases is, of course, to serve as evidence to be used in criminal trials. More broadly, these documents can assist courts in the establishment of factual truth regarding complex and often obscure developments, and in understanding the background and context of cases.⁴ An advantage of using documents as evidence over live witnesses is that the former do not change their stories, although they can be 're-interrogated' many times in search of additional facts. Almost as importantly, these documents can be used during the investigation phase of a case for lead purposes as well as for the preparation and conduct of witness interviews. At OSI, many leads on Nazi crimes and Nazi

⁴ I will not here enter into issues related to the potential role of international crimes trials in contributing to peace and reconciliation or in the creation of a historical record. Suffice it to say a courtroom, where it is necessary to avoid the type of interpretation and conjecture routinely practiced by professional historians, is also a poor place to write history as such.

perpetrators came from old documents, such as guard rosters. The ICTY even has a special provision in Rule 70 of its Rules of Procedure and Evidence for the submission of documents to the OTP for lead purposes only.⁵

Documents played an important evidentiary role in both sets of cases referred to above. OSI's Nazi cases were almost entirely built around documents, rather than witnesses, as eyewitnesses to the actions of the alleged perpetrators were almost always unavailable. In the former Yugoslavia, cases targeting those allegedly most responsible for the crimes in the region were also largely document-based. This was due to the fact that these top political and military leaders were only rarely suspected of personal involvement in crimes.

In international crimes cases, documentary evidence may go to directly proving individual guilt, or proving contextual elements of the international crime concerned. As mentioned above, documentary evidence often plays an important role in the investigation of high-ranking leaders. However, documentary evidence can also serve as direct evidence regarding the guilt of low-level perpetrators. For example, local policemen in Nazi-occupied Poland produced reports accounting for their expenditures of ammunition, referred to as 'bullet reports'. Such reports, signed by the policeman involved, sometimes disclose the killing of Jews who were caught hiding during Nazi-ordered round-ups. Another example of documentary evidence often used is the service identification cards of guards at Nazi concentration camps or extermination centres. Such documents provide *prima facie* evidence of their owners' participation in the persecution occurring in these camps and centres.⁶ In cases involving high-level officials, the signature of overtly persecutory Nazi laws or orders can constitute evidence of the individual's involvement.

Context, however, is also important. The term 'context' here refers to the events, organisational structures, legal frameworks and policies that surround the alleged crimes. In cases involving political leaders, context is

⁵ ICTY Rules of Procedure and Evidence, IT/32/Rev.47, latest version dated 28 August 2012, available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev47_en.pdf, last accessed on 6 October 2012.

⁶ "[I]f petitioner had disclosed the fact that he had been an armed guard at Treblinka, he would have been found ineligible for a visa [...]". United States Supreme Court, *Fedorenko v. United States*, No. 79-5602, Decision, 21 January 1981, 449 U.S. 513 (1981), available at <http://supreme.justia.com/us/449/490/>, last accessed on 9 October 2012.

particularly important as there is usually no direct evidence of these leaders' involvement in the crimes concerned. It therefore becomes necessary to reconstruct these leaders' scope of authority and responsibility, their goals, and their activities to the extent possible on the basis of evidentiary materials. Such contextual evidence may include constitutional provisions, basic legislation, minutes or transcripts of meetings, orders, reports, correspondence, *et cetera*. These documents may illuminate issues regarding the means and degree of control at the disposal of the individual concerned, as well as purposes motivating the said individual. At the ICTY, leadership cases are in fact largely based on such documentary contextual evidence, which provides links between leaders and direct perpetrators. During the trial of such cases, large volumes of documents are typically introduced into evidence by the parties concerned, which are often accompanied by extensive expert reports (on which, see further below). Court judgments therefore usually contain lengthy sections on context, which sometimes reach far back into pre-conflict history.⁷

Even in OSI cases involving low-level perpetrators from the World War II era, it is still necessary to link the individuals concerned to Nazi policies of persecution by reconstructing the chains of command within which they operated, and proving the persecutory ends which their units served. This could only be done on the basis of the surviving records of German and German-sponsored security and military organisations.

8.2. Collection

In gathering any evidence, it is essential for investigators to have an idea of what they are looking for in at least general terms. Only by analysing all initially available evidence or information is it possible to formulate a preliminary hypothesis or set of questions. This is not necessarily the same as the theory of the case. These questions will then guide the hunt for new evidence. Investigations can then begin, and continue to proceed, on the basis of this substantive hypothesis. For example, the question may be which battalion was in a particular area at the relevant time or whether the party leader was really in overall control. The next step is to attempt to find out as much as possible about the actions, personnel, organisations, and policies which figure in the hypothesis. It is here that documents can be helpful or

⁷ On these points, see Richard Ashby Wilson, *Writing History in International Tribunals*, Cambridge University Press, Cambridge, 2011, especially pp. 73–77 and 128–39.

even essential. It is necessary to emphasize that the process of collecting documents should not be just a search for ‘smoking guns’, and that possibly exculpatory evidence must not be neglected.

The search for documents begins with identifying the possibly relevant types of documents, some examples of which were mentioned above, and their locations. When common knowledge fails, the assistance of experts, informants, and witnesses may be crucial in locating documents. Public archives located in various countries are the most common repositories for older documents generated by official bodies or donated by prominent, and sometimes not so prominent, individuals. Indeed, by far the single most valuable source of documentation for OSI was the National Archives in Washington, DC, literally a stone’s throw from the Department of Justice, which houses well-known collections of captured German documents and Nuremberg trial materials. Many official records, especially but not always of recent date, are still held, however, by agencies, official bodies or other organisations such as the U.N. This is the type of documentation that proved so important for OTP investigations, with former Yugoslavia and U.N. agencies accounting for the bulk of the documents it collected. The advantage of these types of collections is that they tend to be well organized and catalogued. Private individuals, including former officials or political activists, may also have documents in their possession or know of those who do. They may also be able to alert investigators to the existence of particular documents, if not their location. Private diaries can likewise be an invaluable source of evidence and information. The OTP collected some very valuable documents on a voluntary basis from such private sources, usually retired international officials who were originally contacted as potential witnesses.

Nor should libraries be forgotten. National libraries and other large research libraries typically contain collections of official gazettes, other legal publications, newspapers and other contemporaneous periodicals, memoirs and secondary literature. Much material of this type may even be available via the Internet. All of these sources can provide valuable evidence or information. OSI was able to obtain many published documents and even Nazi-era writings containing prima facie evidence of advocacy of persecution from the U.S. Library of Congress, while libraries in the Netherlands and the Internet provided the OTP with much useful legal and political material from the former Yugoslavia.

In any case, it is always preferable to have direct access to documentary collections of whatever type so that investigators can do their own research and analysis. This may require travel to the site of documentary collections. The OSI sent many such research missions to archives in numerous countries, such as Germany, Poland, Israel and the former Soviet Union; and it almost goes without saying that OTP staff travelled to the former Yugoslavia on countless occasions to collect documents from agencies there. Such missions may involve one or more persons, but they must always be carefully planned to ensure adequate staffing as well as sufficient logistical and technical support. To limit expenses, costly missions should be organized to act on behalf of all investigations interested in the given collection. If requests are made to distant holders of possibly relevant documents for copies or originals of documents, they are best not framed as “give us anything you have on so-and-so”. Instead, requests should ask for specified items whenever possible. If a collection is considered to be important, investigators should visit it personally for review.

When reviewing documents, it should be remembered that any document is better than no document. Even though relevant documents may seem scarce, one should still go through them meticulously as important information may be contained in one single page, for example, in the signature line or in a distribution list. Of course, the greater the number of documents that are available, the better the results of the investigation will be, although vast quantities may be a mixed blessing in view of the necessarily limited resources to handle them. Documents can be copied or, if conditions permit, seized. The use of portable copying machines, scanners or, these days, digital cameras, is much preferable to relying on even the most cooperative custodian to provide copies later. In order to avoid complicating authentication or the destruction of evidence, original documents should never be defaced. No useful material, including possibly exculpatory evidence or documents that may provide evidence in related cases or new leads, should be neglected. An easy trap to fall into is to look for evidence relating only to “the period of the indictment”. Especially in leadership cases, such an approach can lead to the loss of material crucial to an understanding of facts regarding personnel, organisations, and policies – the elements of which contribute to events that do figure in an indictment.

It must be said that the availability of old documents is heavily dependent on their timely seizure and their subsequent careful preservation. These events may antedate an investigation by years, if not decades. The

investigation of World War II era crimes in the United States would have been virtually impossible were it not for the fact that American and other Allied forces captured vast quantities of German documents at the conclusion of hostilities. Many of these documents were used in trials before the International Military Tribunal in Nuremberg and other courts immediately after the war. Later, experts in the U.S. organized and prepared detailed catalogues of these documents, which were returned to Germany after being microfilmed. An extensive scholarly literature based on these documents was already in existence by the time the OSI began its investigations in 1979.⁸ It therefore had the benefit of access to these important collections as well as thorough archival guides to, and much ground-breaking analytical work based on, them.

The case of the former Yugoslavia is different. Here, the conflict was still in progress when the ICTY was created, and all the most relevant documents were still held by various regional and international agencies and organisations. Ongoing hostilities and lack of cooperation by certain parties to the conflicts hampered efforts at collection in the region. Nevertheless, through persistent efforts over a period of years, the OTP managed to build up a huge collection of documents and other evidence. The establishment of cooperative relations with the parties, particularly after the Dayton Peace Accords, greatly facilitated collection efforts, but important material was also obtained through search warrants and court orders, sometimes even during trial.

The collection and analysis of documents and other evidence is assisted by building up a library of reference materials, such as geographical aids (maps and gazetteers), basic published documents (*exempli gratia*, laws and constitutions) and scholarly studies. Eventually, investigators will also build up their own archive of collected documents. These documents must be carefully indexed, organized and preserved in order to maximize their usefulness for investigatory and later trial purposes. The original order of collected documents should be maintained whenever possible.

8.3. Analysis

As indicated above, some analysis is necessary before proceeding to the collection of documents. This analysis must also continue during the docu-

⁸ See especially, Raul Hilberg, *The Destruction of the European Jews*, Harper and Row, New York, 1961.

ment collection process. Conducting an ongoing analysis of the evidence that one accumulates, including old documents, is essential as this will help reveal the strengths and weaknesses in one's original hypothesis as well as the gaps in information and what further evidence is needed. The hypothesis which one starts with may, and indeed most likely will, change over time, but these changes should reflect and result from a deepening of knowledge based on constant analysis. This analysis should serve as a guide to the investigative process as a whole, as one proceeds with the gathering of fresh information and evidence, including additional documents. All relevant information and evidence must be continually integrated through analysis into the original or altered hypothesis. It is important to note that any inconsistent or irrelevant evidence should merely be put aside, but not forgotten, for later re-evaluation and possible use.

In this way, hard-won knowledge, obtained on the basis of steadily accumulating information and evidence, will not be ignored or forgotten. The ongoing analysis will constantly incorporate new knowledge into one's hypothesis while evaluating and re-evaluating this hypothesis and all available knowledge against each other. This reciprocal relationship between the hypothesis and knowledge gathered in the investigative process is extremely important, and the constant analysis that is required to establish and maintain this relationship is what should drive the investigation forward.

Ideally, of course, at the end of the investigative process, all information and evidence obtained will either be consistent with the final hypothesis or have been shown to be false or irrelevant. The initial hypothesis may not even have pointed to criminal liability. Indeed, the final hypothesis may not point to criminal liability, but it will at least be clear why this is so. The crucial thing is that at any given point in time, the investigators should have a good command of what they know, and what they must still find out. This is especially important in order to avoid any duplication of evidence collection efforts. Investigators should, therefore, always have an overview of what documentary sources have been explored and what documents have been obtained. Having such a comprehensive overview will also help to prevent evidentiary gaps and to ensure the efficient use of resources by preventing the collection of duplicative evidence.⁹

⁹ Sometimes multiple copies of the same document are useful to show, for example, its wide distribution.

The results of analysis can be set out in various formats, such as a Word document or by using inter-relational software such as Case Map or Case Matrix. Creating a narrative, such as might be found in a brief supporting an indictment or closing a case, will probably be necessary at some stage in any event. Whatever format is adopted, the analytical product should always be made available to everyone involved in the specific investigation as well as other related investigations. Ideally, one person or a small group will be tasked with maintaining and updating this analysis. This will ensure its internal consistency. This shared analysis itself enables the creation of an institutional memory, which facilitates the addition of new staff and mitigates consequences resulting from the departure of experienced personnel.

8.4. Presentation

Old documents are used at trial in various ways. They may serve as trial exhibits, which are to be introduced as evidence along with the testimonies of appropriate fact witnesses whether on direct or cross-examination. If the court allows, they can also be introduced in dossiers. A very efficient way to exploit the evidentiary value of documents is by submitting substantive analytical expert reports based on these same documents, in conjunction with a testimony by the author as an expert witness. This is especially useful when dealing with a large number of frequently lengthy documents.

For, as the analytical process will have shown, documents do not always speak for themselves, and the volume of collected documentation may be so high that it would be inadvisable to burden the court with all the documents concerned. A report, if accepted into evidence along with the testimony of the expert witness, can reduce the need to introduce the documents themselves. That is, the number of actual documents taken into evidence can be curtailed, sometimes dramatically, depending on the extent to which the report captures the relevant facts contained in them. The role of the expert is accordingly not to argue one side of a case but to explain the contents of the documents.

In commissioning such expert reports, clear and transparent instructions must be given to the expert concerned. Reports may be commissioned by either party or, in some jurisdictions, by the court itself. The instructions should specify the topics to be treated in the report (*exempli gratia*, the chain of command and operations of a particular military unit over a particular time period or the authority, structure and activities of the ministry of

internal affairs). Ideally, the instructions should be in writing in order to be available to a trial chamber or opposing party to help them appraise whether the report displays any bias toward the commissioning party. The methodology to be used in the report may best be left to the expert, and it has proven highly advisable for the expert to include a note on methodology and sources in a preface to his or her report in order to show how the instructions were carried out. The primary requirement here is that the said expert should be given complete access to all relevant documents collected in the course of the investigation, including potentially adverse material. The expert must be given the full opportunity to analyze these documents as well as other sources that he or she considers suitable in light of the instructions. Reports must be carefully sourced through the use of footnotes or other citations to the sources used. This would be normal procedure for any academically trained expert, but ICTY trial chambers have actually received and rejected expert reports that failed to meet even this minimum professional standard. Trial chambers have also refused to accept reports based solely on open sources such as press stories or utilizing only one set of documents (*exempli gratia*, minutes of meetings of a single body). They have been especially dismissive of reports that appeared to judge the ultimate issues of innocence and guilt in a case.

How can such experts be found? As indicated above, this depends on the overall availability of the documents concerned. Old documents that are preserved in public archives may have already been extensively exploited by reputable scholars. Published works that are based on and analyze these documents not only assist the investigation, but also establish the author's qualifications as an expert. In addition, these publications can sometimes be introduced as evidence along with a specifically commissioned report. It was the OSI's practice to utilize such outside experts in Nazi war crimes cases in the United States. In instances where documents have not been publicly accessible, they may have been read and analyzed only by investigation staff. Finding an outside expert with the time necessary to duplicate this effort may be next to impossible and probably prohibitively expensive. For these reasons and as further explained below, the ICTY eventually adopted a practice of using 'inside' experts at many trials.

8.5. Staffing

The foregoing considerations about the use of inside experts in court are related to the overall staffing requirements of the investigative offices con-

cerned. Both the OSI and the OTP were combined investigative and prosecutorial offices that specialized in war crimes cases alone. That is, the prosecutors and investigators worked in the same office, were headed by a prosecutor, and specialized in these types of cases. This model was pioneered by the OSI in the war crimes field and was later adopted in some, but not all, jurisdictions outside the U.S. when pursuing international crimes cases from the World War II era.¹⁰ Whether organisationally joined with the prosecution or not, virtually all these investigative organs concerned recognized, again following the lead of the OSI, the need for them to include and engage an additional area of substantive expertise possessed by a third professional group: analysts.

The successful collection, analysis and presentation of documentary evidence demand high levels of organisational, analytical and communications skills. Depending on the context of the given investigation, specific linguistic skills and background knowledge not possessed by prosecutors and criminal investigators may also be necessary. At the OSI, a group of historians provided this required skill set while at the OTP, a corresponding group of Research Officers in the Leadership Research Team ('LRT') performed the same function. Both offices eventually created separate organisational units for these analysts.¹¹ At the OSI, in fact, the presence of the relatively large number of historians virtually supplanted the need for criminal investigators. This was certainly not true in the case of the OTP, as the contemporary nature of investigations facilitated the availability of many witnesses and other traditional forms of evidence that are best exploited by experienced criminal investigators.

In both the OSI and the OTP, however, the presence of academically trained researchers with the necessary skills and often extensive personal experience in the regions of their specialisation proved to be invaluable assets to the organisation. These researchers not only played major roles in the collection, analysis and presentation of documents but also assisted in many other aspects of investigation and litigation. At the OSI, each historian formed part of an effective, multi-disciplinary team that was created for each case or group of cases, working with others under a lead attorney. All members of these teams had clearly defined tasks in keeping with their pro-

¹⁰ *E.g.*, Australia, International Criminal Tribunal for Rwanda ('ICTR') and the International Criminal ('ICC') but not Canada and the United Kingdom.

¹¹ OTP also had military intelligence analysts, organised in a separate Military Analysis Team ('MAT'), and criminal analysts, working with the investigation teams proper.

professional backgrounds. The historians were responsible for the collection and analysis of all historical documents. They did not act as experts at trial, but consulted closely with the outside experts who did.¹² Within the OTP, individual members of the LRT and the Military Assessment Team ('MAT') similarly worked directly with the trial attorneys or investigators of one or more investigative or trial teams. As noted above, many of these analysts also prepared expert reports and testified at numerous trials, in addition to the traditional outside experts.¹³

8.6. Conclusion

The use of old documents, as outlined above, must always be informed by a consciousness among all those concerned that it is frequently the accused who is in fact the leading expert on aspects of the distant events being considered by analysts, investigators, attorneys and judges. If these professionals neglect old documents, they run a serious risk of letting these accused provide their own self-serving and unchallenged versions of unfamiliar times and places.

¹² Including Raul Hilberg, whose monumental work was cited in *supra* note 8.

¹³ On the use of inside and outside experts at ICTY, see Wilson, 2011, pp. 121, *ff.*, see *supra* note 6.

Memory and Trauma

Anya Topiwala* and Seena Fazel**

9.1. Introduction

Clinicians and researchers have investigated the reliability of witness accounts, particularly in individuals who have been subject to violence and aggression. In many legal settings, the reliability of witness memory is a key determinant in the outcome of cases. This paper aims to provide a structured review of recent evidence on the effects of violence and trauma on memory, and outline some good practice guidelines.

Some research has demonstrated that individuals subjected to stress show memory impairment. Inconsistencies in trauma victims' narratives have also been reported. However, these studies have a number of methodological problems including a focus on victims with Post Traumatic Stress Disorder ('PTSD'), with little information on other psychiatric diagnoses. Overall, a reasonable body of evidence exists in support of a specific type of memory deficit in victims of trauma. The loss of memory relates to the recall of verbal material, particularly autobiographical memory. This concerns recollections from an individual's life, a key element of witness memory. It is unclear to what extent this may undermine the credibility of the testimony of witnesses. There is a contradictory body of evidence suggesting some enhancement of memory under stress. Some studies report an increase in the retention of material with an emotional

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content, to the detriment of more peripheral details. This enhancement may be mediated by sleep and occur over a time period of a few days. In addition to summarising the latest evidence, we propose clinical guidelines for professionals assessing victims prior to and in the courtroom.

In a number of high profile international criminal trials such as those of the former Yugoslavia, Rwanda and Cambodia, evidence has relied substantially on victim memories. The cases of Rwanda and Cambodia are based on memories of events that occurred eight and thirty years after the alleged criminal acts, respectively.¹ These cases raise two major issues in relation to the reliability of evidence. First, eyewitness memory in normal subjects is thought to be unreliable and, over time, it is known that memories decay. Second, PTSD, anxiety and depression are common in veterans,² remaining for some years after the traumatic events, and the contribution of these to memory decay is a contentious area. Therefore, the ability of some individuals to act as reliable witnesses in court needs clarification.

A 1992 review of the literature by Christianson³ argued that the assumption that stress decreases brain processing capacity, and thus memory, was simplistic. This review suggested that emotional events are preferentially processed, and therefore memory was not necessarily adversely affected by trauma. Koss *et al.*, in a later review, concluded that memories for traumatic experiences typically contain more central than peripheral detail, are reasonably accurate, and are well-retained for very long periods, but are not completely indelible.⁴

The most recent article reviewing the field centred around the trial of *Prosecutor v. Anto Furundžija* at the International Criminal Tribunal

¹ Alexander Zahar, “Witness Memory and the Manufacture of Evidence at the International Criminal Tribunals”, in Carsten Stahn and Larissa van den Herik (eds.), *Future Perspectives on International Criminal Justice*, TMC Asser/Cambridge University Press, 2010, p. 600.

² Jillian Ikin *et al.*, “Anxiety, Post-Traumatic Stress Disorder and Depression in Korean War Veterans 50 Years after the War”, in *The British Journal of Psychiatry*, 2007, vol. 190, p. 475.

³ Sven-Åke Christianson, “Emotional Stress and Eyewitness Memory: A Critical Review”, in *Psychological Bulletin*, 1992, vol. 112, no. 2, p. 284.

⁴ Mary Koss *et al.*, “Traumatic Memories: Empirical Foundations, Forensic and Clinical Implications”, in *Clinical Psychology: Science and Practice*, 1995, vol. 2, no. 2, p. 111.

for the former Yugoslavia in 1998.⁵ *Furundžija* was a Bosnian-Croatian soldier accused of aiding and abetting the imprisonment and rape of a Muslim woman. The defence argued that the victim's memory was inaccurate because she had been diagnosed with PTSD. This piece summarised the defence and prosecution evidence on this issue. It concluded that as memories in all individuals are subject to a range of inaccuracies, it was vital to obtain collateral information in cases involving both PTSD and non-PTSD victims.

Overall, these previous reviews are somewhat contradictory in their conclusions, particularly regarding the accuracy of traumatic memories. They also have tended to focus on victims with PTSD. This review will attempt to update this literature, and propose evidence-based guidelines to assist professionals interviewing individuals in such cases.

9.2. Background

Memory has been categorised into implicit and explicit forms. Implicit memory comprises previous experiences that aid in the unconscious performance of a task, such as riding a bike. In contrast, explicit memory is the conscious, intentional recollection of previous experiences and information. Explicit memory includes autobiographical memory. The latter includes memory for events ('episodic') and knowledge ('semantic'). Autobiographic memory for a normal event is verbal, sequenced (beginning, middle and end), recognised as being in the past, and may be recalled voluntarily. After ten years, it is thought that memories can be highly accurate, highly inaccurate, or include both accurate and inaccurate reports relating to different aspects of the same episode.⁶

The main effect of a delay between an event occurring and it being recalled is forgetting. Two factors affect this: memory vividness and the amount of rehearsal. Vividness is determined by the comprehension and emotion at the time, its personal significance, and the extent to which it

⁵ Landy Sparr and Douglas Bremner, "Post-Traumatic Stress Disorder and Memory: Prescient Medicolegal Testimony at the International War Crimes Tribunal?", in *Journal of American Academy of Psychiatry and Law*, 2005, vol. 33, p. 71.

⁶ "Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory", *British Psychological Society*, 2008, available at http://www.psychiatry.ox.ac.uk/epct/emily_holmes/articles/bpsmemorylaw, last accessed on 9 October 2012.

integrates with existing memories. Highly vivid memories may be retained for long periods and be more resistant to decay. Rehearsal makes memories more resistant to decay, but also offers the opportunity for distortion or errors to be assimilated into memory. The effects of delay are mediated by age, mental illness, and trauma. This paper will review the latter.

9.3. Methods

We searched the electronic bibliographic database MEDLINE using search terms relating to memory and testimony. Publications were largely selected from the past five years, but commonly referenced and highly regarded older publications were not excluded. We also searched the reference lists of articles identified by this search strategy and selected those we judged relevant, focusing on key publications and review articles.

9.4. Discussion

9.4.1. Normal Subjects under Stress

There is evidence that subjecting normal humans to stress impairs memory. A reduced recall of neutral slides has been demonstrated after viewing a traumatic autopsy slide.⁷ A key study exposed 509 military survival school trainees to low or high stress interrogations.⁸ A large number were unable to identify their interrogators despite being physically threatened by them for over 30 minutes. Those exposed to high-stress identified true positives only 30–49 percent of the time and 51–68 percent identified false positives. However, methodological criticisms have been levelled at these studies in that they do not entail the same degree of personal ‘threat’ as real-life trauma.⁹ Hence, it is difficult to extrapolate these results to trauma victims, who may additionally be suffering from a consequential mental disorder.

⁷ T. Kramer *et al.*, “Effects of Stress on Recall”, in *Applied Cognitive Psychology*, 1991, vol. 5, p. 483.

⁸ Morgan C.A. *et al.*, “Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Stressful Personally Relevant Events”, in *International Journal of Law and Psychiatry*, 2004, vol. 27, p. 265.

⁹ Steven Penrod and Brian Cutler, “Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation”, in *Psychology, Public Policy, and Law*, 1995, vol. 1, no. 4, p. 817.

9.4.2. Traumatic Experiences and Memory

Traumatic memories are thought to be often incomplete, unstable, can be triggered unexpectedly, provide fragments of details, emotions, or lead to freezing. Research has suggested that they are not complete in the sense of providing a temporal sequence of events.

A number of studies of victims have reported inconsistencies in their trauma narratives.¹⁰ These have been found in those experiencing severe trauma including Nazi concentration camp survivors collected 40 years apart.¹¹ Roemer and colleagues demonstrated “systematic inconsistencies” over time in the retrospective accounts of war-zone events among Somalia veterans.¹² Such inconsistencies apparently caused problems in the International Criminal Trial for the former Yugoslavia’s *Kupreškić* case. The brothers, Zoran and Mirjan Kupreškić, were acquitted by the Trial Chamber of one count on the basis that the key witness to the incident had been embellishing his testimony over time. As the trial judges wrote:

The difficulty concerning the credibility of this witness’s evidence is that it was not until ten months after the incident that he firmly identified Zoran and Mirjan Kupreškić as the perpetrators of the massacre of his family.¹³

However, there may be other explanations for these discrepancies. For instance, more information can be recalled later (there is some evidence that memory is consolidated after one week), or information may have been given by others. It is also difficult to account for the severity and intensity of trauma.

Trauma memory is characterised by vivid and distressing memories of the worst moments with jumbled and inconsistent recall of remaining

¹⁰ Urs Hepp *et al.*, “Inconsistency in Reporting Potentially Traumatic Events”, in *The British Journal of Psychiatry*, 2006, vol. 188, p. 278.

¹¹ Willem A. Wagenaar and Jop Groeneweg, “The Memory of Concentration Camp Survivors”, in *Applied Cognitive Psychology*, 1990, vol. 4, no. 2, p. 77.

¹² L. Roemer *et al.*, “Increases in Retrospective Accounts of War-Zone Exposure Over Time: The Role of PTSD Symptom Severity”, in *Journal of Trauma and Stress*, 1998, vol. 11, p. 597.

¹³ Zahar, 2010, p. 600, see *supra* note 1.

events.¹⁴ In light of this, victims may be presented as unreliable in the courtroom.

9.4.3. Post-Traumatic Stress Disorder ('PTSD') and Memory

To date, much of the work examining the effects of trauma on memory has focused on PTSD victims.

Bremner and colleagues¹⁵ reported that abused women with PTSD demonstrated increased false recognition of words (95 percent) compared with abused women without PTSD (78 percent) or the non-abused with PTSD (79 percent). *Jenkins et al.* found that rape victims with a formal diagnosis of PTSD performed significantly worse than non-PTSD victims and controls on recall using a standardised test.¹⁶ Vietnam veterans with PTSD were shown to have deficits on tasks of attention, working (short-term) memory, and learning.¹⁷ Impaired recall of words has also been found in a number of study populations with PTSD, including Holocaust survivors,¹⁸ rape victims,¹⁹ refugees from the former Yugoslavia,²⁰ earthquake survivors,²¹ and combat veterans.²² Some studies suggest a correlation between symptom severity and the degree of impairment.²³

¹⁴ Amy Hardy *et al.*, "Does psychological trauma in victims play a role in the attrition of sexual assault cases?", in *Criminal Bar Quarterly*, 2010, no. 4, p. 8.

¹⁵ J. Bremner *et al.*, "False Memories in Women with Self-Reported Childhood Sexual Abuse: An Empirical Study", in *Psychological Science*, 2000, vol. 11, p. 333.

¹⁶ Melissa Jenkins *et al.*, "Learning and Memory in Rape Victims with Posttraumatic Stress Disorder", in *The American Journal of Psychiatry*, 1998, vol. 155, p. 278.

¹⁷ Jennifer Vasterling *et al.*, "Attention, Learning, and Memory Performances and Intellectual Resources in Vietnam Veterans: PTSD and No Disorder Comparisons", in *Neuropsychology*, 2002, vol. 16, no. 1, p. 5.

¹⁸ Julia Golier *et al.*, "Memory Performance in Holocaust Survivors with Posttraumatic Stress Disorder", in *The American Journal of Psychiatry*, 2002, vol. 159, p. 1682.

¹⁹ Reginald Nixon *et al.*, "The Accumulative Effect of Trauma Exposure on Short-Term and Delayed Verbal Memory in a Treatment-Seeking Sample of Female Rape Victims", in *Journal of Traumatic Stress*, 2004, vol. 17, no. 1, p. 31.

²⁰ Gunilla Kivling-Bodén and Elisabet Sundbom, "Cognitive Abilities Related to Post-Traumatic Symptoms Among Refugees from the Former Yugoslavia in Psychiatric Treatment", in *Nordic Journal of Psychiatry*, 2003, vol. 57, no. 3, p. 191.

²¹ E. Eren-Koçak *et al.*, "Memory and Prefrontal Functions in Earthquake Survivors: Differences between Current and Past Post-Traumatic Stress Disorder Patients", in *Acta Psychiatrica Scandinavica*, 2009, vol. 119, no. 1, p. 35.

A systematic review and meta-analysis of 28 such studies found a consistent impairment in verbal memory in victims compared to controls. The impairment was strongest in those with PTSD, but there was a modest effect in exposed non-PTSD controls. Perhaps surprisingly, stronger effects were found in war veterans than in sexual or physical assault victims.²⁴

Overgenerality in autobiographical memory, a reduced ability to access specific memories of life events, has been demonstrated in individuals exposed to trauma.²⁵ Some have hypothesised that this is a protective mechanism that helps to attenuate painful emotions associated with trauma. Increased severity of post-traumatic stress has been associated with reduced autobiographical memory specificity in trauma-exposed samples.²⁶ *Moradi et al.* reported impaired retrieval of some aspects of autobiographical memory in trauma survivors with a past diagnosis of cancer.²⁷ The degree of impairment was associated with levels of both flashbacks and avoidance of the trauma. In refugees, a significant association was found between flashback frequency and reduced specificity for autobiographic memory. These studies, however, need to be interpreted cautiously. There is a high comorbidity with other psychiatric disorders associated with PTSD, especially alcohol and substance misuse, and depres-

²² Rachel Yehunda *et al.*, “Learning and Memory in Combat Veterans with Posttraumatic Stress Disorder”, in *The American Journal of Psychiatry*, 1995, vol. 152, no. 1, p. 137.

²³ Steven Southwick *et al.*, “Trauma-related Symptoms in Veterans of Operation Desert Storm: a 2-Year Follow-Up”, in *The American Journal of Psychiatry*, 1995, vol. 152, p. 1150; Roemer *et al.*, 1998, p. 597, see *supra* note 12.

²⁴ Grethe Johnsen and Arve Asbjørnsen, “Consistent Impaired Verbal Memory in PTSD: A Meta-Analysis”, in *Journal of Affective Disorders*, 2008, vol. 111, no. 1, p. 74.

²⁵ Sally Moore and Lori Zoellner, “Overgeneral Autobiographical Memory and Traumatic Events: An Evaluative Review”, in *Psychological Bulletin*, 2007, vol. 133, no. 3, p. 419.

²⁶ Tim Dalgleish *et al.*, “Reduced Autobiographical Memory Specificity and Posttraumatic Stress: Exploring the Contributions of Impaired Executive Control and Affect Regulation”, in *Journal of Abnormal Psychology*, 2008, vol. 117, no. 1, p. 236.

²⁷ Ali Moradi *et al.*, “Specificity of Episodic and Semantic Aspects of Autobiographical Memory in Relation to Symptoms of Posttraumatic Stress Disorder (PTSD)”, in *Acta Psychologica*, 2008, vol. 127, no. 3, p. 645.

sion, which may complicate the findings. Only a minority of studies have attempted to address this.²⁸

Despite good evidence for specific impairments in victims with PTSD, such as in verbal memory, this is not thought to be necessarily indicative of a lack of credibility of testimony. One cannot extrapolate a compromised memory for past events from poor recall of words in an operationalised test. Nevertheless, PTSD may not account for all memory impairment after trauma. Memory can be decreased after trauma in the absence of PTSD symptoms.²⁹

9.4.4. Enhanced Memory after Trauma

An apparently contradictory body of evidence exists suggesting an enhancement of memory after trauma. Pre-clinical, animal and human studies demonstrate that arousal increases adrenaline levels that in turn enhance memory.³⁰

For example, normal human subjects who have viewed slides and are then subjected to stress have increased cortisol levels (a stress hormone) and an increased memory for the emotionally arousing slides one week later.³¹ Giving cortisol to subjects also results in an increased recall for emotionally arousing pictures.³² *Reist et al.* found that recall after one

²⁸ Melissa Jenkins *et al.*, 1998, p. 278, see *supra* note 16.

²⁹ Ariela Gigi *et al.*, “Memory Functioning Following Terror Attack and the Suggested Immunization by Religious Faith”, in *Stress and Health*, 2007, vol. 23, no. 3, p. 199; Murray Stein *et al.*, “Neuropsychological Function in Female Victims of Intimate Partner Violence With and Without Posttraumatic Stress Disorder”, in *Biological Psychiatry*, 2002, vol. 52, no. 11, p. 1079; S. Wessley *et al.*, “Stability of Recall of Military Hazards Over Time Evidence from the Persian Gulf War of 1991”, in *The British Journal of Psychiatry*, 2003, vol. 183, p. 314.

³⁰ John Haycock, “Enhancement of Retention With Centrally Administered Catecholamines”, in *Experimental Neurology*, 1977, vol. 54, no. 2, p. 199; R. O’Carroll *et al.*, “Stimulation of the Noradrenergic System Enhances and Blockade Reduces Memory for Emotional Material in Man”, in *Psychological Medicine*, 1999, vol. 29, p. 1083.

³¹ Larry Cahill *et al.*, “Enhanced Human Memory Consolidation with Post-Learning Stress: Interaction with the Degree of Arousal at Encoding”, in *Learning and Memory*, 2003, vol. 10, p. 270.

³² Tony Buchanan and William Lovallo, “Enhanced Memory for Emotional Material Following Stress-Level Cortisol Treatment in Humans”, in *Psychoneuroendocrinology*, 2001, vol. 26, no. 3, p. 307.

week for an arousing narrated slide story was enhanced.³³ This effect was blocked by propranolol, a drug that decreases cortisol levels. These studies suggest a possible biological explanation for this effect, mediated by the corticosteroid hormone system and a part of the temporal cortex of the brain ('the amygdala').³⁴

How do we reconcile these apparently contradictory effects of stress on memory? One possible hypothesis is that trauma leads to an enhancement of central or emotional details of an event to the detriment of peripheral neutral aspects. In support, one study of psychology graduates shown a film of a simulated kidnapping demonstrated that these students remembered central actions but were unable to recall descriptive details. In addition, and notably, they accepted false but plausible contents with high levels of confidence – a finding that has implications for suggestibility of witnesses in court.³⁵ In a similar experiment by *Payne et al.* students subjected to stress had significantly disrupted recall for the neutral but not the emotional content of a slide show.³⁶ *Herlithy et al.* reported that the recall of details rated by the interviewee as peripheral to the account are more likely to be inconsistent than recall of details that are central to the account.³⁷ Therefore, such inconsistencies should not be relied on as indicating a lack of credibility.

In addition, the research evidence suggests that timing may be important. Consolidation of memory may occur after a number of days. *Quevedo et al.* found an enhanced memory for emotional slides after one

³³ Christopher Reist *et al.*, "β-Adrenergic Blockade and Emotional Memory in PTSD", in *The International Journal of Neuropsychopharmacology*, 2001, vol. 4, p. 377.

³⁴ Benno Roozendaal *et al.*, "Stress, Memory and the Amygdala", in *Nature Reviews Neuroscience*, 2009, vol. 10, p. 423.

³⁵ Malen Migueles and Elvira Garcia A-Bajos, "Recall, Recognition, and Confidence Patterns in Eyewitness Testimony", in *Applied Cognitive Psychology*, 1999, vol. 13, p. 257.

³⁶ Jessica Payne *et al.*, "The Impact of Stress on Neutral and Emotional Aspects of Episodic Memory", in *Memory*, 2006, vol. 14, no. 1, p. 1.

³⁷ Jane Herlithy *et al.*, "Discrepancies in Autobiographical Memories – Implications for the Assessment of Asylum Seekers: Repeated Interviews Study", in *The British Medical Journal*, 2002, vol. 324, p. 324.

week but not after one hour.³⁸ This process has been postulated to involve sleep.³⁹

In summary, there is no clear consensus as to whether stress improves or worsens memory. Research findings imply the complexity of the relationship, and one moderated by many individual psychosocial and biological factors.

9.5. Summary

There is an apparently contradictory body of evidence supporting both an impairment and enhancement of memory in normal humans subjected to stress. One approach to reconcile this is that memory is enhanced for central emotional aspects of an event but disrupted for peripheral non-emotional aspects of the same event. Therefore, the evidence suggests that inconsistencies in recall of peripheral details are not indicative of the unreliability of a particular witness. At the same time, there are a number of caveats to the research findings to date. First, many studies have been conducted involving normal persons and cannot be extrapolated to trauma victims. Second, when they focus on trauma, they tend to focus on individuals with one particular diagnosis, that of PTSD. There is robust evidence for a deficit in verbal memory in this group. Finally, there are some notable gaps in the literature – whether or not verbal memory deficits actually affect their testimony reliability and their autobiographical memory, a key requirement for witness recall, in an operationalised manner.

9.6. Practice Guidelines

Clinicians assessing and treating victims, as well as those working in the criminal justice system, may benefit from some clinical guidelines that have been suggested by professional bodies such as the British Psychological Society.⁴⁰ Trauma victims have often undergone very distressing

³⁸ João Quevedo *et al.*, “Differential Effects of Emotional Arousal in Short- and Long-Term Memory in Healthy Adults”, in *Neurobiology of Learning and Memory*, 2003, vol. 79, no. 2, p. 132.

³⁹ Jessica Payne and Elizabeth Kensinger, “Sleep’s Role in the Consolidation of Emotional Episodic Memories”, in *Current Directions in Psychological Science*, 2010, vol. 19, no. 5, p. 290.

⁴⁰ “Guidelines on Memory and the Law: Recommendations from the Scientific Study of Human Memory”, 2008, *supra* note 6.

experiences and efforts should be made to decrease pressures on them during their journey through the judicial system. For example, it is recommended that one should be aware of cultural and language issues. Timing is of importance when scheduling interviews. Given the suggestion from the literature that memory may be enhanced one week after compared to immediately post-trauma, a delayed assessment has been advised. Developing a rapport with the victim is important, and may be encouraged by asking open-ended questions. It is recommended to reinstate the context of events by enquiring about victims' thoughts, feelings and physical experiences at the time of the incident. Imagery techniques may aid in this endeavour, as they may recall the event in different temporal orders. Inconsistencies or omissions in testimony should be considered relatively common in the memory of traumatised victims, and should not necessarily undermine the entirety of their testimony. Criticism of any memory gaps should be avoided. Witnesses who have experienced trauma are potentially suggestible; hence leading questions or proposing alternative hypotheses in court should be resisted. Inappropriate questioning styles such as frequent interruption and over-talking may decrease performance. Specific clinical presentations, such as the dominance of arousal and intrusive symptoms ('flashbacks'), may indicate poorer intellectual performance including of episodic memory.⁴¹ Poor concentration is often a feature of PTSD, hence simple questions, repetition and checking understanding are important. It has been recommended to allow sufficient time for responses and avoid interrogative pressures such as challenges and negative feedback. Giving regular breaks in long interviews is also important.

⁴¹ Kivling-Bodén and Sundbom, 2003, p. 191, *supra* note 20.

Some Guidelines for Interviewing and Assessing Trauma Victims
Be aware of cultural and language issues
Consider a delayed assessment
Try to develop a rapport
Ask open-ended questions
Attempt to reinstate the context of events
Recall the event in different temporal orders
Do not criticise memory weaknesses
Abstain from using leading questions or proposing alternative hypotheses
Avoid inappropriate questioning styles such as frequent interruption and over-talking
Use simple questions, repeat them and check understanding
Allow sufficient time for responses
Give regular breaks

Table 1. Some Guidelines for Interviewing and Assessing Trauma Victims

‘The Messaging Effect’: Eliciting Credible Historical Evidence from Victims of Mass Crimes

Mahdev Mohan *

10.1. Introduction

The 1971 ‘war of independence’ was an armed conflict that pitted then East Pakistan and India against then West Pakistan. It led to the secession of East Pakistan and the formation and recognition of the independent State of Bangladesh. The conflict claimed countless lives,¹ and displaced 10 million people.² The atrocities committed in 1971 have been described as “selective genocide” by the U.S. embassy in Dhaka in a cable in March 1971, revealed in declassified documents in 2002.³

The current administration led by the Bangladesh Awami League in Bangladesh recently established an International Crimes Tribunal (‘ICT-BD’) within its domestic court structure to try those accused of crimes against humanity, genocide, and war crimes during that tragic period in the country’s history. The ICT-BD’s first trial commenced on 20 November 2011, almost four decades after the conflict took place. The ICT-BD’s affiliates opine that justice delayed is better than having it denied. The

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¹ The Rahman Commission estimates 26,000 died in the conflict (available at <http://www.bangla2000.com/bangladesh/Independence-War/Report-Hamoodur-Rahman/default.shtm>, last accessed on 19 October 2012), while others such as Bina D’Costa has estimated that the number is closer to three million; see Bina D’Costa, “Frozen in time? War crimes, justice and political forgiveness”, in *Nation building, gender and war crimes in South Asia*, Routledge, London, 2011.

² D’Costa, 2011, p. 145, *supra* note 1.

³ U.S. Consulate in Dacca, “U.S. Department of State Telegram on ‘Selective genocide’”, 27 March 1971, see available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB79/BEBB1.pdf>, last accessed on 19 October 2012.

ICT-BD prosecutor Advocate Zead-Al-Malum stated that, “[t]he international community had never any reason to be concerned about the standard of Bangladesh’s legal system [...] my team members and I are committed to do our best to ensure justice, that is not for the victims only, but also for the accused”⁴.

The trials have been criticised as being politically charged, and as facing significant challenges in terms of their legitimacy, due process and procedural fairness.⁵ U.S.-based Human Rights Watch stated in a letter to Prime Minister Sheikh Hasina that without significant amendments to the International Crimes (Tribunals) Act, 1973 (‘1973 Act’), the judicial process would fail to meet international standards of fair trial⁶. In March 2011, U.S. Ambassador-at-large for War Crimes Issues Stephen J. Rapp drafted a series of recommendations suggesting amendments to the rules of the ICT-BD, which may help to ensure that the ICT-BD’s proceedings are fair and transparent.⁷

Ambassador Rapp recommended that provisions enshrining the right to appeal against interlocutory orders be incorporated, along with provisions adopting the International Criminal Court’s “elements of crime”⁸, an interpretive tool which assists the ICC in the interpretation

⁴ Zead-al-Malum, Meeting on Bangladesh: Exchange of Views on War Crimes Trials and on Accountability Issues, The Delegation for Relations for the Countries of South Asia, 31 January 2012, European Parliament, Brussels, available at <http://icsforum.org/blog/icsf/text-of-speech-before-the-eu-parliaments-delegation-by-ict-prosecutor/>, last accessed on 19 October 2012.

⁵ John Cammegh, a British lawyer advising the defense, argues that the trials “mak[e] a mockery” of the principle of accountability against impunity, due to its inadequate protections / safeguards for the defense of the accused. See further John Cammegh, “In Bangladesh: Reconciliation or Revenge?”, *New York Times*, 17 November 2011.

⁶ Human Rights Watch, “Letter to Prime Minister Sheikh Hasina Re: International Crimes (Tribunals) Act”, available at <http://www.hrw.org/news/2009/07/08/letter-prime-minister-sheikh-hasina-re-international-crimes-tribunals-act>, last accessed on 19 October 2012.

⁷ “Recommendations made by Stephen J Rapp, US Ambassador at Large, War Crimes Issues & the extent of their implementations by the International Crimes Tribunal and the Government of Bangladesh”, in *ICT-BD Watch*, 28 November 2011, available at <http://ictbdwatch.wordpress.com/2011/11/28/recommendations-made-by-stephen-j-rapp-us-ambassador-at-large-war-crimes-issues-the-extent-of-their-implementations-by-the-international-crimes-tribunal-and-the-government-of-bangladesh/>, last accessed 19 October 2012.

⁸ U.N. Doc. PCNICC/2000/1/Add.2 (2000)

and application of the crimes of genocide, crimes against humanity and war crimes – all crimes within the jurisdiction of the ICT-BD as well.⁹ He also suggested that the accused should be ensured the rights under Part III of the International Covenant on Civil and Political Rights (1966), as well as to include provisions detailing the detention of the accused similar to that used by the International Criminal Tribunal for Rwanda (‘ICTR’). He further recommended the inclusion of rules on the presumption of innocence and placing the burden of proof on the prosecution. He additionally suggested incorporating rules on witness protection and granting visas to foreign counsel whose advice has been sought.¹⁰

10.2. Message as Medium in Bangladesh?

With justice processes that seek accountability for core international crimes, it is not enough to merely denounce alleged perpetrators, as the credibility and legitimacy of such processes are locally perceived and assessed – that is by the very local constituents they are meant to vindicate and serve.¹¹ As Rama Mani observes, “[i]f ideas and institutions about as fundamental and personal a value as justice are imposed from the outside without an internal resonance, they may flounder, notwithstanding their assertions of universality”.¹²

Ambassador Rapp has observed,

[...] these trials [...] are of great *importance to the victims* of the 1971 war of independence from Pakistan. What happens in Bangladesh today will *send a strong message* that it is possible for a national system to bring those responsible for grave human rights abuses to justice (emphasis added).¹³

Ambassador Rapp appears to view the trial as, among other things, an expressivist exercise for victims of the war: a process that is designed

⁹ See Rapp’s Recommendations in *supra* note 7.

¹⁰ *Ibid.*

¹¹ Mark Drumbl, “Rights, Culture and Crime: The Role of Rule of Law for the Women of Afghanistan”, in *Columbia Journal of Transnational Law*, 2004, vol. 42, p. 349.

¹² Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, Blackwell Publishers, 2002, p. 49.

¹³ “Bangladesh International Crimes Tribunal: The judges, at the first opportunity, must define what the term ‘crimes against humanity’ means”, Voice of America, 6 December 2011.

to tell a story and, through trial, verdict and punishment, affirm the value of law, strengthen social solidarity and incubate a moral consensus among victims.¹⁴ His view accords with the UN Secretary-General Ban Ki-Moon's definition of 'legacy' as:

[...] a court's lasting impact on bolstering the rule of law in a particular society, including by conducting effective trials to contribute to ending impunity, while also strengthening domestic judicial capacity.¹⁵

Put differently, expressivism is less concerned with whether the law deters or punishes, than it is with the message victims get from the law. Diane Marie Aman reminds us, however, that for the law to have expressive value, the "message understood, rather than the message intended, is critical".¹⁶ To send the right message, justice processes and their affiliates must be attentive to their primary constituents – their victims. This attentiveness can pave the way for justice and reconciliation, which are maximised when undertaken in a manner that resonates in local cultures and communities, the environs in which law matters most and in which the actual abuses take place.¹⁷

Ambassador Rapp's recommendations are consistent with international law and practice and should be applauded. But further research should be undertaken to consider contemporary Bangladeshi sentiments about the ICT-BD and Rapp's recommendations. In order to have resonance and to be properly understood and received, any proposed legal reforms to the ICT-BD must be context-sensitive, and not simply adopt a one-size-fits-all approach to transitional justice.¹⁸ As Ambassador Rapp

¹⁴ Mark Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, New York, 2007, p. 17.

¹⁵ "Guidance Note of the Secretary-General on the United Nations Approach to Transitional Justice" was issued on 10 March 2010 by the U.N. Secretary-General.

¹⁶ Diane Marie Aman, "Message As Medium in Sierra Leone", in *International Law Students Association (hereinafter 'ILSA') Journal of International and Comparative Law*, 2001, vol. 7, p. 238.

¹⁷ See generally, Drumbl, 2004, see *supra* note 11; Elizabeth S. Anderson and Richard H. Pildes, "Expressive Theories of Law: A General Restatement", in *University of Pennsylvania Law Review*, 2000, vol. 1503, p. 148; and Dan M. Kahan, "The Secret Ambition of Deterrence", in *Harvard Law Review*, 1999, vol. 113, no. 2.

¹⁸ Increasingly, research is being undertaken to explore innovative and contextual approaches to transitional justice, including research and writing by this author in collaboration with others.

himself concedes, it is crucial to “keep in mind that different countries have different procedures and different courts have had different procedures”.¹⁹ After all, victims of massacres that transpired nearly four decades ago often have an astute appreciation of the historical and political baggage that hinders efforts to secure accountability. Survivors of the liberation war are no different.

Drawing on lessons the author has learnt from litigation at the Extraordinary Chambers in the Courts of Cambodia (‘ECCC’)²⁰, including gathering victim evidence in relation to its putative *Cases 003* and *004*, this chapter considers: (a) the inherent challenges of eliciting non-contemporaneous or ‘old’ evidence from victims/witnesses; (b) how to gather and verify old evidence from victims/witnesses; and (c) what courts should take into account when applying for and enforcing protective measures for them.

These considerations are critically important to the fair administration of justice by the ICT-BD and the sober reality that the tribunal is, and should be, only one component of transitional justice processes in Bangladesh. Such processes ought to respond to the country’s context while anchored in international norms and standards to address the impact of large-scale past abuses in order to ensure accountability, serve justice and achieve reconciliation, which may include non-judicial mechanisms.

¹⁹ Stephen J. Rapp, Ambassador-at-Large, War Crimes Issues, Press Conference, 13 January 2011, p. 20.

²⁰ The ECCC is a hybrid tribunal established on 6 June 2003 by a bilateral agreement between the U.N. and the Cambodian government as an “Extraordinary Chambers within the existing court structure of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea”; albeit with international assistance. See “Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea”, U.N.-Cambodia, 6 June 2003, available at http://www.eccc.gov.kh/sites/default/files/legal-documents/Agreement_between_UN_and_RGC.pdf, last accessed on 19 October 2012. The KRT was recognized by the Cambodian legislature on 27 October 2004 when it ratified and implemented the U.N. “Agreement through the adoption of enabling legislation named the Law on the Ratification of the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea and Law on Amendments to the Law on the ECCC for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea”, U.N. Cambodia, 5 October 2004.

10.3. The ‘War of Independence’, Politics and Elusive Justice

The seeds of a conflict as complex as the war of independence did not begin with the armed attacks of 1971, but can be traced to deep-seated grievances, politicking and unrest. The declaration by Muhammad Ali Jinnah as early as 1948 of Urdu as the official language of Pakistan as a whole was deeply resented by East Pakistanis, and led to an uprising in 1952, and the deaths of several demonstrators. Conflict mounted with economic and political grievances in East Pakistan. Although East Pakistan’s population was larger, West Pakistan received the lion’s share of fiscal support, and opportunities in government.

Additionally, in 1970, a cyclone devastated large parts of East Pakistan, with a reported death toll between 300,000 and 500,000.²¹ Pakistani President General Yahya Khan mismanaged the relief efforts and tried to suppress the magnitude of loss, leading to protests against the regime in Dhaka. In the same year, the Awami League led by Mujibur Rahman (‘Mujib’) achieved a landslide victory in East Pakistan, obtaining an overall majority of parliamentary seats in Pakistan. However, Zulfikar Ali Bhutto was unwilling to allow Mujib become the Prime Minister, and proposed a joint-P.M. solution, which was not well received by the East Pakistanis. Subsequently Bhutto and Yahya Khan travelled to Dhaka to seek a solution.

However, unrest was brewing and West Pakistan secretly flew a number of soldiers to East Pakistan. On 25 March 1971, the Pakistani army launched Operation Searchlight, an attempt to quash the movement for liberation by the then East Pakistanis. The army began to gun down students, intelligentsia and Bengali members of the military, especially targeting the Hindu areas. Mujib was arrested, but not before he reportedly declared the emergence of the State of Bangladesh in the early hours of the next morning.

Over the next nine months of conflict, an estimated three million people were killed,²² although the Hamoodur Rahman Commission esti-

²¹ Nicholas D. Kristof, “Cyclone in Bangladesh Tests the Fragile New Democracy”, 19 May 1991.

²² D’Costa, 2011, p. 145, see *supra* note 1. Although it is difficult to independently confirm this figure.

mates only 26,000 victims.²³ Also, it is estimated that there were about 10 million refugees crossing the border into India.²⁴ Around 200,000 women were raped by West Pakistani soldiers, leading to a generation of ‘war babies’.²⁵ The international community failed to stop the atrocities, although the United Nations condemned the human rights violations. India finally intervened, sending arms and soldiers into East Pakistan, and training guerrilla fighters, resulting in a war between the two countries. The West Pakistani army surrendered on 16 December 1971. General Yahya Khan was subsequently ousted, and Zulfikar Ali Bhutto was declared the Prime Minister of Pakistan.

Prime Minister Bhutto negotiated with India for the return of land lost by Pakistan as well as the release of Pakistani POWs. India held 90,000 POWs, the most since World War II. Pakistan refused to recognise the new State of Bangladesh, and thus Bangladesh and India refused to settle the issue of POWs. Mujib wanted to try 1,500 of the POWs for alleged war crimes,²⁶ although later the number was reduced to 195 accused of genocide and other serious crimes, and the other 90,000 POWs were given amnesty and returned to Pakistan. On 17 April 1973, the government decided to convene war crimes trials, however political factionalism within the country and compromises struck with Pakistan led to them being shelved indefinitely. Mujib and his family were assassinated in 1975 after the Awami League was removed from power,²⁷ and Bangladesh went through 15 years of martial law, poverty and economic hardship.

In the aftermath of the war, the new government was unable to prosecute alleged war criminals. In 1972, the Bangladesh Collaborators (Special Tribunals) Order came into force, to indict those who collaborat-

²³ The Hamoodur Rahman Commission was appointed by the President of Pakistan in December 1971 to inquire into the circumstances of the surrender of the Pakistani forces to India. The Commission examined 213 witnesses and its report was submitted in July 1972. See also Ziauddin Ahmed, “The Case of Bangladesh: Bringing to Trial Perpetrators of the 1971 Genocide”, in ed. *Contemporary Genocides: Causes, Cases, Consequences*, Albert Jongman, 1996, pp. 95–115.

²⁴ D’Costa, 2011, p. 145, see *supra* note 1. See also Susan Brownmiller, *Against Our Will: Men, Women and Rape*, Simon and Schuster, 1975.

²⁵ D’Costa, 2011, see *supra* note 1.

²⁶ D’Costa, 2011, p. 145, see *supra* note 1.

²⁷ D’Costa, 2011, p. 149, see *supra* note 1.

ed with the Pakistani forces.²⁸ There are conflicting reports on the number of arrests and trials conducted by the tribunals;²⁹ however, it is generally believed that evidentiary difficulties held up the trials.³⁰ Pressing humanitarian and economic concerns also derailed any plans for legal proceedings³¹.

The promulgation of the International Crimes (Tribunals) Act of 1973 ('1973 ICT Act') was the only concrete legislative step taken towards accountability.³² In November 1973, however, the government granted a general amnesty and released most of the detainees.³³ Organisations that were previously labelled collaborators and banned were permitted to participate in politics, and many of their members were appointed to influential positions in government, making the establishment of a tribunal even less probable.³⁴

The assassination of Mujib and the political events that followed forestalled all accountability processes for the next several years. In the 1990s, powerful civil society advocates, movements and campaigns called for erstwhile alleged collaborators to be removed from power and brought to justice.³⁵

10.4. New Parliamentary Resolve and a Push to Prosecute Core Crimes with an Old Statute

The Liberation War Museum, located in Dhaka, Bangladesh, was established on 22 March 1996, and it has since been archiving documents and testimonies of the war.³⁶ The Museum is located in two buildings, with a

²⁸ Suzannah Linton, "Completing The Circle: Accountability For The Crimes Of The 1971 Bangladesh War Of Liberation", in *Criminal Law Forum*, 2010, vol. 21, no. 2, p. 204.

²⁹ Some reports state 11,000 suspects were in custody and 73 tribunals constituted.

³⁰ Linton, 2010, p. 205, see *supra* note 28.

³¹ D'Costa, 2011, p. 151, see *supra* note 1.

³² D'Costa, 2011, p. 150, see *supra* note 1.

³³ Linton, 2010, p. 205, see *supra* note 28.

³⁴ D'Costa, 2011, p. 151, see *supra* note 1.

³⁵ D'Costa, 2011, pp. 151–152, see *supra* note 1. For example, Jahanara Imam's campaign against Golam Azam and the Ghatok Dalal Nirmul Committee.

³⁶ Liberation War Museum, "About Us", available at <http://liberationwarmuseum.org/about-us>. It is directed by Mr. Mofidul Haque, also a trustee of the museum.

total of six galleries.³⁷ The collection has over 10,000 artefacts, including rare photographs, documents and pamphlets. The museum has an outreach programme that educates students who visit it.³⁸ Another outreach project consists of a large bus mounted with 360 photographs and objects, acting as a mobile exhibition, which travels to different parts of the country.

The process of pursuing justice for the victims of the 1971 atrocities moved forward in April 2008, with the War Crimes Fact Finding Committee releasing a list of 1,597 war criminals involved in the 1971 war.³⁹ The list included Pakistani Army officers, political collaborators and members of the Jamaat-e-Islami, a junior coalition partner in the previous government.⁴⁰ In a bold move in 2009, the Bangladesh Parliament adopted a resolution to try persons accused for crimes under the 1973 Act.

The Resolution provides for individuals and groups to be tried, institutes an appeal process and includes English as an official language of the court along with Bengali.⁴¹ While these amendments are designed to ensure that the ICT-BD’s process accords with international standards, there is still a long way to go. Several provisions of the 1973 Act have been criticised for being insufficient with regards to ensuring that international standards of fairness and due process are met.⁴²

After all, the demands for fairness and justice should not centre exclusively on victims, with scant regard to the corollary rights of alleged perpetrators. In order to achieve a justice system free of what has been termed an “impartiality deficit”, its statutory foundation must allude to the

³⁷ Liberation War Museum, “The Museum”, available at <http://liberationwarmuseum.org/the-museum>, last accessed on 19 October 2012.

³⁸ Liberation War Museum, “The Museum”, available at <http://liberationwarmuseum.org/programs>, last accessed on 19 October 2012.

³⁹ D’Costa, 2011, p. 153, see *supra* note 1.

⁴⁰ Members of this group under the name Al-Badr allegedly rounded up approximately 150 academics and journalists and killed them the day before Pakistan’s surrender. Mark Dummett, “Bangladesh war crimes stir tension”, BBC News, 30 June 2008.

⁴¹ The International Crimes (Tribunals) Act, 1973, (‘Act No. XIX of 1973’)

⁴² Human Rights Watch, “Bangladesh: Upgrade War Crimes Law”, 8 July 2009, available at <http://www.hrw.org/news/2009/07/08/bangladesh-upgrade-war-crimes-law>, last accessed on 19 October 2012.

defence function, equal in status, resources and respect to the judicial, administrative and prosecutorial functions.⁴³

The temporal jurisdiction⁴⁴ of Article 3(1) is wide, stating that the tribunal has jurisdiction over any individual who has committed any of the crimes listed “before or after the commencement of [the] act”. The subject matter jurisdiction⁴⁵ of the 1973 Act has also been called into question. It permits prosecution for “genocide, crimes against humanity, war crimes and other crimes under international law”.

Commentators have argued that the statute lacks precise definitions of war crimes, crimes against humanity, genocide and sexual violence.⁴⁶ The extant statutory definitions of these crimes are adapted from the International Military Tribunal (Nuremberg) Charter, with certain amendments. For instance, crimes against humanity in the 1973 Act includes imprisonment, abduction, confinement, torture and rape. Ethnicity is contemplated as one of the grounds of discrimination, though it is unclear if this will reflect customary international criminal law in this regard.⁴⁷ The last provision, “any other crimes under international law”, is vague and may not be held to be consistent with the principle of specificity, an important tenet of international criminal law.⁴⁸

It is noteworthy that the court conceded that it was bound to enforce domestic legislation which gives effect to international treaties to which Bangladesh is a State Party. However, the tribunal held that it saw no reason to borrow definitions of crimes within its subject-matter jurisdiction, from “fairly recent international tribunals”, and that it may only “take into account jurisprudential [and normative] developments from other jurisdic-

⁴³ See William A. Schabas, Ramesh Thakur, and Edel Hughes, (eds.), *Atrocities and International Accountability: Beyond Transitional Justice*, United Nations University Press, Tokyo, 2007.

⁴⁴ ‘Temporal jurisdiction’ refers to the jurisdiction of a court of law over an action in relation to the passage of time.

⁴⁵ ‘Subject-matter jurisdiction’ refers to the authority of a court to hear cases of a particular type or cases relating to a specific subject matter.

⁴⁶ Jyoti Rahman and Naeem Mohaiemen, “1973 War Crimes Act: Getting it right”, *The Daily Star*, 10 July 2009.

⁴⁷ See Linton, 2010, pp. 231–239, see *supra* note 28, for an exhaustive treatment on the differences between the provisions for the definition of ‘crimes against humanity’.

⁴⁸ Linton, 2010, p. 268, see *supra* note 28.

tions should it feel so required in the interests of justice”.⁴⁹ With respect, this is unsatisfactory as although the ICT-BD is a national tribunal, it should have recourse to relevant case law and international standards which are widely accepted at both national and international courts.

It is unclear from the first decision of the ICT-BD, from the way in which the charges are described, in the context of the pronouncement “that there is a prima facie case against the accused”, whether the judges are merely reciting charges by the prosecutor for the accused to hear, read and understand, or whether they have agreed that these charges form the exclusive and unchallengeable scope of the trial.⁵⁰ It appears that it is the latter – that since a prima facie case has been made against the accused, the defence is now being called to answer, which raises significant concerns of perceived impartiality or lack of it.

In particular, certain charges name suspected victims of rape in connection to a crime against humanity, without taking into account whether such identification would adversely affect the physical and psychological security of the victim. This is inconsistent with international standards and best practises.

Strikingly, the 1973 Act also fails to guarantee the independence of prosecutors and the judiciary or the protection of victims and witnesses.⁵¹ In response to these and other criticisms, the 1973 ICT Act was further amended by the International Crimes Tribunal Rules of Procedure (Amendment), 2011 (‘2011 Amendment Act’)⁵², with provisions guaranteeing the rights to: the presumption of innocence⁵³, not to be tried twice for the same offence⁵⁴, a fair and public hearing with counsel of his choice⁵⁵, trial without undue delay⁵⁶, be heard in his defence⁵⁷, not to be

⁴⁹ Order issued on 3 October 2011 by the ICT-BD, on file with the author, p. 10.

⁵⁰ There is indication to say that not all the charges were accepted: 20 out of 31 submitted by the prosecutor.

⁵¹ *Ibid.*

⁵² International Crimes Tribunal Rules of Procedure (Amendment), 2011, dated 28 June 2011.

⁵³ Rule 43(2).

⁵⁴ Rule 43(3).

⁵⁵ Rule 43(4).

⁵⁶ Rule 43(5).

⁵⁷ Rule 43(6).

compelled to testify or confess his guilt against his will⁵⁸, to have access to the judgment at no cost⁵⁹, and to be released on bail at any stage of the proceedings subject to certain conditions being fulfilled.⁶⁰

Importantly, the 2011 Amendment Act also provides for the protection of victims or witnesses.⁶¹ The ICT-BD is authorised to ensure the physical well-being of victims/witnesses and to order in-camera-proceedings to preserve the anonymity of victims/witnesses if that is in their best interests.

The establishment of the tribunal and the earlier amendments to the 1973 Act should be applauded, and these changes have been heralded as positive steps by some legal experts.⁶² Article 58(A) of the 2011 Amendment Act, for instance, states that the ICT-BD may order government authorities to “ensure [the] protection, privacy and well-being” of victims/witnesses, and to maintain the confidentiality of this protective process.⁶³ The government shall also be required to “arrange accommodation”, ensure “security and surveillance” during their stay in connection with the protective process and take “necessary measures” to ensure that law enforcement officials “escort” victims/witnesses to the courtroom.⁶⁴ Where proceedings are held *in camera*, the prosecution and defence counsel are also required to maintain the confidentiality of the proceeding and any related information, including the identity of the victims/witnesses.⁶⁵

Before assessing the potential efficacy of these recent amendments in facilitating the gathering of old evidence from victims/witnesses, it would be appropriate to consider another historical conflict and attendant

⁵⁸ Rule 43(7).

⁵⁹ Rule 43(4).

⁶⁰ Rule 34(3).

⁶¹ Rule 58(A); I understand that drafters of the 2011 Amendment Act benefited from the expertise of, among others, the University of California Berkeley’s International Human Rights Law Clinic directed by Clinical Professor Laurel E. Fletcher.

⁶² See generally “Recommendations made by Stephen J Rapp”, 2011, see *supra* note 2. For the history of the framing of the 1973 Act, see Wali-Ur Rahman, “A Brief History of the Framing of the International Crimes (Tribunals) Act 1973”, Bangladesh Heritage Foundation.

⁶³ Rule 58(A)(1).

⁶⁴ Rule 58(A)(2).

⁶⁵ Rule 58(A)(3).

ongoing justice process which may offer useful lessons – the of the Khmer Rouge crimes and the ECCC.

10.5 Do Not Fail to Keep Therapeutic Promises: Victims will Lose Respect and Confidence

Led by Pol Pot, who died in 1998, the ultra-Maoist Khmer Rouge emptied Cambodia’s cities in a bid to forge an agrarian utopia in the 1970s. Up to two million Cambodians died of starvation, overwork and torture or were executed during the regime’s 1975–1979 reign. Khmer Rouge prison chief Kaing Guek Eav alias ‘Duch’ was convicted for overseeing the torture and execution of around 17,000 detainees at Tuol Sleng prison, also known as S-21. Four other former senior Khmer Rouge leaders are currently being tried for core international crimes at the U.N.-backed ECCC, which was formed in 2006 after nearly a decade of wrangling between the U.N. and the Cambodian government.

Cambodia, like Bangladesh, has endured its share of seemingly intractable political impasses amidst allegations that high-ranking officials of the ruling government bear responsibility for having ordered or permitted large-scale human rights violations between 1975 and 1979. Notwithstanding this, the establishment of the ECCC in 2003, the conclusion of its first trial in July 2010, and its ongoing trials of four senior Khmer Rouge leaders, one of whom was formerly granted a royal amnesty for his crimes as part of a political compromise, is expected to attest to the fact that there may yet be hope for accountability in Cambodia.

Under the 2011 Amendment Act, a victim refers to a person who has suffered harm as a result of crimes under the ICT-BD’s jurisdiction, without limitation as to whether such harm is physical, material or psychological.⁶⁶ Like the ICT-BD, anyone who has suffered from physical, psychological, or material harm as a direct consequence of the crimes committed by the Khmer Rouge between 1975 and 1979 is considered a victim and may apply to become a ‘civil party’ to the proceedings at the ECCC.

⁶⁶ Article 2(26) of the 2011 Amendment Act states that “‘Victim’ refers to a person who has suffered harm as a result of commission of the crimes under section 3(2) of the International Crimes (Tribunals) Act, 1973”.

The ECCC's procedural rules permit an unprecedented degree of victim participation that surpasses the Rome Statute.⁶⁷ By allowing victims to participate in the trials as 'civil parties', the ECCC also seeks to involve Cambodians in the pursuit of justice and national reconciliation.⁶⁸ Civil parties enjoy rights at trial akin to the prosecution and the defence. The ECCC's civil party process thus derives from a victim-oriented approach to punishment, which suggests that a victim needs to tell her story before an impartial judge within the framework of a formalised process in order to feel better.

Commentators have applauded the ECCC for giving victims a robust role, saying that it is a long overdue "recognition, after fifteen years of international and hybrid courts like [the ECCC], not to exclude victims from the justice that is being dispensed on their behalf".⁶⁹ Kheat Bophal, the former Head of the ECCC Victim's Unit, claimed that participation has the potential to transform Cambodian victims into both agents and beneficiaries of a rule of law culture:

It is essential for the effectiveness and legitimacy of the Court that victims are part of the [Khmer Rouge Tribunal's] process, and that they have their own voice.

Participation restores faith in the justice system and provides the first hand-satisfaction of making public the harm suffered.

The process of participation also allows victims the opportunity to denounce the crimes committed against them and

⁶⁷ Rome Statute of the International Criminal Court ('Rome Statute'), 17 July 1998, U.N. Doc. A/CONF. 183/9 (entered into force on 1 July 2002).

⁶⁸ On 12 June 2007, the ECCC's Judicial Committee on the Rules of Procedure, composed of both national and international judges serving in their capacity as rule-makers, issued Internal Rules ('2007 Internal Rules') that, *inter alia*, provided for civil party action purporting to confer victims extensive participatory rights. These Internal Rules will guide the investigation and trial process and help ensure that the court meets international standards for fair trials. Note that the Internal Rules have been amended several times since.

⁶⁹ Seth Mydans, "In the Khmer Rouge Trials, Victims will not Stand Idle By", *The New York Times*, 17 June 2008. Mydan states, "Diane Orentlicher, Special Counsel of the Open Society Justice Initiative believes that the Tribunal marks the evolution of international criminal justice".

support norms and laws that prohibit such actions and events.⁷⁰

In theory, the notion that victims benefit from participation is difficult to dispute, but, as we shall see, in practice victim participation has significant limits. Participation is not always a ‘panacea’, nor should the trial function as a sort of modern-day ‘degradation ceremony’.⁷¹ As Morten Bergsmo has noted, “victims’ interests are variegated”. Victims want “not only to have someone convicted, but also to have a court verify what exactly the facts were and whether the accused is responsible for those acts”, and if others may have been complicit.⁷²

While not perfect, *Prosecutor v. Kaing Guek Eav* (‘the *Duch* case’) is noteworthy in this respect. Significantly, the ECCC Trial Chamber did not merely pronounce on Duch’s guilt, but upheld his due process rights, ruling that his pre-trial detention for more than eight years by the Military Court of Cambodia was illegal and merited a reduction in his sentence. At the time of writing, the ECCC’s Supreme Court Chamber is to issue its first final judgement in relation to the *Duch* case. The Chamber’s reasoning for its decision will be thoroughly examined in the context of the Judgement’s implications for strengthening the rule of law in Cambodia.

The *Duch* case is of great importance to stability in Cambodia in the long run, as in Cambodia the test of legitimacy is not arrests – the Cambodian government knows how to arrest people it does not like – but whether ‘fair trials’ can be carried out so Cambodian victims can see that justice is possible in their country.

Bergsmo has added a cautionary note about balancing victims’ interests for truth and justice through adherence to the highest legal professional and evidentiary standards in court:

A people should be entitled to its own history, even when every detail is not documented. Yet, in comparison higher standards of evidence should apply to core international

⁷⁰ Interview with Kheat Bophal, Head of the Victim’s Unit at ECCC, Access Victims’ Rights Working Group Bulletin, Spring 2008, vol. 11, p. 4.

⁷¹ See, generally, James Cockayne, “Hybrids or Mongrels? Internationalized War Crimes Trials as Unsuccessful Degradation Ceremonies”, in *Journal of Human Rights*, 2005, vol. 4; and Harold Garfinkel, “Conditions of Successful Degradation Ceremonies”, in *American Journal of Sociology*, 1956, vol. 61, no. 5, pp. 420–424.

⁷² Morten Bergsmo, “Using Old Evidence in Core International Crimes”, *FICHL Policy Brief Series*, 2011, no. 6, p. 4.

crimes processes, where penalties are particularly severe. If old evidence should not be an excuse not to prosecute, it requires greater caution. The fact that it relates to events carrying highly emotional burdens may render it more fragile (emphasis added).⁷³

Complexities arise when this caution is cast aside. They are compounded when promises are made to victims about their role in formal accountability and truth-telling process, which are not honoured. These complexities have occurred at the ECCC, and should then be carefully examined. In particular, I have encountered significant problems in connection with victim-oriented approaches being misunderstood or misapplied at the ECCC, which the ICT-BD's affiliates may wish to consider.

The ECCC's civil party process derives from a victim-centred approach to punishment, which suggests that a victim needs to tell her story before a decision-maker within the framework of a formalised process in order to feel better.⁷⁴ Suggestions abound about the soothing effects of participation.

To Naomi Roht-Arriaza, victims gain “a sense of control, an ability to lessen their isolation and be reintegrated into their community, and the possibility of finding meaning through participation in the process”.⁷⁵ For Jamie O'Connell, participation may also restore a victim's dignity by giving him “a sense of agency and capacity to act that the original abuse sapped”.⁷⁶ More than testifying as a witness, playing a role in the prosecution is said to “assist victims to take back control of their lives and to ensure that their voices are heard, respected, and understood”.⁷⁷ Leila Sadat

⁷³ Bergsmo, 2011, p. 4, see *supra* note 59.

⁷⁴ Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and International Law and Practice*, Oxford University Press, 1995, p. 21. The author notes: “[...] more formalized procedures, including the ability to have an advocate and to confront and question their victimizers, may be more satisfying for victims than less formal, less adjudicative models.”

⁷⁵ Roht-Arriaza, 1995, p. 19, see *supra* note 61; see also Raquel Aldana-Pindell, “An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes”, in *Human Rights Quarterly*, 2004, vol. 26.

⁷⁶ Jamie O'Connell, “Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?”, in *Harvard International Law Journal*, 2005, vol. 46. The author quotes from a telephone interview with Mary Fabri, clinical psychologist.

⁷⁷ Yael Danieli, “Victims: Essential Voices at the Court”, Victims Rights Working Group, London, U.K., 2004, p. 6.

notes that war crimes trials “will not only provide a forum for the particular defendant but also an arena in which the victims may be heard”.⁷⁸

In short, participation is equated with “truth-telling”, which is held out as being fundamentally and necessarily beneficial, validating the victims’ experience and permitting them to heal.⁷⁹ Yet, legal justice is often too “thin” to support therapeutic goals. The notion that victims benefit from participation is powerful but it should be closely examined if tribunals wish to send the right message to victims.

Based on conversations with and observations of Cambodian victims and civil parties at the ECCC, it is my view that unless modestly conveyed and properly managed, the message of victim participation can devolve into a rhetorical device.⁸⁰ A device that soothes the ECCC’s affiliates and donors, but not all victims, some of whom complain that their token participation in the ECCC trial proceedings has “revive(d) memories, bitterness and misery”, and engendered a “loss of faith in the ECCC”.⁸¹

Despite being a hybrid court based in Phnom Penh, the ECCC has at times externalised justice away from Cambodian victims. The ECCC’s promise that victims have a place in the proceedings results in heightened

⁷⁸ Leila Nadya Sadat, “Redefining Universal Jurisdiction”, in *New England Law Review*, 2001, vol. 35, pp. 241–263.

⁷⁹ Judith Lewis Herman, *Trauma and Recovery*, Basic Books, New York, 1992, p. 181. The authors note: “The fundamental premise of psychotherapeutic work [with survivors of severe trauma] is a belief in the restorative power of truth-telling”.

⁸⁰ See generally, Mahdev Mohan and Vani Sathisan, “Erasing the Non-Judicial Narrative: Victim Testimonies at the Khmer Rouge Tribunal”, in *Jindal Global Law Review*, 2011, vol. 2, issue 2; and Mahdev Mohan, “The Paradox of Victim-Centrism – Victim Participation at the Khmer Rouge Tribunal”, in *International Criminal Law Review*, 2009, vol. 5.

⁸¹ Press Release, Victims’ Press Conference at the ECCC, Victims Voice their Hopes and Concerns about ECCC (3 December 2009), on file with author:

We hope participation in this process will provide us with some relief, a sense that justice has been done and an understanding of our history; but it also revives memories, bitterness, and misery. We began with hope that the ECCC would provide some satisfaction, but we are now concerned about the delays, the allegations of corruption, the sufficiency of available resources, and the lack of information on the progress made by the ECCC and prospects for our involvement. These problems prompt many of us to lose hope and faith in the ECCC.

disillusionment for victims when the process turns out to be unreceptive to and incompatible with their subjective impressions, general reminiscences, emotions and renditions of truth.⁸²

Some Cambodian civil parties have been disillusioned because the court process has turned out to be unreceptive to and incompatible with their subjective impressions, emotions and renditions of truth. Others who have applied to become civil parties but have been told that their applications are inadmissible for jurisdictional reasons – for instance, because the crimes they suffered took place outside the 1975–1979 timeline – have felt affronted because their status and identity as victims has been questioned. Still others wish to speak in their own voice in court rather than through prosecutors and are distraught when the evidence they take pains to re-tell do not make their way to the official record.⁸³

Historically, the indigenous lowland Khmers or ‘Khmer Krom’ have been a marginalised minority group due to their geographical, historical, and cultural ties to both Cambodia and Vietnam. Their distinct identity also made the Khmer Krom community the target of crimes during the Khmer Rouge regime. In the Khmer Krom heartland of the Bakan district, Pursat province, up to 80 percent of the community was singled out and slaughtered *en masse* by the Khmer Rouge, who considered them to be traitors associated with the Vietnamese – persons with “Khmer bodies but Vietnamese minds”. This was a calculated mass murder with some chilling parallels to the notorious Srebrenica Massacre of 1995 in Bosnia and Herzegovina.

Yet, for the past two years, the Khmer Krom community has remained a blind-spot for the Investigating Judges and Co-Prosecutors at the ECCC, who have repeatedly failed to acknowledge their evidence. In January 2010, the ECCC’s co-investigating judges decided to charge the suspects for crimes against Cambodia’s Cham Muslim and ethnic Vietnamese minorities, but not the Khmer Krom – ethnic Khmers with roots in southern Vietnam. This omission stemmed in part from the prosecution’s exclusion of the Khmer Krom from its investigation, which left the tribunal’s judges unable to pursue such charges, despite compelling

⁸² Marie-Benedicte Dembour and Emily Haslam, “Silencing Hearings? Victim-Witnesses at War Crimes Trials”, in *European Journal of International Law*, 2004, vol. 15, no. 151, p. 156.

⁸³ See generally Mohan and Sathisan, 2009, see *supra* note 80.

evidence of mass killing and forced displacement of the Khmer Krom throughout Cambodia.⁸⁴

However, Khmer Krom survivors continued to press their case with the court, submitting extensive evidence of the atrocities they suffered and detailing prison sites and mass graves. These efforts paid off.

On 13 June 2010, the ECCC’s international co-prosecutor Andrew Cayley reached out to Khmer Krom survivors. Meeting for the first time with nearly 200 of them in Pursat Province, on the grounds of a pagoda where Khmer Krom had been executed, Cayley acknowledged the need to present to the court the atrocities committed against the Khmer Krom people.

On 17 June 2011, Mr. Cayley lived up to his word. He filed “Request for Investigative Action and Supplementary Submission” which adds additional crimes to a new case at the court (*Case 004*), including crimes committed against the Khmer Krom population in Takeo and Pursat provinces, based primarily on civil party evidence.

Now, at the time of writing, more than 130 Khmer Krom survivors will have an opportunity to participate in the next trial of senior Khmer Rouge leaders, which is expected to begin at the end of the month. Their evidence, which has thus far not been documented, could also become the centre-piece of *Cases 003/004*.

As one civil party eruditely put it when speaking to court officials,

Give me, give us [civil parties] the voice that you promised.
Do not play with the hearts and the souls of the victims and
my (dead) parents. Justice must be transparent, if not it will
be for nothing, and you will have a real problem on your
hands.⁸⁵

For its part, the ECCC fearing an onslaught of 3,866 Cambodians who have been admitted as civil parties in the next case, all jostling for an opportunity to address the court, has back-pedalled on several of the rights it originally conferred to civil parties. All in all, the civil party pro-

⁸⁴ The ECCC grounded its decision partly on a technicality. Months before, prosecutors had sent a memorandum to investigating judges about possible genocide against Khmer Krom in the Pursat province. They entitled the memorandum an “investigative request” rather than a “supplementary submission”. The latter title would have triggered an investigation.

⁸⁵ *Ibid.*

cess promises far more than it can deliver. Legal accountability processes often buckle under the strain of supporting ambitious therapeutic or restorative goals. The ECCC and other accountability processes should instead abide by their foundational goal of delivering accountability under the law. To ask more of it may be asking too much of any criminal trial. Restorative justice may better reside with complementary processes that can be more receptive to strategies that commemorate victims in the non-legal arena using pre-existing traditions that are communicated in a manner that resonate with victims.

As we shall see, practice at the ECCC offers important lessons to the ICT-BD on the inherent challenges of eliciting ‘old evidence’ from victims or witnesses; how to gather credible old evidence from them; and the protective processes that ought to be supported and strictly enforced when seeking to inspire victims/witnesses to come forward to share their traumatic narratives with the tribunal.

10.6. Beware the Taint of Sham Trials and Selective Justice: Send the Message that Trials are Independent

Notwithstanding the recent legislative amendments and the confidence they are meant to inspire in Bangladeshi victims/witnesses, there are likely to remain significant challenges in eliciting old evidence for the core crimes charged. This is not because the ICT-BD’s affiliates and lawyers are saviours who “know best” or have to deal with victims who are powerless, helpless innocents whose naturalist attributes have been negated.⁸⁶ As Mutua notes, that presumption, which has at times unwittingly informed the larger international criminal justice process, is often as flawed as it is offensive. On the contrary, victims or witnesses are keenly aware of the possible risks that their testimony may involve. After all, piecemeal investigations or purported laws promising protection but that may not be enforced are problematic in the eyes of Bangladeshi victims who have historical reasons not to trust any exercise that resembles official information gathering.

Victims of mass crimes which transpired over three decades ago and who have not benefited from timely justice processes and legal remedies are keenly aware of the fact that such processes and remedies, when

⁸⁶ Makau Mutua, “Savages, Victims, and Saviors: The Metaphor of Human Rights”, in *Harvard International Law Journal*, 2001, vol. 42, p. 201.

promised, may be but a mirage. Despite the due process guarantees that have been introduced by the above-mentioned legislative amendments, other extant constitutional provisions send a different message.

Under Article 47(A) of the Bangladesh Constitution, traditional fair trial rights which are accorded to all other citizens have been deliberately withdrawn from persons detained, suspected or charged in connection with crimes within the scope of the 1973 ICT Act. Linton highlights additional difficulties undermining due process, as well as concerns over the retention of the death penalty – all of which do not augur well for the legitimacy of the ICT-BD in the eyes of the victims whose evidence it is meant to elicit.⁸⁷ As Linton notes, “such considerations could have enriched and improved the Bangladeshi law in the amendments of 2009, in a way that is consistent with the overarching principle of legality”.⁸⁸

Steven Kay too has been moved to lament as follows:

The overall effect of these measures was to put persons questioned, detained, suspected of committing crimes or charged with crimes within the International Crimes (Tribunal) Act 1973 outside the norms of the national legal system. For the first time inequality has been introduced into the Bangladesh justice system by the Constitution that claimed to promote equality.⁸⁹

War crimes courts cannot apply justice selectively and all applicable legislation undergirding the ICT-BD’s judicial process should be harmonised. The process and the victims it seeks to vindicate are not helped by anything which may resemble a ‘degradation ceremony’, regardless of how heinous the alleged crimes may be. In fact, the greatest danger to such a process is the perception that it may be denouncing certain groups, whilst implicitly condoning others that are equally or more culpable.

Such a perception robs the court of its legitimacy in the eyes of local and international stakeholders and undermines its goals. This is precisely what happened when Pol Pot and Khmer Rouge Foreign Minister, Ieng Sary, were tried *in absentia* for genocide and other international

⁸⁷ Linton, 2010, see *supra* note 28.

⁸⁸ Linton, 2010, p. 209, see *supra* note 28.

⁸⁹ Steven Kay, Q.C., “Bangladesh War Crimes Tribunal – A Wolf in Sheep’s Clothing?” *International Criminal Law Bureau*.

crimes in 1979 by the so-called People's Revolutionary Tribunal ('PRT') established by the Vietnamese-installed Heng Samrin administration.⁹⁰

Although foreign lawyers had been invited to serve as prosecutors and defence counsel in order to "reflect international standards of justice" and thereby enhance the legitimacy of the proceedings, the PRT was not well received by local and international stakeholders. The short duration of the trial, the denial of due process rights to the defendants who were convicted *in absentia* and a poor defence combined to create the impression of mob justice. These factors created the impression of "primitive political justice" which was seen to be "akin to the Stalinist show trials of the 1930s".⁹¹ Many Cambodian victims of the Khmer Rouge regime saw the trial as an assertion of Vietnamese sovereignty over Cambodia. The reaction in the West to the verdict was conspicuous silence – all it commanded was two square inches in the back pages of the *New York Times*.

In contrast, the U.N.-backed ECCC was established by virtue of a great deal of patience and skilful negotiation. Cold War politics and competing national interests impeded the establishment of a tribunal to try Khmer Rouge leaders throughout the 1980s. Painstaking negotiations among the U.N., various member states and Cambodia over much of the ensuing decade reflected a mixture of – depending on the government in question – ambivalence, conflicting priorities and/or active hostility to the tribunal.

Despite this, Cambodian Prime Minister Hun Sen, himself formerly a Khmer Rouge cadre, was moved in 1997 to request the U.N. to assist in bringing senior Khmer Rouge leaders to book through war crimes trials. Mr. Hun Sen invited international participation in the trials due to the weakness of the Cambodian legal system and the international nature of the crimes, and to help in meeting international standards of justice.

Until the requisite political will and donor support aligned to permit the creation of the ECCC, the idea of a U.N.-backed tribunal was kept alive by a variety of diplomats, other actors at the U.N., INGOs and Cambodian NGOs, including, among others, the Office of the High Commissioner for Human Rights, U.S. Senator John Kerry, U.S. Ambassador-at-

⁹⁰ Cambodia: Information on P.G. Jail in Phnom Penh from 1979–1981, available at <http://www.unhcr.org/refworld/country,,USCIS,,KHM,,3f52079b4,0.html>, last accessed on 3 October 2012.

⁹¹ Peter Maguire, *Facing Death in Cambodia*, Columbia University Press, 2005, p. 65.

large for War Crimes, David Scheffer, the Director of Genocide Watch, Gregory Stanton, academics from the Yale Genocide Program, and Cambodian civil society leaders such as Youk Chhang, Director of the Documentation Centre for Cambodia (‘DC-Cam’).

International negotiators and experts, such as the Group of Experts, which was established by the U.N. Secretary-General in 1999, were instrumental in laying the foundation for the present day tribunal. At times, they settled for a compromise, such as when the U.N. decided against the Group’s recommendation of establishing an *ad hoc* tribunal pursuant to the U.N. Security Council’s powers under Chapter VII of the U.N. Charter to restore international peace and security, and instead established a hybrid tribunal situated in Cambodia so that local communities could better identify with the process.

On other occasions, negotiators stood firm, such as when the U.N. withdrew from negotiations with Cambodia in 2002 because negotiations had failed and the Cambodian court would not guarantee impartiality and independence, which is required for U.N. co-operation. Finally, the ECCC was established in 2003 with U.N.’s chief negotiator, Under-Secretary General Hans Corell, stating that the ECCC’s foundational documents and processes were “designed to ensure a fair and public trial by an independent and impartial court”.⁹²

Mr. Corell’s faith in the ECCC was vindicated earlier last year when the ECCC’s Trial Chamber delivered its first judgment in the *Duch* case – a well-reasoned decision which has been praised for its sound treatment of the facts before the court. Had the ECCC been rushed into action ahead of its time, rather than through a phased-in approach over several years, or had international negotiators caved in to pressure to allow national judges to have greater say in deciding cases rather than ensuring that decisions will require a ‘super-majority’ to be conclusive, it is likely that any chance of securing justice would have been scuttled outright or led to results that would not have been viewed as credible, fair or impartial by national and international stakeholders alike. This is noteworthy for the ICT-BD.

⁹² Press Release, “UN and Cambodia reach draft agreement for prosecuting Khmer Rouge crimes”, available at <http://www.un.org/apps/news/story.asp?NewsID=6487&Cr=cambodia&Cr1=>, last accessed on 19 October 2012.

It is striking that despite the more than 30 years that have elapsed since the fall of the Khmer Rouge, the trials now underway are broadly considered meaningful and important by the Cambodian public. Despite the long delay, the general public followed the *Duch* trial with great interest, as indicated, among other things, by the very large television viewing audience the trial attracted. While a delay in justice is hardly advisable as a matter of course, it is important to bear in mind that justice delayed is not always justice denied – war crimes trials that come long after a conflict may nonetheless enjoy very considerable public support and may operate to promote reasoned reflection upon the past. Having said this, it is too early to tell whether, as some ECCC affiliates argue, the trials will in themselves make a significant contribution to societal reconciliation by ‘healing’ survivors.

Tribunals such as the ECCC have grand ambitions of delivering “justice”, in the broadest sense of the word. Judging by continued obstacles to accountability at the ECCC, however, it appears justice does not come easy or cheap. Even though the trials have begun, Cambodians face a long road to justice. At the time of writing, the final two cases pending before the ECCC, referred to as *Cases 003/004*, were submitted for judicial investigation in September 2009 and concern former Khmer Rouge cadres who are part of or are closely associated with the ruling political party and the Hun Sen administration.⁹³ Unsurprisingly, little has been done since, due in no small part to the reluctance of national investigators to co-operate.

The reluctance of the ECCC’s top Cambodian investigators to proceed with *Cases 003/004* is likely in response to statements from high ranking Cambodian officials indicating that these trials should not go forward. The clearest example of ostensible interference came from Prime Minister Hun Sen when he told the UN Secretary-General, “Case 003 will not be allowed [...]. The court will try the four senior leaders successfully

⁹³ See generally, Rob Carmichael, “Tribunal’s Credibility Under Threat as Controversial Cases Head for Closure”, 11 May 2011, available at http://www.robertcarmichael.net/Robert_Carmichael/Radio/Entries/2011/5/11_Tribunals_credibility_under_threat_as_controversial_cases_head_for_closure.html, last accessed on 19 October 2012; James A. Goldston, “Justice Delayed and Denied”, in *New York Times*, 13 October 2011, available at: http://www.nytimes.com/2011/10/14/opinion/14iht-edgoldston14.html?_r=1, last accessed 9 October 2012.

and then finish with Case 002”.⁹⁴ At the time of writing, the international Co-Investigating Judge resigned from his post, ostensibly in protest against his inability to make headway in *Cases 003/004*.⁹⁵ Both cases have attracted an overwhelming amount of criticism from commentators due to the serious and consistent allegations of political interference by the Cambodian Government. In the last years several senior ECCC officials have resigned from their posts citing the government’s interference as making it impossible for them to carry out their functions.⁹⁶

Despite the success of the first trial before the ECCC the current controversy aroused by the Prime Minister’s remarks threatens to undermine the tribunal’s legitimacy. If in fact the cases now under investigation are not permitted to go forward because of political interference, the tribunal will be seen as having failed both to provide accountability and to serve as a model of the rule of law for Cambodia. The lesson we can glean from this is that if the independence, impartiality, and effectiveness of an accountability mechanism cannot be guaranteed at its inception, the expectations of victims may be disappointed and the culture of impunity may be reinforced rather than overcome.

This lesson is particularly apposite in Bangladesh as genuine concerns have been expressed by victims that the ICT-BD trials could be advanced by the current administration to gain political or electoral mileage, and if there is a change in power, the ICT-BD may be strangled at birth. Like the suspects in *Cases 003/004* at the ECCC, many of the suspects and accused persons at the ICT-BD have long-standing political ties.⁹⁷

⁹⁴ “Hun Sen to Ban Ki-moon: Case 002 last trial at ECCC”, in *Phnom Penh Post*, 27 October 2010.

⁹⁵ See the following reports by civil society members that called for (and achieved) this resignation due to the fact that the ECCC has not made any progress on cases 003/004: Open Society Justice Initiative, *Recent Developments at the Extraordinary Chambers in the Courts of Cambodia: June 2011 Update*, available at http://www.soros.org/initiatives/justice/articles_publications/publications/cambodia-eccc-20110614/cambodia-eccc-20110614.pdf; Human Rights Watch, “Cambodia: Judges Investigating Khmer Rouge Crimes Should Resign”, 3 October 2011, available at <http://www.hrw.org/news/2011/10/03/cambodia-judges-investigating-khmer-rouge-crimes-should-resign>, last accessed on 3 October 2012.

⁹⁶ See Human Rights Watch, *ibid.*

⁹⁷ “War Crimes and Misdemeanours: Justice, reconciliation—or score-settling?”, *The Economist*, 24 March 2011, available at <http://www.economist.com/node/18446875>, last accessed on 3 October 2012.

Bangladeshi victims would not be alone in harbouring such suspicions, as expert commentators too have argued that the trials may be politically motivated, calculated to shift focus away from other issues which impair the current administration's political control.⁹⁸

As Ambassador Rapp notes, it is "important that the trials be carried out in a way that will stand the test of time".⁹⁹ While this is far easier said than done, no effort should be spared in order to insulate the tribunal from political interference. The best tool for such insulation is for the tribunal to adhere to domestic and international legal standards which will help it make clear that it is a separate and independent body within the judicial branch of government that is beyond executive interference.

It is important, therefore, that the ICT-BD's affiliates have modesty of ambition when it comes to devising and calibrating its' process. In view of the current political climate in Bangladesh, and the historical lens through which the ICT-BD may be viewed by victims and the international community, I suggest that the ICT-BD ensure that its legal and judicial officials possess the requisite training and resources to ensure that the process is seen to fruition and comports with Bangladeshi law and international law and standards.

For a start, the ICT-BD's practical challenges and capacity constraints must be anticipated and addressed. It has been reported that approximately USD \$1.5 million has been approved by the Cabinet for the trial.¹⁰⁰ Yet, the elements of the legal process covered by the budget are unclear and the sheer scope of crimes and alleged criminals within its jurisdiction is staggering.¹⁰¹ The ECCC has done well to have planned for similar exigencies¹⁰² so that it could have deployed its resources more ef-

⁹⁸ D'Costa, 2011, pp. 158–159, see *supra* note 1.

⁹⁹ Stephen J. Rapp, Ambassador-at-Large, War Crimes Issues, Press Conference, 13 January 2011, p. 22.

¹⁰⁰ D'Costa, 2011, p. 159, see *supra* note 1.

¹⁰¹ See Linton, 2010, p. 309, see *supra* note 28; D'Costa, 2011, see *supra* note 1; D'Costa and Hossain, "Redress for Sexual Violence before the International Crimes Tribunal in Bangladesh: Lessons from History and Hopes for the Future", in *Criminal Law Forum*, 2010, vol. 21, pp. 331–332.

¹⁰² The ECCC plans to spend close to \$200 million to try five defendants; a process it anticipates could take until March 2014. That is a big increase from the court's initial three-year budget of \$56.3 million – an amount unfathomable to many ordinary Cambodians who live on less than \$1 a day. The court's spokespersons have emphasised that Cambodia's hybrid court looks like a bargain compared with tribunals in Rwanda

fectively in the last five years. The ICT-BD should not repeat the ECCC’s mistakes in this regard.

As intuitive as it may be to commence war crimes trials, absent systematic investigations, sufficient resources and sustained political will, or an adequate mandate and principled completion strategy, such trials may be mired in challenges. They may also divert precious attention and resources from achievable restorative goals. Criminal prosecution is just one element in a toolbox of post-conflict justice and accountability. In any given context, those who seek accountability must closely examine their objectives to ensure that the mix of tools they select is best tailored to the particular need. Exaggerating what just one tool – prosecution – can reasonably accomplish may mean that other avenues which are more meaningful and effective are not explored or are prematurely foreclosed.

10.7. Investigate, Document and Preserve: Send the Message that Victims’ Narratives Matter

Another innovative way to bolster the ICT-BD’s legitimacy would be for it to make appropriate reference to and rely on other independent and complementary transitional justice processes which may be well-received by Bangladeshi victims. The experience in Cambodia points to the key role that civil society may play. The lessons from these contexts indicate that international practitioners who wish to engage in investigation and documentation of alleged mass atrocities are more likely to succeed if they engage and work with local experts who enjoy the trust and confidence of victims and, in some cases, of at least some governmental actors. In my experience partnering with local experts in a respectful and constructive manner is a necessary pre-requisite for gaining a sound legal and forensic understanding of the nature of the mass atrocities, their scale, and their geographical sweep. This sets the foundation stone for proper documentation of victim narratives, which will in turn form the basis for comparative assessment and corroboration of new testimonial evidence of old crimes which may emerge in the course of the ICT-BD’s investigations and trials.

and the former Yugoslavia, which have cost about \$150 million a year. The Cambodian side of the court has begun to run out of money to pay salaries, but donors have yet to publicly commit funds for fear that the funds will be siphoned away by corrupt officials at the highest levels.

In Cambodia, leading local NGOs have assisted in interviewing vulnerable survivor communities and put forward data that has assisted the ECCC to charge defendants for crimes such as genocide and forced marriage, which were hitherto unknown to ECCC prosecutors.¹⁰³ By way of analogy, the ICT-BD's affiliates should look to NGOs in Cambodia such as DC-Cam which was first established by international funding and supported by academic research, to conduct research, documentation and training on the Khmer Rouge Regime. DC-Cam and the Tuol Sleng Museum serve as the principal sources of evidentiary material for the ECCC. DC-Cam's very inception can be traced back to a statute passed by the U.S. Congress in April 1994 – the Cambodian Genocide Justice Act – that led to the establishment of the Yale Genocide Program in the U.S., and to the birth of DC-Cam in 1997.

The organisation's motto, "searching for the truth", gives it the aura of an investigative entity tasked with finding, corroborating and recording facts. DC-Cam's Director, Youk Chhang, emphasised this when he told the press, "They say that time heals all wounds, but time alone can do nothing. You will always have time. To me, research heals. Knowing and understanding what happened has set me free".¹⁰⁴ In its methodical approach to gathering data, we observe how DC-Cam is "analysing an oral text, and correlating it with other, written documents and other pieces of information" to "restore the text to its 'original' version, and situate this version in its social context, establishing the particular perspective on the past that the 'oral document' takes".¹⁰⁵

As the nation's primary repository of documents relating to the Khmer Rouge that provided the ECCC with its secondary evidence, we ask how the very act of "searching for the truth" has been significantly influenced by DC-Cam. The lesson to be learnt here is that under the right circumstances a limited and well-calibrated mandate to document and preserve old evidence can achieve success in establishing the truth, while

¹⁰³ Similarly, in Timor-Leste, for example, it was national NGOs that led the way in documenting systematic sexual violence, providing a report that spurred investigation into such crimes.

¹⁰⁴ Stefan Lovgren, "Documenting Cambodia's Genocide, Survivor Finds Peace", in *National Geographic News*, 23 January 2008, http://news.nationalgeographic.com/news/2005/12/1202_051202_cambodia.html, last accessed on 9 October 2012.

¹⁰⁵ James Fentress and Chris Wickham, *Social Memory*, Blackwell Publishers, Oxford, 1992.

a broader mandate might well undermine it, regardless how noble its intentions.

Nevertheless, despite the best efforts of archives and libraries in Cambodia and elsewhere, over the years much evidence of and witnesses to the Cambodian ‘killing fields’ have been destroyed, disappeared or perished and unfortunately will not form part of Cambodia’s historical record.¹⁰⁶ For victims of mass violence who have now come forward to give evidence, including their testimony in the ECCC’s legal record or in some other virtual space which acts as a repository of their important narratives and aspirations may become the only formal acknowledgment they will receive of the atrocities they endured under the Khmer Rouge regime.¹⁰⁷ The ICT-BD should explore similar initiatives. ECCC International Co-Prosecutor Andrew Cayley puts it well:

[I]t is crucial that evidence be documented as soon as possible and as regularly as possible thereafter. This documentation should be preserved in a form which will permit it to be understood and interpreted. Also it is very important that original documents be retained and that chains of custody are able to be proven.

With regard to crimes committed decades ago [...] the above circumstance may not be present; however those prosecuting international crimes should seek out interested persons and organizations that have been collecting evidence from the relevant period. Furthermore, electronic data systems and other advanced technologies should be used to discover, pre-

¹⁰⁶ Tuol Sleng has been in a state of gross disrepair, with inadequate facilities to house and archive old primary documents, despite its status as a ‘Museum’. Observers have noted that its staff lack training in the proper preservation of such materials and little has been done to fulfil the wishes of survivors who were interred there, to refurbish it and turn it into a proper memorial site. Efforts may be under way soon, however, by UNESCO and other stakeholders to redress this.

¹⁰⁷ A Victims Register or *Kraing Meas* (or ‘Golden Book’) whereby victims’ information and narratives will be maintained in physical and online formats by the ECCC in coordination with NGOs. The online format of the register will be a major component of the Virtual Tribunal, an online database chronicling the regime and the work of the ECCC maintained by the War Crimes Study Centre of University California Berkeley. The core idea of the Virtual Tribunal is to expand the conventional notion of the archive for International Criminal Tribunals into a powerful educational legacy tool, accessible to local citizens, schools, and universities as well as international audiences.

serve, organize, analyze and disseminate evidence of crimes. These are invaluable tools to both those who are prosecuting and defending.¹⁰⁸

Archivists at the Liberation War Museum and related documentation organisations in Bangladesh should work towards interviewing potential witnesses, identifying and analysing narratives of survival, securing important primary evidence, implementing measures to prevent the destruction of documents and forensic evidence, and providing a basis to begin to confront the conflict and its consequences. By identifying and preserving evidence, both through traditional and electronic means, this archive may yet make a significant contribution to the success of future prosecutions.

10.8. Engage but Do Not Over-burden Civil Society: Send the Message that there is a Distinction between Judicial and Non-Judicial Actors

Investigation and documentation of alleged mass atrocities can be led by formal or informal truth and reconciliation commissions and referenda, by civil society, or by researchers at academic and documentation institutions dedicated to contemporaneous data collection and analysis. Where effective formal judicial accountability mechanisms are stalled, transitional justice processes devoted to truth and reconciliation can nonetheless provide a foundation for sustained accountability, not to mention strengthen local legal capacity and justice institutions which maintain the rule of law.

The lessons from Cambodia show how important the role of civil society can be in locating and preserving the documentary record of a conflict. Ideally, collaborative civil society and court initiatives can make use of that documentary record and victim testimonies and narratives for education, for assisting victims to come to terms with the past, and for fathoming how to prevent and deter mass atrocities.

Yet, compulsory truth-telling is not always effective or well-received in Asian or non-Judeo-Christian societies, where speech may be seen as performative and not necessarily consistent with justice and reconciliation.

An initiative spearheaded by a Cambodian NGO a few years ago is instructive in this regard. From 2006 to 2008, the Centre for Social De-

¹⁰⁸ Bergsmo, 2011, p. 2, see *supra* note 72.

velopment (‘CSD’) sought to create an outreach programme that was one of the most ambitious and far-reaching efforts by any NGO at that juncture. Its then Executive Director, Theary Seng, stated during one such public forum that “[...] the goal is to broaden the conversational space and to put down the burden of the past, which many have carried silently for too long. In that sense, ours is an informal truth and reconciliation commission”.¹⁰⁹

The combined effect of these informal public forums and the legal outreach work of civil society organisations in the context of the ECCC is to extol “truth telling” and positivist ideas of the law as the main paths to reconciliation. As one Cambodian victim said during one of these forums, “[w]e need *clear and exact facts/cases* from Cambodian people. In the past they did not collect written evidence but they can tell what they have suffered. But in law it is not enough to be regarded as evidence, so it’s not relevant”.¹¹⁰

Several difficulties arose in the course of this civil society organisation (‘CSO’) initiative, which typify legal outreach and informal transitional justice processes that CSOs have conducted in Cambodia.

First, as the victim’s quote above demonstrates, the discourse of truth-telling has become synonymous with ‘facts’ established within the court of law, rather than ‘truth’ and is evidenced by the sorts of impassioned remarks made by victims at non-judicial *fora*: in the course of public forums, press interviews and civil society meetings. If allowed to overreach themselves, CSO-led non-judicial truth-telling processes may often become freighted with the same baggage that weighs heavily upon judicial war crimes trials – *id est*, a desire to compel a population that preferred to heal through forgetting into “truth-telling subjects who would, after adequate sensitization, recognize their ‘need’ to talk about the violence”.¹¹¹

However, when CSOs take a legal tone it has a profound impact on how people are expressing their memories; how they understand justice

¹⁰⁹ Theary C. Seng, “Opening speech at the Phnom Penh Public Forum”, 14 November 2007.

¹¹⁰ On file with author.

¹¹¹ Rosalind Shaw, *Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone*, United States Institute of Peace, February 2005, Special Report, no. 130, p. 4.

and the law. As Rosalind Shaw aptly stated with regards to the Truth and Reconciliation Commission in Sierra Leone,

[d]ifferent regions and localities, moreover, have their own memory practices and often their own techniques of social recovery that may have developed during the course of their own history. How do these practices intersect with public truth telling during a truth commission?¹¹²

In the case of Sierra Leone, Shaw indicates that local practices were largely focused on “forgiving and forgetting” and that “valorizing verbally discursive remembering” was problematic as a result.

Shaw’s words are apposite in the ECCC context as well. Even if she was referring to a truth and reconciliation commission and not a tribunal as is the case in Cambodia, the combined effect of these informal public forums and the legal outreach work of CSOs in the context of the ECCC is to extol “truth telling” and positivist ideas of the law as the main paths to reconciliation. Non-judicial initiatives which seek to establish a historical record and smooth out the creases of conflicting versions of the truth or collective memory in the public’s mind can be antithetical to the victim’s desire to disclose vital nuanced truths and layered memories which depart from the ‘standard total view’.¹¹³

Insisting on forming or adhering to collective memory can also run contrary to the judicial endeavour. In other words, judges cannot presume to accept ‘facts of public notoriety’ which have not been established as agreed or probative facts in accordance with the applicable standard of proof.¹¹⁴

¹¹² *Ibid.*

¹¹³ Michael Vickery, *Cambodia 1975–1982*, South End Press, Boston, 1984.

¹¹⁴ Bergsmo, 2011, p. 3, see *supra* note 72; ECCC Supreme Court Judge Agnieszka Klonowiecka-Milart states:

[beware] the danger of collective memory, as forged through secondary sources such as reports or books. First the demonstration of individual criminal responsibility should clearly be distinguished from the establishment of the background of facts. Second, tribunals should be very careful in addressing what might be presented to them as ‘facts of public notoreity’. Such concepts might serve the economy of the trial, but they de facto lower the standard of proof.

In order to elicit credible old evidence, one must keep in mind what remembering and recounting traumatic and deeply personal events entails. After all, to remember is to have a “reading” of the past which,

[...] requires linguistic skills derived from the traditions of explanation and story-telling within a culture and which [presents] issues in a narrative that owes its meaning ultimately to the interpretative practices of a community of speakers.¹¹⁵

A key problem in Cambodia is the lack of adequate investigation into what local practices are in this regard. Cognizant of this *lacuna* at the ECCC and its attendant processes, the ICT-BD should explore the non-judicial arena when considering victim-oriented measures premised on restorative justice, regardless of how alien that may seem to lawyers. Non-judicial initiatives which run or will run parallel to the ECCC’s trials give victims confidence that restorative justice can be meted outside the courtroom at a spiritual ceremony or ritual, through testimonial therapy, on a dramatic stage or through the arts.¹¹⁶ There are informal transitional justice mechanisms like the *Shalish* in Bangladesh which is akin to the *Gacaca* in Rwanda which can also be further researched and explored.¹¹⁷

Second, by taking on the mantle of the court when speaking to victims about their evidence and using and encouraging the language of the law, CSOs externalise their greatest strength – their roots in and connection to the community and the trust and confidence that this connection inspires and the narratives it elicits. Without this connection, victims or witnesses will look upon civil society as an extension of the court or the government, which is not always beneficial. The proposition that the involvement of judges necessarily makes proceedings more accessible to local constituents is doubtful. It has been my experience that Cambodian victims are generally more suspicious of justice initiatives that are linked to local authorities and judges, some of whom are regarded as corrupt.

¹¹⁵ David Bakhurst, “Social Memory in Soviet Thought”, in D. Middleton and D. Edwards (eds.), *Collective Remembering*, Sage, London, 1990, pp. 209.

¹¹⁶ For further details on the sort of initiatives which can be supported, see Mohan and Sathisan, 2011, see *supra* note 80.

¹¹⁷ See generally, http://www.banglapedia.org/httpdocs/HT/S_0281.HTM on *shalish*, last accessed on 19 October 2012.

Third, inexperienced or untrained local CSOs can also miss the point and undermine the legal process. Speaking extra-judicially, ECCC Supreme Judge Agnieszka Klonowiecka-Milart remarked as follows:

[Beware of] the frailty of contemporaneously adduced evidence, especially in relation to its physical availability and credibility. The latter is especially salient when civil society participates in the collection of evidence as its lack of adequate training may impede the process. This is one of the reasons why the adversarial nature of the proceedings should be enhanced, if necessary through international involvement.¹¹⁸

Non-judicial processes must therefore retain their independence and separation from the judicial arena. Suffice it to say that Bangladesh's national efforts over the years have not produced authoritative or reliable evidence of the period in question upon which collaborative transitional justice processes can be based or build upon. The ICT-BD's affiliates should be wary of civil society-led or entirely national commissions of inquiry, surveys, referenda or truth commissions which profess to deliver healing. However noble the intentions of such commissions or processes may appear, they are, as mentioned earlier, inherently problematic in complex political contexts such as Bangladesh.

10.9. Retooling Law and Ethnography: Send the Message that Victims Deserve Proper Presentation

What then of the ICT-BD's adversarial judicial process as a method to elicit credible old evidence from Bangladeshi victims? Noting that old evidence is not necessarily bad evidence, ICTY Judge Alphons M.M. Orié has suggested the following instructive suggestions on how ICT-BD judges may do so:

When drawing inferences from the evidence presented, what matters the most is to understand the psychological mechanisms underlying such a process, beyond a mere legal approach. The story of the criminal event needs to be tested in all its details, even when conclusions seem easy to draw. The search for positive and negative indicia should aim at verifying or falsifying the elements of the story. This sounds even

¹¹⁸ Bergsmo, 2011, p. 3, see *supra* note 72.

more imperative when inferences rely on witness statements, considered as the most ‘vulnerable’ evidence.¹¹⁹

Yet, the judicial arena too is not without its inherent constraints which, if lawyers and judges are not careful, result in critical old evidence being compromised and the victims who possess them being scarred. The experience of Civil Parties in the *Duch* case is noteworthy in this regard. The judicial endeavour of the ECCC, to maintain a legally authoritative account of what happened, crippled the participation of the Civil Parties as they were excluded from the process of asking questions that were vital in aiding them deal with their post-conflict trauma. Several Civil Parties were also forced to leave the stand as their identities as victims were questioned by the Tribunal. During the testimony of Civil Party Mr. Ly Hor,¹²⁰ an alleged survivor of S-21, inconsistencies in his account led Duch to publicly challenge his identity as a victim.¹²¹ Such an experience, scholars and trial monitors assert, may “defeat the positive outcomes of participation and instead lead to re-traumatization”.¹²² Civil Party Ly Hor took the stand only to have his oral testimony and credibility come under fire as it deviated materially from both his written statement and the written confession purportedly produced at S-21 that he insisted was his own. Ly Hor’s lawyers,¹²³ who appeared none the wiser, were unable to offer any satisfactory reason for why the ECCC Trial Chamber should nevertheless regard the documents as supportive of Ly Hor’s claim.¹²⁴ “I suppose you would agree with me that this civil party has been very poorly prepared for this morning’s experience,” was Judge Sylvia Cartwright’s wry ad-

¹¹⁹ Bergsmo, 2011, p. 2, see *supra* note 72.

¹²⁰ Civil party E2/61.

¹²¹ See KRT Trial Monitor, Report Issue No. 12: Week Ending 9 July 2009, p. 2, available at http://krttrialmonitor.files.wordpress.com/2012/07/aiji_eccc_case1_no12_09july09_en.pdf (hereinafter ‘KRT Report No.12’).

¹²² Michelle Staggs Kelsall *et al.*, “Lessons Learnt from the Duch Trial”, Berkeley C.A., Asian International Justice Initiative’s KRT Trial Monitoring Group, p. 34.

¹²³ Ly Hor was represented by lawyers from Civil Party Group 1.

¹²⁴ The ‘*Duch*’ trial, Transcript of Trial Proceedings, 6 July 2009, pp. 58–59. According to one of Ly Hor’s lawyers, the use of an informal instead of official translation resulted in the true purport of his client’s documentation being unclear. See *ibid.*, pp. 55 and 58.

monishment to Ly Hor's lawyers,¹²⁵ after a morning of questioning that saw Ly Hor become visibly and increasingly distressed.¹²⁶ Also taken to task by the Chamber were the lawyers for civil party Nam Mon¹²⁷ for Nam Mon's belated disclosure of new allegations, which were eventually rejected.¹²⁸

But to Ly Hor and Nam Mon, the inaccuracy of the written statements was peripheral to the fact that Phaok Khan was able to recount his "very interesting" experiences before the Trial Chamber.¹²⁹ The applications of Ly Hor and Nam Mon were ultimately rejected by the Trial Chamber.¹³⁰ By rejecting their non-judicial narrative – those parts of their stories which did not comply with the legal and evidential requirements of the court – the judges gravely underestimated the cost to survivors of laying bare their personal histories in open court, having their stories publicly undermined and their efforts potentially laid to waste. The credibility of the civil parties' testimonies was, in their presence, questioned by the Chamber, and more fiercely, by Duch himself, and ultimately discredited.¹³¹

Attempting then to create a space for victims in the judicial arena alone is misguided. Victims recount their stories of pain and distress to an audience that is more interested in seeing how these facts neatly fit evi-

¹²⁵ 'Duch' Trial, 2009, p. 56, see *supra* note 124. Ly Hor had informed the Trial Chamber that the last time he spoke to his lawyers was a month before his Court appearance. See *ibid.*, pp. 55 and 58.

¹²⁶ KRT Report No. 12, p. 7.

¹²⁷ Civil party E2/32, who was represented by lawyers from Civil Party Group 2.

¹²⁸ Nam Mon's new allegations pertained to her alleged rape at S-21. According to Nam Mon's lawyers, Nam Mon had not informed them of these allegations until just before her Court appearance. Nam Mon's lawyers subsequently filed a written request for these allegations to be put before the Chamber. This was rejected on the ground that the allegations were belated. See the 'Duch' trial, *supra* note 30, Decision on Parties Requests to Put Certain Materials Before the Chamber Pursuant to Internal Rule 87(2), p. 14, 28 October 2009, available at http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E176_EN.pdf, last accessed on 19 October 2012.

¹²⁹ 'Duch' Trial, 2009, pp. 94–95, see *supra* note 109 (emphasis supplied).

¹³⁰ See *supra* note 124, pp. 223–225.

¹³¹ For example, with regard to Li Hor's testimony, Duch, after bringing the Trial Chamber through certain documents, insisted that Li Hor was wrongly claiming as his own a written confession of a different S-21 detainee who had already died. 'Duch' Trial, 2009, pp. 83–87, see *supra* note 124.

dentiary matrices. In that process, victims’ non-evidentiary voices, claims and desires for vindication, are unfortunately not heard and taken into account, but carelessly side-lined and silenced.

Rosalind Shaw notes that when interacting with victim communities, “it is important to examine, through ethnographic rather than quantitative survey methods, the range of practices of conflict resolution and reconciliation that people and communities are adapting and retooling *now*”.¹³²

Like Shaw, I find that ethnography, which mainly consists of extended periods of participant observation and informal interviews with victims, is the most appropriate approach to eliciting genuine narratives and evidence from victims on their terms. Piecemeal investigations that “get in, extract information, get out” are undoubtedly problematic in contexts in which victims are emerging from mass violence and have historical reasons not to trust any exercise that resembles official information gathering. In my experience as a civil party lawyer gathering old evidence from Cambodian victims in relation to *Case 002* and putative *Cases 003* and *004*, I have found that investigation that respects ethnographic field research and its subjects could give access to a very different body of knowledge from that accessible to someone who examines, documents and evaluates stories of historical trauma from mass crime victims.¹³³ In order to find out what my client communities want, my legal team and I have had to look beyond the physical space of the hearings, evidentiary documents or victim information forms prepared by CSO intermediaries and spend time in rural provinces talking to people who have never met investigators or prosecutors, or in villages from which they had been driven, as well as those in which they were welcomed. Ultimately, this form of ethnographic investigation and lawyering is a useful approach to dealing with victims of mass crime as it entails spending time with ordinary people (as opposed to court affiliates) and listening to them on *their* terms – not through the

¹³² Shaw, 2005, p. 4, see *supra* note 111.

¹³³ Scholars have pondered whether memory can be distilled, with all of the chaff of personal inhibitions, prejudices and inaccuracies sloughed off, so that one can arrive at an accurate picture – indeed, a virtual photographic snapshot – of a particular moment in time, at how such stories and narratives remain unclassifiable, incomplete and marred with controversy. See generally Maurice Halbwachs, *The Collective Memory*, Harper and Row Colophon Books, New York, 1980.

medium of our survey forms, or in our sensitisation workshops, or through local NGOs and intermediaries. With this general ethos in mind, these are my specific recommendations for the ICT-BD's affiliates when they seek to meet with and elicit credible evidence from vulnerable Bangladeshi mass crime victims.¹³⁴

- 1) *Work with Local Partners.* Work with local organisations, which enjoy the community's trust and confidence. Based on the indications of this intermediary organisation, investigate, trace and interview victims who are keen to be civil parties and may be in a position to provide valuable evidence or testimony. Nonetheless, however good the local NGOs are, it bears mentioning that over-reliance can marginalise victims who do not wish to speak the lingo of NGOs, human rights, and humanitarian assistance.
- 2) *Identify Focal Sites.* Identify geographical locations and sites that have been recognised in the existing literature or data currently housed at documentation centres and archives that evince a targeted attack against the victims. Trace and map these sites on physical documents and note any patterns of alleged crime and relevant conduct which may emerge. This will serve as a good starting point when speaking with victims and ultimately help establish or corroborate charges relating to core international crimes¹³⁵.
- 3) *Adopt a 'Thick Description'.*¹³⁶ Adopt a qualitative approach that views members of the victim community as subjects rather than

¹³⁴ For further details, see generally Mahdev Mohan, "Re-constituting the Un-Person": the Khmer Krom and the Khmer Rouge Tribunal", in *Singapore Yearbook of International Law*, 2008, vol. 12.

¹³⁵ See John Ciorciari, *The Khmer Krom and the Khmer Rouge Trials*, August 2008, online: Documentation Center of Cambodia, available at http://www.dccam.org/Tribunal/Analysis/pdf/Summer_Assn_John_KRT_Khmer_Krom.pdf, last accessed on 19 October 2012. For example, documents recovered from the Khmer Rouge's infamous Kraing Ta Chan prison in Takeo province, one of the few provincial prisons to leave behind a large trove of paperwork, suggest that the Khmer Krom were frequent suspects of espionage and other counter-revolutionary activities and were singled out for torture and imprisonment. According to Dr. Ciorciari, senior legal advisor of DC-Cam, roughly 1,000 pages of documentary material from Kraing Ta Chan prison are on file at DC-Cam.

¹³⁶ Clifford Geertz, *The Interpretation of Cultures: Selected Essays*, Basic Books, New York, 1973.

objects and allows time for interviewers to roll up their sleeves and properly document the victims’ genuine historical narrative, examine their desires and reservations regarding reparations and answer their questions about the process. Only then can we hope to arrive at, in Clifford Geertz’s words, a “thick description” of the community that includes information about who they are as a people, the context of the crimes they suffered, and their present plight and desires for social change.¹³⁷ Social scientist Roger Henke cautioned me against relying on using quantitative surveys in group settings as a data source; Henke believes that country-wide surveys that do not have a qualitative element were prone to distortion, bias and mimicry of opinions – “getting them altogether in a dreadful focus-group to fill forms is counter-productive; they may not be forthcoming, some who have been made to fill surveys may have rehearsed answers and others may echo popular sentiments, leading to a distortion of data”.¹³⁸

- 4) *Further Systematic Research.* Design concise and clear interview questions, in consultation with experienced social scientists who have conducted empirical research in Cambodia’s rural and urban provinces. Future researchers and investigators should investigate the data you have collected in a scientific manner. With more reliable field-data, researchers could seek to refine the typology presented and sharpen the explanations of individual dynamics.
- 5) *Representation and Reparation.* Provide independent legal representation to victims. Victims need to have lawyers looking out for their rights which may not always coincide with the interests and obligations of investigators and prosecutors at the ICT-BD. Victims lawyers’ communications with their victim-clients are clothed with confidentiality and their role would include conducting interviews

¹³⁷ Ibid. As Joseph Ponterotto notes in “Brief Note on the Origins, Evolution, and Meaning of the Qualitative Research Concept”, in *The Qualitative Report*, 2006, vol. 11, no. 3, p. 538. (“Thick description accurately describes observed social actions and assigns purpose and intentionality to these actions, by way of the researcher’s understanding and clear description of the context under which the social actions took place. Thick description captures the thoughts and feelings of participants as well as the often complex web of relationships among them.”)

¹³⁸ Author’s Interview with Roger Henke, Institutional Development Specialist, Phnom Penh, Cambodia, 5 December 2008.

with victims, preparing victim impact statements, collecting and analysing evidence where appropriate, and taking instructions from and keeping victims informed of the legal proceedings as they unfold and with a view of supporting the prosecution of the alleged crimes and identifying possible forms of judicial and non-judicial reparation measures. Having their own legal counsel gives victims confidence and insulates them to a degree from the clinical rigour of transitional justice processes. It reminds them that there are those whose duty it is to have their best interests at heart.

10.10. Be Sensitive to Vulnerable Victims: Send the Message that Victims will be Protected

For victims of mass crime to feel confident that they can come forward and speak to official authorities about traumatic events which may be attributable to persons who occupy or may have occupied political office, it is important that they know that the law will be their guardian. The law must guarantee their safety, security and well-being before, during and after their testimony. It is also essential that vulnerable victims are given protection not just from physical violence, but also from social pressures and stigmas, which can often be far more damaging to their identity and place in society.

A pre-cursor to the ICT-BD, the Peoples' Tribunal for Trial of War Criminal and Collaborators ('Gono-Adalat'), was infamously unable to insulate victims/witnesses who gave evidence before it from ostracisation and remains a cautionary tale to victims/witnesses who may wish to come forward to provide evidence.

Held in 1992, the Gono-Adalat in Dhaka drew close to 200,000 participants from across the country. It comprised of several retired and respected judges and heard evidence from a cross-section of the community, including four women from a remote area in the Jessore District who publicly testified about the sexual crimes that they had endured and other attacks against their community.¹³⁹ The testimony of the women contained sensitive allegations which illustrated the "failure" of the men in the community to protect them and thus their collective honour. In a different

¹³⁹ D'Costa, 2011, p. 152, see *supra* note 1. For further details see Partha S. Ghosh, "Bangladesh at the crossroads: religion and politics", in *Asian Survey*, 1993, vol. 33, pp. 697–710.

context, this testimony and the courage which it took these women to come forward to present it, would have been hailed as a local and international touchstone for victim-centered justice.

Yet, due to a government-sponsored attack on the tribunal, the victims or witnesses who testified were brought into harm’s way. Unlike the other victims or witnesses, these four women were especially socially and economically vulnerable. Nonetheless, their photographs were printed in the newspapers, and a documentary filmmaker who visited their village subsequently discovered that as a result of the exposure of the women in the press, they were ostracised by their community, and faced problems such as being barred from using the local well, or difficulty finding a suitable match for their daughters.¹⁴⁰

These and other vulnerable victims/witnesses of the 1971 sexual violence experienced “their own narratives being taken over by a broad based social movement, without any comprehension of the impact of violence on their lives, and the failure to provide them with any concrete, legal, financial or moral support”.¹⁴¹ Bina D’Costa and Sara Hossain point out that gender sensitivity needs to be maintained even while referring to the crimes committed against women during the conflict.¹⁴² The crimes committed against the women have been largely described in terms of the loss to the community, rather than the individual. Additionally, the question of whether giving evidence leads to re-traumatisation needs to be addressed.¹⁴³ The language and cultural context within which rape and sexual offences is couched is also significant and has a marked expressive effect. Mujib coined the term ‘Birangona’ to depict the ‘sacrifice’ of the women for their country,¹⁴⁴ through the roles women played during the war, even when this alluded to their being raped or forcibly impregnated. Whilst the term was ostensibly intended to provide honour and confer a special status on these women, instead it just singled them out for further ostracisation.¹⁴⁵ Quite clearly, the message understood was far from what

¹⁴⁰ D’Costa and Hossain, 2010, p. 347, see *supra* note 101.

¹⁴¹ D’Costa and Hossain, 2010, pp. 347–348, see *supra* note 101.

¹⁴² D’Costa and Hossain, 2010, p. 333, see *supra* note 101.

¹⁴³ *Ibid.*, p. 333.

¹⁴⁴ *Ibid.*, p. 340. The term means ‘war heroine’ or ‘valiant’ woman.

¹⁴⁵ *Ibid.*, pp. 340–341.

was intended, but it is the former that sticks and unwittingly leads to victims being ‘othered’.

Unfortunately, these victims are not alone. Chim Math, one of the few female survivors of Duch’s notorious Tuol Sleng torture centre in Cambodia, underwent a similar fate. In July 2007, a group that was on a tour of Tuol Sleng, organised by CSD, identified Chim Math’s photo – one of the countless haunting black and white faces of prisoners interred there during the Khmer Rouge period. They knew the woman, they said and furthermore, she was still alive. A photo-journalist caught wind of the conversation and arranged to have Chim Math brought to Tuol Sleng, where she stood beside her photo and verified that in fact, she had survived torture at Tuol Sleng and much more. CSD quickly tasked us with drafting a press release to state that CSD, through its ground tours and outreach activities, had succeeded in finding the “sole female survivor of Tuol Sleng”.¹⁴⁶ Chim Math was thrust into the public domain, her original name and identity revealed to the world. In a matter of days, she became the metaphorical “site” of conflict between a journalist associated with a well-known European news agency and CSD on the issue of who had the authority to claim they had “discovered” her.¹⁴⁷

If the “resequencing, decontextualizing and suppressing of social memory in order to give it new meaning is itself a social process”, I witnessed a victim undergo a profound process.¹⁴⁸ In a brief period, Chim Math experienced both the terror of public scrutiny and the peculiar sense of righteousness that comes from the “duty to remember”. Her case seems to hinge a great deal on how accessible the ECCC is to a witness like Chim Math and on whether the witness can continue to have her voice

¹⁴⁶ Bronwyn Sloan, “Unique Pol Pot Survivor”, DPA Wire News Agency, 24 July 2007; Veasna Mean, “Purported Survivor Claims She was tortured in Tuol Sleng”, VOA Khmer, 3 August 2007; Rosemary Righter, “A Paralysed Nation, afraid to unlock its tortured past”, *Times Online*, 3 August 2007.

¹⁴⁷ After her interview with the press, CSD staff I had accompanied in our visit to Chim Math’s home said that her mannerisms and her statements regarding her experiences suggested that there were significant personal reasons for why she had been wary to reveal any of these experiences to family. But these nuances were lost on the media and, importantly, the ECCC which viewed her as another repository of information and evidence. Chim Math was called to testify as a witness in *Case 001* (the ‘Duch case’). Her formal testimony is available at <http://www.eccc.gov.kh>, last accessed on 11 October 2012.

¹⁴⁸ Fentress and Wickham, 1992, p. 201, see *supra* note 105.

heard, long after the media has switched off its tape-recorders and video cameras. In other words, her evidence has to be made to matter and the sacrifices inherent in coming forward to give it should be respected. It is not enough that it is intrinsically important in the courtroom; victim/witnesses like Chim Math must be protected beyond it if they are to feel comfortable in coming forward.

The ICT-BD’s statutes provide only one crime of sexual violence, rape, as a core crime within the definition of crimes against humanity; and omit other offences, as well as a definition of ‘rape’.¹⁴⁹ Additionally, in Bangladesh, the stigma associated with these crimes has led to the suppression of evidence, and social problems associated with forced pregnancies.¹⁵⁰ In such cases, where the testimonies provided by vulnerable victims/witnesses may be sensitive, especially where women are testifying, the court needs to ensure adequate and sustained protection that goes beyond just physical protection. D’Costa and Hossain advocate gender-sensitivity training for the tribunal staff, as well as caution and sensitivity when interviewing witnesses and victims, with which I wholly agree:

If the Tribunal is to deal with sexual crimes, then an informed review of the available evidence and an exploration of possible gender-friendly approaches is urgently needed.

While the Tribunal does set up a possibility for some form of accountability, the investigation and trial process is a particularly thorny one in cases of sexual violence, and needs to be navigated with care and caution, given the risk of repercussions for the survivors.¹⁵¹

These observations are important and should be carefully heeded as the first judgement of the ICT-BD contains names of suspected sexual violence victims and makes little or no meaningful effort to provide them with adequate witness or victim support and protection.

10.11. Conclusion

The ICT-BD’s legacy will depend on its ability to contribute to building the capacity of Bangladesh’s justice sector, and the degree to which it harmonises the Bangladesh justice system with international rule of law

¹⁴⁹ D’Costa and Hossain, 2010, p. 343, see *supra* note 101.

¹⁵⁰ *Ibid.*, p. 344.

¹⁵¹ D’Costa and Hossain, 2010, p. 338, see *supra* note 101.

norms. This entails transferring knowledge, skills and practices from the ICT-BD to the rest of the national justice sector, and fostering local ownership of judicial and legal reform.

As Diane Marie Aman has observed, while “conveying a concrete message of accountability may begin to break (the) cycle of violence, that message must be managed with the utmost care and respect for victims of mass violence”.¹⁵² If the ICT-BD trials are to have any resonance for Bangladeshi victims and to have a lasting and positive legacy in Bangladesh, its affiliates should pay close attention to the lessons which the ECCC offers and which I have distilled herein. I have couched these lessons in the form of genuine and concrete messages that should be sent to victims/witnesses when seeking to elicit credible evidence from them in relation to core crimes. Of course, these lessons are by no means exhaustive, but they cast light on potential problems that need careful consideration.

The ICT-BD should also give effect to Ambassador Rapp’s recommendations in this regard. First, its affiliates should do all they can to ensure that the witness protection system envisioned by Article 58(A) of the 2011 Act be developed in practice and made available for both prosecution and defence witnesses.

Second, the ICT-BD’s proceedings must be accessible to all – ideally broadcast on television or radio, or possibly shared through reports by independent trial observers and victim associations that would show key testimony, arguments, and rulings and ensure that they are properly explained to victims and take into account their concerns and communal desires for vindication and reparation.

Third, the ICT-BD should make an effort to incorporate the recommendations made by Ambassador Rapp on ensuring the rights of the accused, taking inspiration from similar protections granted by the ICTR/ICTY.

Without these guarantees, victims may feel that their role at the ICT-BD is a token one and may not be prepared to provide genuine and independent evidence, thereby significantly diminishing the legitimacy of the ICT-BD. Victim/witness protection, in particular, is critically important to eliciting and preserving the veracity of both ‘old’ and ‘new’ evidence. Its central relevance to old evidence, however, is sometimes un-

¹⁵² Diane Marie Aman, 2001, p. 245, *supra* note 16.

derestimated as the common misconception is that victims or witnesses of old evidence have come to terms with their past or are no longer under threat.

As we have seen, real and perceived threats are often not diminished by the passage of time: they may remain unchanged or sometimes take on heightened dimensions due to changed political realities. In order to elicit credible evidence from victims/witnesses who have suffered so much, the law must send them the right message and, more importantly, it must have the modesty of ambition and live up to honour these messages, lest victims/witnesses lose what little confidence they may have in the process.

The ICT-BD’s process should match available resources and political will from local and international actors. Its mandate should be tailor-made to suit operational realities. Consideration of the Cambodian experience shows that it is important not to create a flawed mechanism and then try to patch it up with quick fixes in response to criticisms levelled against it. Finally, prosecution is just one element in a toolbox of accountability. The Bangladesh government and the ICT-BD’s affiliates must closely examine their objectives to ensure that the mix of tools they select is best tailored to the particular need. Exaggerating what just one tool, prosecution, can reasonably accomplish may mean that other avenues that are more meaningful and effective are not explored or are foreclosed.

PART II:
OLD EVIDENCE IN THE CONTEXT OF BANGLADESH

Towards the Prosecution of Core International Crimes before the International Crimes Tribunal

M. Amir-Ul Islam*

I deem it a great honour and a privilege to have co-hosted the international expert seminar entitled “Old Evidence and Core International Crimes” organised by the Forum for International Criminal and Humanitarian Law (‘FICHL’) a knowledge-transfer international platform that is extending its support to Bangladesh. Activities such as the seminar and the publication of this anthology assist the prosecutors and investigators engaged in the trials of perpetrators of genocide and crimes against humanity committed in Bangladesh upon innocent men, women and children in 1971, causing death and destruction, rape and rampage, arson and extermination, the killing of three million civilians, and the violation

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of 200,000¹ women during an army occupation of nine months (25 March – 16 December 1971).

The support and co-operation of FICHL – and its sister platform, the Case Matrix Network (‘CMN’) – in the field of law and its concern about the trials of core international crimes, such as genocide and crimes against humanity, is based on international and universal commitments as duly resonated in the Preamble of the Rome Statute. One of the objects of the Rome Statute is that perpetrators of core crimes must not go unpunished. It further reiterates that “their effective prosecution must be ensured by taking measures at the national level”.² FICHL and CMN’s co-operation and support thus fits well within the object of the Rome Statute which emphasises measures to be taken at the national level for fair and effective prosecution to be ensured. Bangladesh thus finds a perfect match by developing a collaborative effort and initiative “by enhancing international co-operation” for holding the trial in Bangladesh at the national level, this being an integral part of the universal concept and commitment stated in the Rome Statute, as well as one of the objects of Bangladesh’s International Crimes (Tribunals) Act 1973.³

I, on behalf of my colleagues and friends, with great appreciation and gratitude, would particularly like to acknowledge the most timely initiative taken by FICHL with special tribute to Professor Morten Bergsmo⁴ who, besides being endowed with knowledge and expertise in his field of discipline in international law, is gifted with tremendous capacity, dedication and energy in mobilising experts and resources to ensure support for national initiatives in various countries, like the one extended to Bangladesh. This chapter will particularly focus on the laws applicable to, as well as the background of, genocide and crimes against humanity committed in Bangladesh.

¹ “War’s overlooked victims – Rape is horrifyingly widespread in conflicts all around the world”, *The Economist*, 13 January 2011. This is according to a conservative estimate of the Economist while the unofficial estimate is double the number. See <http://www.economist.com/node/17900482>, last accessed on 3 October 2012.

² Preamble of the Rome Statute of the International Criminal Court, available at <http://www2.ohchr.org/english/law/criminalcourt.htm>, last accessed on 3 October 2012 (‘Rome Statute’).

³ International Crimes (Tribunals) Act 1973, 20 July 1973, amended in 2009, see http://bdlaws.minlaw.gov.bd/pdf_part.php?id=435&vol=17&search=1973, last accessed on 3 October 2012 (‘the Act’).

⁴ For information on Morten Bergsmo, see the note on the first page of Chapter 1.

11.1. Background of the International Crimes (Tribunals) Act of 1973 and Its Content

After the liberation of Bangladesh from Pakistan's occupation army, there rose a human cry for the trial of perpetrators. The father of the nation Bangabandhu Sheikh Mujibur Rahman asked, at the very early stage in 1972 in his speeches, that an international tribunal be sent to Bangladesh to try war criminals. Unfortunately, there was no one able and willing to set up such a tribunal.⁵ Due to a then-existing void in the world of international machinery to prosecute perpetrators of international crimes, Bangladesh, in consultation with international jurists and experts, enacted a special law, namely, the International Crimes (Tribunals) Act 1973 ('the Act').⁶ The International Crimes (Tribunals) Rules of Procedure, 2010 ('ICT Rules of Procedure') was also framed as provided under the Act.⁷ The abovementioned Act was considered by international jurists at that time "as a model of international due process". "It is a carefully prepared document", as commented by the ICJ, which covers:

[...] the legal ramifications of the detention, prosecution and punishment of persons for genocide, crimes against humanity, war crimes and other crimes under International

⁵ Niall MacDermot, Q.C., "Crimes against Humanity in Bangladesh", in *International Lawyer*, 1973, vol. 7, no. 2, pp. 483–484. If there is to be a trial, what kind of court should there be? Sheikh Mujibur Rahman asked this at an early stage in public speeches that an international tribunal should be sent to Bangladesh to try war criminals. Unfortunately, there was no one able and willing to set up such a tribunal. The efforts within the U.N. to promote the establishment of an international criminal court had, for the time being at least, foundered. Even more modest proposals, such as that of the U.N. High Commissioner for Human Rights, so sturdily promoted by Ambassador Rita Hauser, had been blocked. There were, it seems, too many governments with too many skeletons for them to agree to any effective enforcement machinery for human rights. The Commission's purpose in Bangladesh was to try to persuade the government that, if they do hold such a trial, they should themselves constitute an international court for the purpose, much in the way that the victorious allies did at Nuremberg and Tokyo after World War II.

⁶ See *supra* note 2.

⁷ International Crimes (Tribunals) Rules of Procedure 2010, 15 July 2012, amended 28 October 2012 and 28 June 2011.

law, affording appropriate legal protections to those accused of such crimes.⁸

This Act assured that the trial of perpetrators would be conducted in accordance with international legal and human rights standards. Some amendments were also made to the said Act in order to achieve the desired standard, transparency, and due process. An independent Tribunal was set up under this Act to try the perpetrators. At the time of writing, the Tribunal consists of three judges, out of whom two are Judges of the High Court Division of the Supreme Court of Bangladesh and one is a District Judge. An Investigation Agency and a team of prosecutors were appointed in accordance with the provisions of the 1973 Act and the ICT Rules of Procedure, 2010. Furthermore, according to the Act, the accused would be given the full opportunity to defend themselves at trial. Persons convicted of crimes specified under Section 3 of the Act and sentenced by the Tribunal shall have the statutory right to appeal under Section 21 of the Act to the Appellate Division of the Supreme Court of Bangladesh, the highest court of the country.

11.2. Historical Background of Core International Crimes Committed in 1971

The act of genocide was perpetrated in Bangladesh by Pakistan's occupation army with their cohorts, *id est*, the Rajakar, Al Badr, Al Shams, and various local killing squads in 1971. Although the killing of unarmed civilians in early March seemed abrupt and sporadic, it soon became a systematic act of violence with Operation 'Search Light' enforced at midnight, on 25 March 1971, as part of the central planning and conspiracy hatched at Larkana⁹ and reinforced at Rawalpindi by Pa-

⁸ Jordan J. Paust and Albert P. Blaustein, *Human Rights and the Bangladesh Trials: A Legal Memorandum to the People's Republic of Bangladesh*, in Editorial Correspondents Ltd., N.Y., 1973, p. 65.

⁹ S.A. Karim, *Triumph and Tragedy*, The University Press Limited, 2009, pp. 172–176, quoted Mohammed Asghar Khan, *Generals in Politics: Pakistan 1958–1982*, p. 28: "In the middle of 1970, only a few months before the scheduled general election, Bhutto had suggested privately to Yahya that the two of them would make a very good team and could together run the country. Yahya has replied that "this made sense" and asked what he proposed to do about East Pakistan. Bhutto replied: "East Pakistan is no problem. We will have to kill some 20,000 people and all would be well". This story was recounted by Yahya to Air Marshall (Ret'd.) Asghar Khan and it is quite in line with Bhutto's well-known pet theory that the Awami

kistani General Yahya and other generals preparing an operation plan executed in collaboration with their Quislings under the umbrella of a politico-religious military alliance, creating the formation of local militia as an auxiliary force for perpetrating ‘the cleansing process’.

Peter Hazelhurst, writing in *The Times* on 4 June 1971 also indicted Pakistani President Yahya Khan, for having perpetrated a ‘holocaust’ in Bangladesh, and Mr. Z. Bhutto, for their role in the events leading up to the massacre on 25–26 March 1971.¹⁰

11.3. Genocide in Bangladesh and Old Evidence

The object was to eliminate the Awami League and its supporters in former East Pakistan, in order to crush the will of the majority earlier demonstrated in the general election and to turn a majority people of the then East Pakistan (now Bangladesh) into a minority forever by creating terror through indiscriminate killing, rape, arson, and looting, thus forcing ten million people to leave their country, and to seek shelter and succour in the neighbouring states of India. In this mayhem the members of the Hindu community were the major target. Within the first 48 hours, the massacre ravaged Dhaka and all the major towns and cities in Bangladesh. All foreign journalists were expelled by Yahya Khan’s government, leaving only a few who managed to remain in hiding. Simon Dring¹¹, being one of these very few, recounts how within the first 24 hours, the Pakistani army slaughtered approximately 70,000 people in Dhaka alone, along with another 15,000 all over Bangladesh. Let me use here old evidence by referring to Dring’s description of the attack on Dhaka University as follows:

League was a bourgeois party and it had no stomach for a confrontation with the military. What was dismissed by Yahya as a pipe dream a year before was now apparently embraced by him”.

¹⁰ Muhammad Zamir, “Global response to our War of Liberation”, in *The Daily Star*, 16 December 2009, available at <http://www.thedailystar.net/suppliments/2009/december/victorydayspecial/page04.htm>, last accessed on 3 October 2012.

¹¹ Simon Dring is an award-winning foreign correspondent, television presenter and producer, who alerted the whole world about the massacre in Dhaka by the Pakistani Army. He has worked for Reuters, the Daily Telegraph of London, and BBC Television and Radio News and Current Affairs, available at http://en.wikipedia.org/wiki/Simon_Dring, last accessed on 3 October 2012.

Led by American-supplied M-24 World War II tanks, one column of troops sped to Dhaka University shortly after midnight. Troops took over the British Council library and used it as a fire base from which to shell nearby dormitory areas.

Caught completely by surprise, some 200 students were killed in Iqbal Hall, headquarters of the militantly antigovernment students' union, I was told. Two days later, bodies were still smouldering in burnt-out rooms, others were scattered outside, more floated in a nearby lake, an art student lay sprawled across his easel.

Army patrols also razed nearby market area. Two days later, when it was possible to get out and see all this, some of the market's stall-owners were still lying as though asleep, their blankets pulled up over their shoulders.¹²

The military launched its operations on the nights of 25–26 March 1971 with Operation Search Light. Dhaka University was among the targets of this first attack on Bengali nationalism. On 29 April 1971, Ohio Republican Senator William Saxbe placed a letter from a constituent, Dr. Jon E. Rohde, in the Senate record. Dr. Rohde had served in East Bengal for three years as a physician with the United States Agency for Independent Development ('USAID'). His letter contained the following account of what he witnessed before he was evacuated from Dhaka.¹³

¹² See History, *Bangladesh Genocide Archive*, available at http://www.genocidebangladesh.org/?page_id=30, last accessed on 9 October 2012.

¹³ Rohde's letter is reprinted from the Record of the U.S. Senate as "Recent events in East Pakistan" in Sheelendra Kumar Singh *et al.* (eds.), *Bangladesh Documents*, vol. 1, Madras: BNK Press, 1971, 349Á/51.

My wife and I watched from our roof the night of March 25 as tanks rolled out of the Cantonment illuminated by the flares and the red glow of the fires as the city was shelled by artillery and mortars were fired into crowded slums and bazaars [...]. On the 29th we stood at the Ramna Kali Bari, an ancient Hindu village of about 250 people in the centre of Dacca Ramna Race Course, and witnessed the stacks of machine gunned burning remains of men, women, and children butchered in the early morning hours of March 29 [...]. At the university area we walked through [...] two of the student dormitories at Dacca University [were] shelled by the army tanks. All inmates were slaughtered [...]. A man who was forced to drag the bodies outside, counted one hundred

Dr. Rohde's assessment of the situation in East Bengal was as follows:

The law of the jungle prevails in East Pakistan where the mass killing of unarmed civilians, the systematic elimination of the intelligentsia, and the annihilation of the Hindu population is in progress.¹⁴

Another American evacuated from Dhaka, Pat Sammel, wrote a letter to the *Denver Post*, which was placed in the House record by Representative Mike McKeivitt of Colorado on 11 May 1971.

Sammel wrote:

We have been witness to what amounts to genocide. The West Pakistani army used tanks, heavy artillery and machine guns on unarmed civilians, killed 1,600 police while sleeping in their barracks [...] demolished the student dormitories at Dacca University, and excavated a mass grave for the thousands of students; they've systematically eliminated the intelligentsia of the country, wiped out entire villages – I could go on and on. It's hard to believe it happened.¹⁵

Further reports of a massacre at Dhaka University can be found among James Michener's interviews in Teheran with Americans who were evacuated from the East Pakistani capital. Several evacuees reported that they had seen Pakistani leaders with specific lists containing the names of Bengali professors who were slated for execution. They also reported seeing mass graves of students who had been killed.¹⁶

three Hindu students buried there [...]. We also saw evidence of a tank attack at Iqbal Hall where bodies were still unburied.

¹⁴ *Ibid.*, p. 351.

¹⁵ Reprinted from the Record of the U.S. House of Representatives in *ibid.*, p. 357.

¹⁶ James A. Michener, "A lament for Pakistan", *New York Times Magazine*, 9 January 1972.

11.4. Murders, Extermination, Widespread and Systematic Attack against the Civilian Population of Bangladesh

The ‘old town’ quarter of Dhaka city was targeted and demolished largely due to the strong Awami League support there, but also because there were many Hindu residents¹⁷ in the area. In Simon Dring’s words,

The lead unit was followed by soldiers carrying cans of gasoline. Those who tried to escape were shot. Those who stayed were burnt alive. About 700 men, women and children died there that day between noon and two pm, I was told.

In the Hindu area of the old town, the soldiers reportedly made the people come out of their houses and shot them in groups. The area, too, was eventually razed.

The troops stayed on in force in the old city until about 11 pm on the night of Friday, March 26, driving around with local Bengali informers. The soldiers would fire a flare and the informer would point out the houses of Awami League supporters. The house would then be destroyed – either with direct fire from tanks or recoilless rifles or with a can of gasoline, witnesses said.¹⁸

After having massacred 15,000 unarmed civilians in a single day, the Pakistani soldiers bragged about their invincibility to Simon Dring:

“These bugger men,” said one Punjabi lieutenant, “could not kill us if they tried.”

“Things are much better now,” said another officer, “Nobody can speak out or come out. If they do we will kill them – they have spoken enough – they are traitors, and we are not. We are fighting in the name of God and a united Pakistan”.¹⁹

Pakistani journalist Anthony Mascarenhas was permitted to tour East Bengal in April 1971. His reports indicate that the government’s policy was to eliminate the Hindus by death or expulsion. The comments made by Pakistani military officials in Bengal are eerily reminiscent of Nazi notions of purification and the weeding out of bad elements

¹⁷ Particularly in the Jagannath Hall, which is a full resident hall exclusively for Hindu and non-Muslim students, teachers and professors of the University of Dhaka.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

from society. According to Mascarenhas, senior government and military officials in East Bengal stated:

[W]e are determined to cleanse East Pakistan once and for all of the threat of secession, even if it means killing off two million people and ruling the province as a colony for 30 years.²⁰

The Pakistani army carried out this ruthless genocide with military precision, employing tanks, artillery, mortars, bazookas, and machine guns against the unarmed civilian population of Dhaka. Although their prime targets were students, local police, intellectuals, political leaders, Awami League supporters, and Hindus, they still killed ordinary citizens indiscriminately.

11.5. Forcible Transfer of Ten Million People and Persecutions

Bangladesh suffered the crimes perpetrated on the entire people. By conservative estimates, three million of the civilian population were killed. Women and children were raped and violated. There was indiscriminate killing of the civilian population, including professors, doctors, engineers, lawyers, teachers, political activists, Awami League leaders and supporters, and members of the religious minority, particularly those of the Hindu community, who were subject to killing, torture, arson, rape and loots. Ten million people²¹ of whom 70 percent were Hindus had to leave the country to seek succour and shelter in the refugee camps of India. Leadership layers in all fields, such as politics, education, business, and professions were the main targets with a view of making the country leaderless in every sector. This was done with a view to destroying this nation, with an intent to make the targeted victims a numerically and electorally a permanent minority without leadership. They would thus be crippled politically and economically, and be easily exploited under Pakistan's military backed autocracy.

²⁰ Mascarenhas, *The Rape of Bangladesh*, Vikas Publications, 1971, p. 117.

²¹ Niall MacDermot, Q.C., p. 479, see *supra* note 4. The result of this systematic repression was a flood of refugees to India on an unprecedented scale. We have no reason to think that the Indian estimate of ten million refugees is exaggerated.

11.6. Independence of Bangladesh and POWs Returned to Pakistan

The scheme of Pakistan's military regime, which denied the right of the majority people, through their elected representatives, to frame the constitution and form a government of their own choice as so expressed through the election of 1970, was to be frustrated by any means. The election was held under the Legal Framework Order ('LFO').²² The resort to crimes of genocide and crimes against humanity, and the holding of another sham election to constitute a so-called parliament consisting of the perpetrators of crimes and their cronies was part of their well-knit agenda. Candidates were handpicked, and having no contestants, the results were published by the military junta to install a rubber stamp parliament.²³ After nine months of resistance against the Pakistani occupation Army, victory was won in December 1971 following an effective resistance and mobilisation by the people of Bangladesh. The occupation army of Pakistan surrendered on 16 December 1971 following a short-lived war declared by Pakistan, while an operation conducted under India-Bangladesh's joint command was formed on 3 December 1971.²⁴ This brought an end to Pakistan's occupation of the country, which emerged as Bangladesh through the blood bath of nine months.

Following the victory, initiatives were taken for the trying of 195 prisoners of war against whom there was specific evidence and proof of core international crimes. Under the pressure of Pakistan's Western allies²⁵ and Islamic states headed by the strong lobby of Saudi Arabia and ultimately on the assurance of Mr. Zulfikar Ali Bhutto, which was given

²² According to LFO, if the constitution could not be framed within 120 days, the Parliament was to be dissolved for the holding of another election, available at <http://www.storyofpakistan.com/articletext.asp?artid=A115>, last accessed on 9 October 2012.

²³ The Parliament was without any rival candidate nor was any poll to be held. See "Reforming Pakistan's Electoral System", in *Asia Report*, March 2011, no. 203–230, available at http://www.crisisgroup.org/~media/Files/asia/south-asia/pakistan/203_Reforming_Pakistan's_Electoral_System.ashx, last accessed on 9 October 2012.

²⁴ "Gen. Tikka Khan, 87; 'Butcher of Bengal' Led Pakistani Army", *The Los Angeles Times*, 30 March 2002, available at <http://articles.latimes.com/2002/mar/30/local/me-passings30.1>, last accessed on 9 October 2012.

²⁵ Niall Macdermot, Q.C., p. 483, see *supra* note 4. In the Western world there seems to be a considerable body of opinion which thinks there ought not to be any trials of those alleged to be responsible.

to both Bangladesh and India that he would ensure the trial of those 195 POWs in Pakistan, they were so returned.

11.7. Old Evidence Revealed Before the Enquiry Commission in Pakistan

The Hamoodur Rahman²⁶ Commission was constituted by the then Pakistani government to obtain credibility in the eyes of the international community and the governments of Bangladesh and India by indicating Mr. Bhutto's willingness to hold the trial before those 195 POWs were returned. He was also to use it as leverage on Pakistan's military junta in order to secure his political power. The commission so constituted inquired into the atrocities committed during the nine months of occupation. The Commission examined nearly 300 witnesses and hundreds of classified army signals between East and West Pakistan.²⁷ General Yahya, General Niyazi, and General Tikka's own admissions, along with those admitted by their cohorts and collaborators, are evident from the available Commission reports and documents. Let us refer to some of this old evidence that is available and that which has been established before the Commission as admitted by those army officers themselves. According to the allegations generally made, the excesses committed by the Pakistani Army and their cohorts, as summarised by the Commission, fall into the following categories:

- a) Excessive use of force and fire power in Dacca during the night of the 25 and 26 March 1971 when the military operation was launched.
- b) Senseless and wanton arson and killings in the countryside during the course of the "sweeping operations" following the military action.
- c) Killing of intellectuals and professionals like doctors, engineers, etc., and burying them in mass graves not only during early phases of the military action but also during the critical days of the war in December 1971.

²⁶ Rahman, (Justice) Hamoodur was the Chief Justice of the Supreme Court of Pakistan and Vice Chancellor of Dhaka University. See http://www.bpedia.org/R_0026.php, last accessed on 9 October 2011.

²⁷ "Hamoodur Rahman Commission Report", available at <http://www.bangla2000.com/bangladesh/Independence-War/Report-Hamoodur-Rahman/default.shtm>, last accessed on 9 October 2012.

- d) Killing of Bengali Officers and men of the units of the East Bengal Regiment, East Pakistan Rifles and the East Pakistan Police Force in the process of disarming them, or on pretence of quelling their rebellion.
- e) Killing of East Pakistani civilian officers, businessmen and industrialists, or their mysterious disappearance from their homes by or at the instance of Army Officers performing Martial Law duties.
- f) Raping of a large number of East Pakistani women by the officers and men of the Pakistan army as a deliberate act of revenge, retaliation and torture.
- g) Deliberate killing of members of the Hindu minority.²⁸

Indefinite identification of responsibility as revealed from the Hamoodur Rahman Report is as follows:

It is, however, clear that the final and overall responsibility must rest on General Yahya Khan, Lt. Gen. Pirzada, Maj Gen. Umar, Lt. Gen. Mitha. It has been brought out in evidence that Maj. Gen. Mitha was particularly active in East Pakistan in the days preceding the military action of the 25th of March 1971, and even the other Generals just mentioned were present in Dacca along with Yahya Khan, and secretly departed there on the evening of that fateful day after fixing the deadline for the military action. Maj. Gen. Mitha is said to have remained behind. There is also evidence that Lt. Gen. Tikka Khan, Major Gen. Farman Ali and Maj. Gen. Khadim Hussain were associated with the planning of the military action [...].

At the same time there is some evidence to suggest that the words and personal actions of Lt. Gen. Niazi were calculated to encourage the killings and rape.²⁹

11.8. An Impunity Culture Begins, Contributing to the Destabilisation of the Constitutional Regime

Mr. Bhutto did not keep his promise and desecrated his international obligation to try these criminals. Following such default, impunity grew in

²⁸ *Ibid.*

²⁹ *Ibid.*

all directions and on all dimensions. In 1977, Mr. Bhutto and his party got the majority's vote and won parliamentary elections held in Pakistan, and the military took over power in a successful *coup d'état* led by General Zia-ul-Haq under code name 'Operation Fair Play'.³⁰

The rest of history that followed are a series of tragedies backed by extra-constitutional regimes and the destabilising of democracy, not only repeating the frustration of the electoral verdict of 1977 in Pakistan, but also leading to the killing of Mr. Bhutto as the elected Prime Minister, who was hung by a court verdict, widely believed to be a judicial killing.³¹ The rule of law and constitutional governance was thus destabilised, and General Muhammad Zia-ul-Haq, who patronised the religio-militant groups as part of his agenda for Pakistan to be eventually transferred into a theological state, was killed in an air crash on 17 August 1988. His military transport aircraft, a C-130, exploded mid-air a few minutes after take-off from Bhawalpur Airport, killing all passengers aboard including the President.³² The power in Rawalpindi rolled from one general to another, except for some interruption by elected governments that were then toppled by the military. Failure to try the perpetrators of core crimes by the Pakistani Army thus caused disaster, followed by a series of killings and frequent constitutional derailment on the one hand, and the rise of core militancy and extremists under the patronage of the military wing on the other. Under the Pakistani military's direct patronisation, Talibans³³ were raised and trained, and used in the Afghan

³⁰ Pakistan's General problem, *Asian Window*, 11 June 2011, available at <http://www.openthemagazine.com/article/international/pakistan-s-general-problem>, last accessed on 9 October 2012.

³¹ See <http://chagataikhan.blogspot.com/2010/02/judicial-murder-of-zulfikar-ali-bhutto.html>, last accessed on 9 October 2012.

³² See <http://storyofpakistan.com/death-of-general-zia-ul-haq/>, last accessed on 9 October 2012.

³³ Pierre Tristam, "History of the Taliban: Who They Are, What They Want", see http://middleeast.about.com/od/afghanistan/ss/me080914a_2.htm, last accessed on 9 October 2012:

They were schooled in Pakistan's *madrassas*, religious schools which, in this case, were encouraged and financed by Pakistani and Saudi authorities to develop militantly inclined Islamists, which raised another military reign, known as Talibans which later transformed into various groups such as al Qaeda, Harkat-ul-Jihad-al-Islami (Huji), etc.

War. There is need therefore for proper and systemic research and analysis by academics and experts, taking Pakistan and Bangladesh as a case study, to identify the relationship between the omission and default in trying the perpetrators of crime, and the destabilisation of the constitution, democracy, and the rule of law as well as the rise of a religio-military oligarchy that has a close relationship with militancy, that is patronised by the military or military-backed regimes, and that has formed under the shelter of political party. The tragedies which followed in the form of coups, counter-coups, killings, and assassinations, the destabilising of the constitutional regime, the subverting of the electoral process, and the rise of extra-constitutional regimes, can be traced back to the failure and omission to hold trials and punish the perpetrators of the original crimes committed in Bangladesh in 1971, giving rise to an impunity culture. This seems to be the core causation between the repetitious derailments of constitutional regimes followed by the rise of terrorism spreading all over the globe. The seed of this lies in the failure to try the perpetrators of core crimes of genocide and crime against humanity in Bangladesh in 1971.

11.9. Tragic Fall Out of the Default

Although Bangladesh's 1973 Act is the first written statute on core international crimes, the trial could not be held due to the hijacking of state power by the killing of the father of the nation, Bangabandhu Sheikh Mujibur Rahman, and his family, which included Begum Mujib and children, including the young child Russel, newly wed Jamal and Kamal, along with their wives, on 15 August 1975. Two other families of close relations to the President, one being a cabinet member, Mr. Serniabad, and his family, met the same fate as his son-in-law, Sheikh Moni, along with Moni's pregnant wife, who was killed around the same time in their respective residences in the city. It was followed by the killing of the four national leaders³⁴ in prison on 3 November 1975 in

³⁴ In the absence of the President Sheikh Mujibur Rahman (in the Pakistan prison), Mr. Syed Nazrul Islam was the Acting President of the government in exile in 1971, Mr. Tajuddin Ahmed was the Prime Minister, Mr. M. Mansur Ali was the Minister of commerce and trade, A.H.M. Kamruzzaman was a cabinet Minister leading the liberation movement as a lawful and constitutional government. See [http:// four-leaders.webs.com/histryofthetime.htm](http://four-leaders.webs.com/histryofthetime.htm), and <http://www.thedailystar.net/newDesign/news-details.php?nid=161098>, last accessed on 3 October 2012.

another orgy operated by the same military group at the Dhaka Central Jail who killed the President on 15 August 1975. This would reveal genocide and crimes against humanity surfacing often thereafter, all part of the same scheme to destabilise Bangladesh by making Bangladesh leaderless, thus subverting and derailing the constitution and democracy so that this nation may not sustain its constitutional values, the values of the war of liberation, and democracy. Thus, in the process, the fruits of freedom are left to the future generation. The killings of 1975 were protected from any trial by an indemnity ordinance decreed by the usurper, after having hijacked the state power. The killers were patronised by the new military-backed regime under which some of the killers were given diplomatic assignments abroad and others were encouraged to form a political party and to become members of the parliament, under the patronage of this regime. The constitution was changed by decree in order to change the secular character of the republic, introducing Islam as the state religion.

During subsequent regimes, cultural workers, artists, public leaders, and judges also became targets of bomb attacks by the religio-militant groups who were allowed to grow and operate under the umbrella of the military-backed regime. This threatened the national peace and stability of the country several times. Systematic terror and violence occurred through the targeting of cinema halls, public meetings, and cultural functions, and the killing of innocent people which created public scares. All court premises in the country, including the Supreme Court, became targets of bomb blasts on 17 August 2005, simultaneously also causing the death of judges in Jhalakathi and some advocates in Gazipur on 14 November 2005.³⁵

Election and post-election violence following the general election in 2001 was another manifestation of such crimes, as reported in various newspapers and documented by a commission of inquiry set up by the government and headed by Judge Shahabuddeen. His report has been submitted before the court and is still waiting to be made public. Based on newspaper reports, during the 87 days of caretaker government in 2001, there were about 2483 incidents of atrocities in which 906 were

³⁵ “2 Britons funded JMB to carry out bomb blasts”, The Daily Star, 9 February 2006, last accessed 4 October 2012. See http://en.wikipedia.org/wiki/Jamaat-ul-Muja_hideen_Bangladesh, last accessed on 9 October 2012.

killed and 15,616 injured. After the assumption of the four-party Alliance³⁶ to power, several hundreds were killed, more than thousand injured, about 41,000 tortured, and several hundred raped as part of the post-electoral violence.³⁷ The figures continued to swell each day as the reports appeared in the dailies. Such violence and atrocities in the form of killings, rape, and looting were committed on Hindu communities and on Awami League leaders and supporters at the grassroots level, repeating the same syndrome perpetrated in 1971 against the party which won the election in 1970 and which led the liberation movement to a victory in December 1971.

³⁶ “A major rightist alliance of B.N.P. along with Jamat-e-Islami and two other parties”, available at http://www.asiapacificms.com/papers/pdf/faultlines_bangladesh.pdf, last accessed on 9 October 2012.

³⁷ Such incidents have been reported in various newspapers such as:

- The Daily Sangbad, 19 September 2001: Father and daughter named Dulal Chandra Das and Akhi Rani Das of a family of Hindu minority were killed by a terrorist group in the village of Haroshshor, Allahabad Union, Debiddar Upazilla of Comilla District.
- The Daily Prothom Alo, 5 October 2001: Terrorist groups attacked in 20 Districts of Bangladesh the supporters of Awami League and the Hindu Minorities. 9 persons were killed and 217 persons were injured in that incident.
- The Daily Star, 11 October 2001: Attacks on Awami League (AL) leaders and workers and the minority community continued in Pabna and Barisal districts.
- The Independent, 17 October 2001: Houses of minority community ransacked in Keshabpur. The members of the minority community of the district left their homes for safer places following terrorism let loose by the armed miscreants.
- The Daily Star, 30 October 2001: Hindus who fled to India tell tales of torture. Hundreds of Bangladeshi Hindu families have fled across the border into India because they say they have been ‘tortured’ since an Islamist-allied government came to power.
- The Daily Star, 11 October 2001: Minorities in 3 Pabna UZs flee houses. Torture and arson alleged. Members of the minority community in some areas of three upazilas in the district are allegedly being subjected to attacks and threats by ‘terrorists’, following the October 1 election. The upazilas are Chatmohor, Sujanagar and Bera.
- The Daily Star, 13 October 2001: Hundreds of minority people flee Agailjhara in Barisal. Hundreds of members of the minority community including local public representatives in the neighbouring Agailjhara upazila of Barisal fled their homes and took shelter in villages in Kotalipara upazila. They left their houses to escape the wrath of hoodlums under the banner of BNP.

On 21 August 2004, there was an attack on the present Prime Minister of Bangladesh Sheikh Hasina while she was leader of the opposition and holding a rally protesting the killing of a senior leader of her party, distinguished statesman, Mr. Shah A.S.M. Kibria, the former Finance Minister of the country who was brutally assassinated in a grenade attack on 27 January 2005 in his constituency at Sylhet.³⁸ The leader of the Awami League, Sheikh Hasina, was protected by a human shield built around her against a repeated grenade attack at the venue of the meeting. Though she miraculously survived with an impairment of hearing and escaped death, her other colleagues, including Begum Ivy Rahman, the wife of the present President of Bangladesh, Mr. Zillur Rahman, along with 21 other active members of the Party, were killed and more than 100 wounded, still carrying the pains and pangs of splinters in their body. Investigations conducted now reveal that this massacre and orgy was planned and conspired under the patronage of the then government in power, now awaiting trial.

It is difficult to fathom the Bangladesh Rifles ('BDR') massacre on 25–26 February 2009. The manner of killing the officers and the wife of the Director General of BDR, and the looting and mutilating of dead bodies, disclose the nature of a crime which cannot be simply dealt with and described under the definition of mutiny or murder alone. It has the symptoms and elements of the core international crime of crimes against humanity. In tracing the above-mentioned mayhem and mass murder, there seems to be a thin veil between the definition of mass murder and crimes against humanity. Hence I crave the indulgence of experts, jurists, and academics, drawing their attention to the continuing repetitions of crime. Specifically, whether this has any connection from the perspective of the science of criminology of core international crimes with the default culture giving rise to impunity, and whether the mass murders as perpetrated on 9/11 in the U.S. or in Bangladesh or Pakistan, which repeatedly recurs in the name of religion or otherwise, should be considered as crimes to be included in the definition of crimes against humanity, those crimes being closely connected and having the characteristics of achieving the same or similar object.

However, there is a thin distinction between mass killing and crimes against humanity. Under the heading "Mass Killing", Blair

³⁸ See <http://www.kibria.org/>, last accessed on 9 October 2012.

wrote, “Looking ahead over the next five years, a number of countries in Africa and Asia are at significant risk for a new outbreak of mass killing”. He defined ‘mass killing’ as:

[...] the deliberate killing of at least 1,000 unarmed civilians of a particular political identity by state or state-sponsored actors in a single event or over sustained period.³⁹

U.S. President Barack Obama and other senior policy makers have communicated that they believe the preventing of mass killing, genocide, and other mass atrocities is important. Upon his acceptance of the Nobel Peace Prize, he stated,

[m]ore and more, we all confront difficult questions about how to prevent the slaughter of civilians by their own government [...] When there is genocide in Darfur, systematic rape in Congo, or repression in Burma-there must be consequence.⁴⁰

What happens if the perpetrators are let go and the impunity culture grows? It will endanger the democratic polity, stability of the country, and its constitutional continuity as it has already happened in Bangladesh more than twice since 1975. The survival of the cultural and civilisational base for democracy and the rule of law would often be undermined by unconstitutional usurpation; consequently society becomes vulnerable to terror and all kinds of violence and militancy.

The present trial taking place before the International Crimes Tribunal at the national level in Bangladesh is being held against the background of what the Bangladeshi people have suffered and were subjected to in 1971. Threats of similar crimes in different forms and shapes seem to still persist as are well-described in various contemporary press reports published and compiled into various documents.

11.10. Lessons from History

I need not elaborate on these trails of tragedy except for the purpose of reminding ourselves of the lessons of history. History teaches us that ac-

³⁹ Lawrence Wocher, “A Smart Use of Intelligence: Preventing Genocide of Mass Killing”, in *Georgetown Journal of International Affairs*, 2010, vol. 11, p. 43.

⁴⁰ Barack Obama, “Remarks by the President at the Acceptance of the Nobel Peace Prize”, The White House, Office of the Press Secretary, 10 December 2009.

tions or omissions to act have definite consequences. The cost of sparing evil has always been very heavy and disastrous. To prevent genocide, the United Nations adopted the Convention on the Prevention and Punishment of the Crime of Genocide in 1948.⁴¹ The Convention deals with issues related to the “crime of crimes”.⁴² The Convention codifies the prohibition against genocide though it has been outlawed for much longer in customary international law and though it has occurred throughout history.⁴³ The definition of genocide is, however, intensely contested terrain.⁴⁴

Despite the adoption of the Convention sixty years ago, many genocides⁴⁵ have occurred in various places⁴⁶ including Burundi, Paraguay, Cambodia,⁴⁷ Iraq, Rwanda,⁴⁸ and it continues to occur today in the

⁴¹ The Genocide Convention had been ratified by 138 states as of 2008. See generally Frank Chalk, “Genocide in the 20th Century: Definitions of Genocide and Their Implications for Predication and Prevention”, in *Holocaust and Genocide Studies*, 1989, vol. 4; Leo Kuper, “The Prevention of Genocide: Cultural and Structural Indicators of Genocidal Threat”, in *Ethnic and Racial Studies*, 1989, vol. 12, p. 157; Ervin Staub, “The Roots of Evil: The Origins of Genocide and Other Group Violence”, in John A. Berry and Carol Pott Berry (eds.), *Genocide in Rwanda: A Collective Memory*, Harvard University Press, 1999.

⁴² This is not a new term, but for a discussion on the term’s use, see Robert D. Sloane, “Sentencing for the ‘Crime of Crimes’: The Evolving ‘Common Law’ of Sentencing of the International Criminal Tribunal for Rwanda”, in *Journal of International Criminal Justice*, 2007, vol. 5, issue 3, pp. 713, 713–734. Genocide was an international crime before Raphael Lemkin designed the word in the early 1940s. See Jeremy Sarkin, “The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and International Law: Their Application from at Least the Nineteenth Century”, in *Human Rights and International Legal Discourse*, 2007, pp. 125–172 (hereinafter ‘Historical Origins’).

⁴³ *Ibid.*

⁴⁴ See, e.g., George Chigas, “The Politics of Defining Justice after the Cambodian Genocide”, in *Journal of Genocide Research*, 2000, vol. 2, issue 2, pp. 245–265.

⁴⁵ Barbara Harff, “No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955”, in *American Political Science Review*, 2003, vol. 97, no. 1, p. 57.

⁴⁶ Benjamin A. Valentino, *Final Solutions: Mass Killing and Genocide in the Twentieth Century*, Cornell University Press, 2004.

⁴⁷ See generally David Cohen, “‘Hybrid’ Justice in East Timor, Sierra Leone, and Cambodia: ‘Lessons Learned’ and Prospects for the Future”, in *Stanford Journal of International Law*, 2007, vol. 43.

Darfur region of Sudan.⁴⁹ In this regard, a major failure of the Convention has been the absence of an institution to oversee the work of preventing genocide from occurring and to intervene where genocide is taking place.⁵⁰

There are certain conditions under which a moral agent may be held morally accountable for his/her actions or omissions. According to the two ‘negative’ Aristotelian principles, an agent should not be ignorant of the facts surrounding his/her actions, and those actions should not show undue force.⁵¹ Equally, the principle of ‘alternate possibilities’ implies that “a person is morally responsible for what he has done only if he could have done otherwise”.⁵²

In addition to crimes of genocide, a sense of moral and ethical duty accompanies the trial of past crimes of genocide, crimes against humanity, and war crimes. These cases encompass a utopian vision of seeking justice through restitution. For example, through his tenacious pursuit of justice, Simon Wiesenthal demanded that the European nations bring Nazi criminals to trial after World War II.⁵³ In a world that would prefer to forget, Wiesenthal hounded both criminals and States to remember and reaffirm the meaning of justice.⁵⁴

⁴⁸ U.N. Economic and Social Council (‘ECOSOC’), Sub-Commission on Prevention of Discrimination and Protection of Minorities, Whitaker Report: Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide, U.N. Doc. E/CN.4/Sub.2.1985/6, 2 July 1985 (prepared by Benjamin Whitaker) (hereinafter ‘Whitaker Report’).

⁴⁹ See, The Secretary General, Report of the International Commission of Inquiry on Darfur, delivered to the Security Council, U.N. Doc. S/2205/60, 1 February 2005.

⁵⁰ See Jeremy Sarkin, “The Role of the United Nations, the African Union and Africa’s Sub-Regional Structures in Dealing with Africa’s Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect”, in *Journal of African Law*, 2009, vol. 53, issue 1, p. 1.

⁵¹ M. Fischer and M. Ravizza, *Responsibility and Control: a Theory of Moral Responsibility*, Cambridge University Press, 1998; M. Zimmerman, “Moral Responsibility and Ignorance”, in *Ethics*, 1997, vol. 107, no. 3, p. 411.

⁵² D. Copp, “Defending the Principle of Alternate Possibilities: Blameworthiness and Moral Responsibilities”, in *Nous*, 1997, vol. 31, issue 4, p. 441.

⁵³ Michael Berenbaum, “The Uniqueness and Universality of the Holocaust”, in John K. Roth and Michael Berenbaum (eds.), *Holocaust: Religious and Philosophical Implications*, Paragon House, 1989, pp. 82, 83.

⁵⁴ *Ibid.*

In seeking justice by holding trials, there is the obvious need to deal with old evidence. There is a need to critically evaluate historical records and victim recollections as well as to deal with collective memories. Such an evaluation will avoid inaccurate submissions or oversimplified comparisons. Additionally, it helps contextualise both when the events took place and the span of time that has elapsed since the events occurred. Such litigation aims to present the untold suffering and injustice of “those who have endured and suffered great injustice, [who] often have a powerful sense that what they experienced must not be forgotten, but must be cultivated both as a monument to those who did not survive and as a warning to future generations”,⁵⁵ so that a nation can be free from these crimes and atrocities; however much a government tries to bury these crimes by default, the crimes continue to haunt the nation from the debris of the history in countless ways.

There is no scope to be ambivalent, hesitant, or even half-hearted in one’s resolve to try and punish those perpetrators through proper investigation and by conducting a fair trial. On this issue there is no scope for being in the middle of the road, “ones who are in the middle of the road are in danger of being knocked down”.⁵⁶ Besides its philosophical significance, it is important to remember that the failure to bring criminals to justice has statistically contributed towards generating future crimes, some of which have been mentioned earlier.

One must not forget the past as it has a curious habit of recurrence unless dealt with in an appropriate manner. The German writer Jurgen Fuchs once said, “If you do not solve this problem in a definite way it shall haunt us”.⁵⁷ In Bangladesh, the series of past persecutions is a re-

⁵⁵ See e.g., Michael R. Marrus, *Some Measures of Justice: The Holocaust Restitution Campaign of the 1990s*, University of Wisconsin Press, 2009 (‘Marrus’). Marrus discusses the “wave of Holocaust-era restitution” in the late 1990s.

⁵⁶ It was stated by Margaret Thatcher, “Standing in the middle of the road is very dangerous; you get knocked down by traffic from both sides”, available at http://www.famousquotesandauthors.com/topics/commitment_quotes.html, last accessed on 9 October 2012.

⁵⁷ Dr. Zia Uddin Ahmed, “Justice After Genocide: Ways To Deal With The Past”, News From Bangladesh, 27 October 1997, available at http://www.mukto-mona.com/Articles/Zia_U_Ahmed/justice_after_genocide_092106.htm, last accessed on 3 October 2012. The German writer Jurgen Fuchs once said to Adam Michnik, a leader of the Polish opposition to communist rule about crimes committed

curing nightmare even after its fortieth year of independence, largely because the burden of the past cannot be shaken off.

11.11. Prime Agendas in the Election Manifesto of the Present Ruling Party and Overwhelming Verdict of Victory

The trial of perpetrators of core international crimes under international law was one of the prime agendas incorporated into the election manifesto of the Awami League, the present ruling party in Bangladesh. It was partly a response to the demand of the new generation for such a trial. This demand was re-confirmed by the unanimous resolution of parliament following the overwhelming verdict of victory in the national elections in 2008. It also accorded with the objectives and declaration of Rome Statute:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.⁵⁸

We, the people of Bangladesh, share the resolve of the Rome Statute by taking measures at the national level, as the present government has undertaken, and “by enhancing international co-operation”, as initiated by FICHL and CMN. It is evident that the people, the government, and the international community, trusting and believing in the rule of law, are:

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.⁵⁹

In concluding, let me say how grateful we are to the eminent jurists of international eminence who have made it convenient to take time

during the communist regime in East Germany that “if we do not solve this problem in a definite way, it will haunt us”.

⁵⁸ Preamble of Rome Statute, *supra* note 2.

⁵⁹ Preamble of the Rome Statute of the International Criminal Court, available at <http://www2.ohchr.org/english/law/criminalcourt.htm>, last accessed on 9 October 2012.

off from their otherwise busy schedules to contribute to the seminar and this anthology, thereby extending their support and solidarity by sharing their knowledge expertise and their exposure to the international trial process related to the prosecution of crimes against humanity and genocide. And in the process of doing so, we exchange and share our common commitment and aspiration to the bringing of an end to impunity so that we may thus prosper in peace, being united by common bonds and determined to contribute to the prevention of such crimes in this country or anywhere else. We gratefully acknowledge your commitment and cooperation towards this common cause.

The Importance of Prosecuting Core International Crimes: The International Criminal Tribunal's Objectives and Experience

H.E. Shafique Ahmed*

The Forum for International Criminal and Humanitarian Law ('FICHL') – a neutral international non-profit organisation – has made a laudable endeavour to focus on the use of old evidence in core international crimes cases by holding a seminar in Dhaka on 11 September 2011 and producing this anthology.

A civilised society must recognise the worth and dignity of those victimised by abuses of the past. Co-existence between the *hostis humani generis* and victims of war crimes should end, and thus, from a restorative justice perspective, trials should be held, even after 40 years. As early as 1948, the Convention on the Prevention and Punishment of the Crime of Genocide defined this international crime and spelled out

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the obligations of States Parties to prosecute. Bangladesh considers that the perpetrators of crimes against humanity, crimes against peace, genocide, and war crimes should be tried. The State has an obligation to remedy serious violations of human rights as stated by Article 8 of the Universal Declaration of Human Rights and Article 2(3) of the International Covenant on Civil and Political Rights, which ensure the right to an effective remedy for violations of human rights, and to which Bangladesh has subscribed.

Bangladesh acceded to the Rome Statute of the International Criminal Court in March 2010. We were the third Asian country, and the first in South Asia, to do so. This amply demonstrates Bangladesh's commitment to the rule of law and international justice, and our efforts to end impunity for genocide, crimes against humanity, and war crimes at all levels. This is a reflection of our State's values, which seeks to uphold the progressive and humane values of democracy, justice, and human rights everywhere in the world. This conviction stems from our national experience. Bangladesh was born out of a sustained struggle for representative inclusion, democracy, and rights, which shaped our collective aspiration for statehood and identity. Our experience during the 1971 War of Liberation brought us face to face with genocide inflicted by the occupying forces. Bangladesh, therefore, is naturally committed to promoting all efforts at all levels to prevent such crimes and bring an end to impunity for crimes of genocide, crimes against humanity, and war crimes.

The present government is committed to bringing an end to the culture of impunity at the national and international level. We have initiated the trial of perpetrators who committed crimes against humanity, crimes against the peace, genocide, war crimes, and other crimes under international law during the 1971 War of Liberation.

The trials will undoubtedly bring justice to the victims, heal the wound that we have been carrying for the last 39 years, end the shameful legacy, and help Bangladesh to move forward with its agenda of development. The trials of 1971 war crimes also answer a popular demand of the people of Bangladesh, particularly of its young population. It was included in the election manifesto of the government at the time of writing, for which the people overwhelmingly voted during the last parliamentary elections in December 2008.

Bangladesh is proceeding with the trial of criminals alleged to have committed crimes during our liberation struggle, as per the provisions of the International Crimes (Tribunals) Act 1973 ('the 1973 Act') and the rules framed on the basis of that Act. The government is determined to conduct these trials in accordance with international legal and human rights standards. We have already made some amendments to the 1973 Act in order to achieve the desired standard and transparency. The amendments contain provisions that ensure fair trial and the independence of the Tribunal in the exercise of its judicial functions. It has also deleted the provision related to the inclusion of an Army person in the Tribunal.

At trial, the accused will be given the full opportunity to defend themselves by engaging lawyers of their own choice. They or their lawyers can cross-examine prosecution witnesses at length. A person convicted of any crime specified in Section 3 of the Act and sentenced by a Tribunal shall have the right to appeal to the Appellate Division of the Supreme Court of Bangladesh, the highest court of the country, against such conviction and sentence.

A Tribunal has been set up to independently conduct the trials ('the ICT-BD'). The government has also established an Investigation Agency and appointed a team of prosecutors in accordance with the provisions of the 1973 Act. The Tribunal consists of three judges led by a learned Justice of High Court. The Tribunal shall be independent in the exercise of its judicial functions and shall ensure fair trial according to the provisions of Section 6(2)(A) of the Act. As of writing, the government is also formulating a new law in order to ensure the protection of the witnesses of the trial.

A number of international organisations and eminent experts have come forward to extend support and constructive suggestions to the ICT-BD. As an independent Tribunal with a statutory obligation to ensure fair trials, it has welcomed the technical support provided by the autonomous Case Matrix Network ('CMN'). Training sessions have also been held in Dhaka, organised by the CMN and aimed at strengthening the capacity of ICT-BD investigators and prosecutors.

All these activities clearly indicate that the perpetrators of war crimes must be brought to justice, in a manner, needless to say, that maintains fairness and due process of law. I consider the FICHL seminar

on “Old Evidence and Core International Crimes”, held in Dhaka on 11 September 2011, and the present book by the Torkel Opsahl Academic EPublisher (‘TOAEP’) as important events that will surely be a mechanism of providing support to the professionals working in the ICT-BD.

The FICHL seminar and this TOAEP anthology have benefited from its distinguished contributors. I was honoured to have been included among them, as I had the opportunity to share my views on the topic with distinguished experts and local participants. I am sure that the input provided through the seminar will open avenues for the ICT-BD professionals and personnel to work more efficiently and effectively. Finally, I extend heartfelt thanks and gratitude to Professor Morten Bergsmo, the FICHL, and the TOAEP for organising the seminar and this book of high international profile.

The International Crimes (Tribunals) Act of 1973 and the Rules: Substantive and Procedural Laws

Md. Shahinur Islam*

At the outset, I would like to express my gratitude to the Forum for International Criminal and Humanitarian Law (‘FICHL’) and the Torkel Opsahl Academic EPublisher (‘TOAEP’) for the opportunity it has given me to contribute to the seminar held in Dhaka, Bangladesh, and this anthology. I also want to say that I consider it a great honour to share this undertaking with Judge Alphons M.M. Orié, Judge of the ICTY; Judge Milart, Judge of the Supreme Court Chamber, Extraordinary Chambers in the Courts of Cambodia (‘ECCC’); Mr. Andrew Cayley, International Co-Prosecutor, ECCC; and other distinguished experts. My special thanks

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goes to Professor Morten Bergsmo whose laudable efforts have made this anthology possible. This chapter was first presented when I served as the Registrar of the International Crimes Tribunal of Bangladesh ('ICT-BD') at the FICHL Seminar entitled "Old Evidence and Core International Crimes".

The aim of this chapter is to briefly highlight the ICT-BD and its governing legal framework, as well as to express a considered academic viewpoint on some fundamental issues.

13.1. Introduction

We know of the notion that the perpetrators of crimes of a universally abhorrent nature are *hostis humani generis* – enemies of all people. These crimes include war crimes, genocide, crimes against humanity, aggression, *et cetera*. Irrefutably, the war crimes and crimes against humanity committed during the 1971 Independence War of Bangladesh exceeded the brutalities and dreadfulness of war crimes committed in contemporary times. With the aim of establishing a durable peace and justice, and bringing the perpetrators of atrocities committed during the 1971 Independence War to justice, a legislation known as the International Crimes (Tribunals) Act 1973 ('ICTA') was enacted by our sovereign Parliament.¹

13.2. Composition of the Tribunal

Bangladesh considers that victims of war crimes should have the right to a remedy. The State has an obligation to remedy serious human rights violations. Bangladesh recognises Article 8 of the Universal Declaration of Human Rights ('UDHR') and Article 2(3) of the International Covenant on Civil and Political Rights, which guarantee the right to an effective remedy for violations of human rights. After making significant amendments to the Act of 1973 in 2009, the Tribunal has finally been set up on 25 March 2010.

Under Section 6(2) of the ICTA, the Tribunal is composed of one Chairman and two Members at the time of writing. The Chairman and one of the Members are sitting Judges of the Bangladesh Supreme Court. The other Member of the Tribunal is a retired District Judge.

¹ International Crimes (Tribunals) Act 1973, 20 July 1973 (hereinafter 'ICTA').

13.3. ICT-BD: Domestic Tribunal

The ICT-BD is a purely domestic tribunal. In other words, it is a national judicial mechanism that has been established to try crimes of an international nature which have been criminalised pursuant to Bangladeshi domestic legislation. Therefore, while the Tribunal's name includes the word "international" and it possesses jurisdiction over crimes, such as crimes against humanity, crimes against peace, genocide, and war crimes, it would be wrong to assume that the Tribunal must be treated as an 'international tribunal' as per the International Criminal Tribunal for Rwanda ('ICTR'), International Criminal Tribunal for former Yugoslavia ('ICTY'), Special Court for Sierra Leone ('SCSL'), Extraordinary Chambers in the Courts of Cambodia ('ECCC'), International Criminal Court ('ICC') and others.

The legitimacy of the ICTA stems from its adoption by an overwhelming decision of the Bangladesh Parliament, which is a democratically elected body of representatives and constitutionally mandated to enact legislation. As such, the ICT-BD can only be interpreted in light of the framework set out by ICTA, and not any other legal instruments of international nature. It should, however, be noted that ICTA refers to, and expressly adopts, a variety of international legal standards. Nevertheless, respect for a country's domestic sovereignty and its people's democratic will require ICTA to be considered as the first and predominant point of reference.

13.4. Independence of the Tribunal: Section 6(2)(A)

Independence is key and fundamental to a judicial body's functions and ensuring a fair trial. It is the statutory obligation of the tribunal to ensure fair trial by maintaining fundamental and universally recognised procedure. Section 6(2)(A) of the ICTA expressly recognises this by providing that "the tribunal shall be independent in the exercise of its judicial functions and shall ensure fair trial". This guarantee of judicial independence reflects international standards. In practice, the Tribunal has been sensitive to the need to protect the interests of the defendant. It has not hesitated to grant the defence further time if the defence needs this for further preparation of its defence. At the time of writing, there has been no single instance where the tribunal has rejected the request made by the defence for further time.

13.5. Personal Jurisdiction and Power of the Tribunal

The Tribunal has jurisdiction over both civilians and individuals from the military. Section 3(1) of the Act of 1973 provides that the Tribunal shall have the power to try and punish “any individual or group of individual, or any member of any armed, defence or auxiliary forces who commits or has committed, in the territory of Bangladesh, whether before or after commencement of the 1973 Act, any of the crimes”.

Several of ICTA’s provisions address the responsibility of individuals of a certain institutional rank. This is particularly important given the fact that the systemic and large-scale nature of international crimes often involves institutional actors with the necessary resources. Section 5 expressly recognises that the “official position” of an individual does not free him or her from responsibility nor will it mitigate punishment.² However, Section 5(2) notes that if the accused acted “pursuant to his domestic law” or the “order of his Government or of a superior”, while this does not free him or her from responsibility, it may be considered for punishment mitigation purposes if “justice so requires”.³

Section 4 of the ICTA also recognises a variety of ways by which superiors may be linked to, and held liable for, crimes committed by their subordinates “in the same manner as if it were done by him alone”.⁴ The first category of superiors applies to the person “who orders, permits, acquiesces or participates in the commission of any of the crimes”. The second refers to those “connected with any plans and activities involving the commission of such crimes”. The third is the person “who fails or omits to discharge his duty to maintain discipline”. The fourth are those who fail “to control or supervise the actions of the persons under his command or his subordinates”. The fifth refers to the individual “who fails to take necessary measures to prevent the commission of such crimes”.

13.6. Definition and Elements of Crime

Before examining ICTA’s subject matter jurisdiction, it would be useful to recall present-day jurisprudence regarding the definition of crimes against humanity as developed by the *ad hoc* international tribunal, the

² Section 5(1), ICTA.

³ Section 5(2), ICTA.

⁴ Section 4, ICTA.

ICTY. The fundamental thing to be noted is that a crime against humanity must be part of a ‘widespread or systematic attack’.⁵ The ICTY concluded that the term ‘widespread’ refers to the scale of the attack and the number of victims. Thus, it could relate to the broad magnitude and a series of acts or one act of extremely wide effect. In the same case it was also held that the term ‘systematic’ relates to the ‘organised nature of the conduct’ concerned, which will very often be evidenced by the ‘planning’ or ‘organisation’ undertaken by the accused. That is to say such ‘planning’ or ‘organisation’ will often fulfil the ‘systematic’ requirement. ‘Planning’ is one of key components of ‘conspiracy’. According to ICTA, conspiring to commit any of crimes enumerated in Section 3(2) is punishable. Additionally, committing offences enumerated in Section 3(2)(c) “with intent to destroy”, in whole or in part, a national, ethnic, racial, religious or political group explicitly qualifies conduct as the offence of genocide.

Undoubtedly, the ICC will rely very heavily on the decisions in jurisprudence developed by the ICTY and the ICTR.⁶ The two earlier tribunals have developed their understanding of customary international law relating to crimes against humanity and have systematised a very extensive functional juridical framework for the prosecutions for these crimes.

According to Section 3(2)(a), the crimes described as “crimes against humanity” must be committed “against civilian population” or persecution must be committed on “political, racial, ethnic or religious grounds” and the same must have been perpetrated “whether or not in violation of domestic law of the country”. While Section 3(2) of the ICTA does not replicate word-for-word the crimes against humanity definition adopted by other international tribunals, there are shared fundamentals. The Elements of Crime, as noted in the Rome Statute, are not in fact binding on the ICC itself, instead, they “shall assist the Court” in interpreting the various crimes.⁷ It should also be noted that while the ICT-BD is not obligated to follow the definitional standards applied by other internation-

⁵ An attack would include, but is not confined to, acts of violence. See International Criminal Tribunal for the former Yugoslavia (‘ICTY’), *Kunarac et al.*, IT-96-23, IT-96-23/1, Trial judgement, 22 February 2001; ICTY *Blaškić* (‘*Lašva Valley*’), IT-95-14, Trial judgement, 3 March 2000.

⁶ Mettraux, “Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda”, in *Harvard Law Journal*, 2002, vol. 43, p. 237.

⁷ Article 9(1), Rome Statute.

al tribunals, it is not to be precluded from seeking guidance from universally recognised references.

Undeniably, the context and extent of atrocities committed in the 1971 Independence War in Bangladesh itself amply proves that they were directed in a ‘systematic’ manner and based on ‘planning’ against ‘civilian non-combatant population’ or ‘members of civilian population’. The attack, which must be either widespread or systematic or both, must be primarily directed against a ‘civilian population’. If the specific offences of crimes against humanity which were committed during 1971 are tried under the 1973 Act, it is obvious that they were committed in the context of the 1971 war. This context is itself sufficient to prove the existence of a ‘widespread and systematic attack’ on the Bangladeshi self-determined population in 1971. Additionally, the Tribunal, as per Section 19(3) of the 1973 Act, shall not require proof of facts of common knowledge; it shall take judicial notice of such facts.⁸ So, there can be no arguable room to say that the offences enumerated in the Act of 1973 are not well defined and devoid of elements to constitute those offences.

13.7. Prosecution, Investigation, Trial Proceedings and Rules of Evidence

The proceedings before the Tribunal shall commence upon submission of the “formal charge” by the prosecution prepared on the basis of the investigation report submitted by the Investigation Agency, established under the ICTA. The challenge of collecting and organising evidence is not insurmountable, even after a passage of 40 years. The ICT-BD will consider all probative evidence regardless of its format, unless the rights of the accused are deemed to be prejudiced by the admission of the said evidence. Section 19(1) of ICTA notes that the Tribunal “shall not be bound by technical rules of evidence”.⁹ Section 19 provides for the possibility of admitting reports, photographs, films and other materials carrying probative value as evidence. This provision has been supplemented by Rule 44 of the Rules of Procedure, which notes the Tribunal’s discretion to “exclude any evidence which does not inspire any confidence in it”.¹⁰

⁸ Section 19(3), ICTA.

⁹ Section 19(1), ICTA.

¹⁰ International Crimes (Tribunals) Rules of Procedure 2010, 15 July 2010, amended 28 October 2010 and 28 June 2011, Rule 44 (‘ICT Rules of Procedure’).

All proceedings before the Tribunal shall be public. The Tribunal may, if it thinks fit, take proceedings “in camera”.¹¹ ICTA also states that no oath shall be administered to any accused person.¹² Further, the statement made by an accused to an investigation officer during interrogation shall not be admissible in evidence, except for that part of the statement leading to the discovery of incriminating material.¹³ Providing at least three weeks – after the framing of a charge – for the preparation of defence explicitly offers a key element of due process which shall appear to be broadly consistent with the settled criminal jurisprudence.¹⁴ As mentioned above, the Tribunal has not refused any requests for time extension. This time-frame aims to strike a balance between the accused person’s rights and ensuring expeditious trials. There is a need to be motivated by both justice and pragmatism, bearing in mind the conditions and resource constraints faced in Bangladesh.

13.8. Presumption of Innocence

Yes, no one can be convicted unless the charge brought against him is proved “beyond reasonable doubt”. This is the normal and universally settled criminal jurisprudence that all the courts constituted under valid legislation will follow. This norm, due to its settled nature, does not need to be embodied in ICTA for the Tribunal to remain bound to respect it.

The Tribunal’s legal framework reflects this commitment to proof beyond reasonable doubt. Rule 50 requires the burden of proving the charge to lie upon the prosecution.¹⁵ More recently, the Tribunal adopted Rule 43(2) which states that a person charged with crimes as described under Section 3(2) of the Act shall be presumed innocent until found guilty.¹⁶

¹¹ ICTA, *supra* note 1, Section 10(4),

¹² *Ibid.*, Section 10(5).

¹³ ICT-BD Rules of Procedure, *supra* note 10, Rule 56(3),

¹⁴ *Ibid.*, Rule 38(2).

¹⁵ *Ibid.*, Rule 50.

¹⁶ *Ibid.*, Rule 43(2).

13.9. Pre-Trial Arrest/Detention: Permitted Even Internationally

There is no international legal rule expressly prohibiting pre-charge detention, which is itself practised in many countries. The ICTA does not contain explicit provisions on pre-charge arrest and detention. But if we have a careful look at Section 14(1) there will be no disagreement that pre-charge detention is permitted. Section 14(1) recognises that any Magistrate “may record any statement or confession made to him by an accused person at any time in the course of investigation or at any time before the commencement of the trial”. If pre-charge arrest and detention is not permitted, how can the confession of an accused, at any time in course of investigation, be recorded by a Magistrate? Investigation is the key to prosecuting the offences defined in Section 3(2). Considering the time which has lapsed since the commission of the crimes, there is a need to take effective steps to preserve or prevent the destruction of any evidence. The framework set out in Rule 9 aims to facilitate effective and proper investigation.¹⁷ This rule supplements Section 14(1) of the Act of 1973. By setting out distinct stages of the investigatory process, Rule 9 aims to prevent arbitrary arrest consistent with international norms. Checks are built into Rule 9’s framework. For example, for accused persons already in custody for another offence or case, the Tribunal is to be “satisfied” that a detention order is “necessary” for the “effective and proper investigation” prior to directing that the person be detained.¹⁸ In addition, investigations are required to comply with certain time limits.¹⁹

13.10. Bail

With respect to the question of bail, the Rules provide that upon the production of the accused before the Tribunal he shall be sent to prison if he is not enlarged on bail.²⁰ At the pre-trial stage and even at any stage of proceedings the accused has the right to seek release on bail and on hearing the matter, the Tribunal shall pass the necessary orders.²¹ So it is not correct to say that the Rules of Procedure do not provide for bail. The

¹⁷ *Ibid.*, Rule 9.

¹⁸ *Ibid.*, Rule 9(4).

¹⁹ ICTA, *supra* note 1, Section 9(5).

²⁰ ICT Rules of Procedure, *supra* note 10, Rule 33.

²¹ *Ibid.*, Rule 33(3).

Rules also provide for the release of the accused person, if investigation is not completed within a specified time.²²

13.11. Rights of the Accused during Interrogation

Through its framework and practice, the ICTA framework has sought to provide for various rights of the accused person during the investigation process. These aim to protect the accused by preventing coercion, torture, *et cetera*. The Tribunal has adopted a number of practices to enhance protections afforded to accused persons despite the absence of explicit rules. For example, at the time of writing, the Tribunal has ensured that at the time of interrogation, both defense counsel and a doctor are present in a room adjacent to that where the accused is being interrogated. The accused is permitted to consult them during breaks in the interrogation. According to the Jail Code, as and when ordered by the Tribunal, upon a request made on behalf of them, accused persons are duly allowed to meet their respective counsel(s). They have the opportunity to have privileged communication with their counsels that may last over a couple of days and for consecutive hours on each day. Their family members are also allowed to meet them, according to the Jail Code which is applicable to our prison management system.

13.12. Interlocutory Appeal

The ICTA does not provide for appeal against an interlocutory order. The absence of such a procedural rule should not be said to automatically result in a greater likelihood of injustice for the accused. The Tribunal retains the ability to intervene to correct any injustice upon viewing the process as a whole. The accused is able to raise any judicial error at the final appeal from conviction before the Appellate Division under Section 21 of the ICTA.²³ Thus, in this manner, ICTA's framework, if appreciated in a holistic manner, adequately ensures that the accused is not without any recourse, even in the absence of a specific provision for appeal against interlocutory orders. Additionally, a rule has been embodied authorising the Tribunal to review its order on request of either party or its own motion.²⁴

²² *Ibid.*, Rule 9(5).

²³ ICTA, *supra* note 1, Section 21(1).

²⁴ ICT Rules of Procedure, *supra* note 10, Rule 26(3).

13.13. Act of 1973 and the Rules of Procedure: The Key Rights of Defence and Witnesses/Victims

Pursuant to Section 22 of the ICTA, the Tribunal has formulated its own Rules of Procedure.²⁵ These Rules and its subsequent amendments implement significant changes aimed at ensuring the highest degree of defence rights and fair trial. Despite any explicit provision relating to witness and victim support measure in the ICTA, the Rules set out provisions aimed at ensuring the protection, privacy, and well-being of the witnesses and/or victims.²⁶

The Rules explicitly set out a number of provisions aimed at preserving the accused person's interests. Taken as a whole, they aim to prevent the arbitrary arrest or detention of an accused; any prosecution on a frivolous charge; coercion, duress or threat of any kind; and self-incrimination through confession. Further, a failure to prove an *alibi* itself will not *ipso facto* prove the guilt. Additionally, the accused is recognised to have the following rights:

- the right to examine witnesses (Section 10(1));
- the right to an interpreter (Section 10(3));
- the right to expeditious trial (Section 11(3));
- the right to have counsel engaged at the expense of the government (Section 12);
- the right to remain free from compulsion in making confession (Section 14(2));
- the right to inspect documents (Section 16(2));
- the right to conduct his own defence (Section 17(2));
- the right to cross-examine prosecution witnesses (Section 17(3));
- the right to appeal (Section 21(1)).

13.14. Witness and Victim Support Measures

As mentioned above, the main statute remains silent on the aspect of witness and victim protection measures. But, undeniably, the protection and

²⁵ *Ibid.*, Section 22.

²⁶ ICT Rules of Procedure, *supra* note 10, Chapter VI(A).

cooperation of victims and witnesses is essential for fair and successful prosecutions; yet in post-conflict situations, individuals very often do not want to cooperate out of fear. Providing witness protection is therefore both an expedient for law enforcement as well as a fundamental legal obligation. However, the Rules introduce significant provisions regarding witness and victim protection. The amendment says,

The Tribunal on its own initiative, or on the application of either party, may pass necessary order directing the authorities concerned of the government to ensure protection, privacy and well-being of the witnesses and/or victims. This process will be confidential and the other side will not be notified.²⁷

The government shall arrange for the accommodation of witness(es) victim(s), if so paid for, and ensure their security and surveillance during their stay as directed by the Tribunal. Witnesses and victims shall also be escorted to the courtroom by the members of the law enforcement agencies. Additionally, the government has taken initiatives to enact legislation in this regard.

In the case of holding proceedings *in camera* under Section 10(4) of the Act, both the prosecution and the defence counsel are required to respect the confidentiality of the proceedings, and shall not reveal any information arising out of such proceedings, including the identity of the witness concerned.²⁸ Any violation of such undertaking shall be prosecuted under Section 11(4) of the Act.²⁹

13.15. Procedural Fairness

Yes, there can be no disagreement that the entire trial process is to be done by maintaining acceptable and settled procedural fairness and by affording fundamental rights of defence. What is procedural fairness? Fairness should not be a bull in a china shop or a bee in one's bonnet. In essence, fairness aims for a good conscience in a given situation, nothing more but nothing less. A fundamental element of procedural fairness is the principle of equality of arms. It means that a person must be afforded a reasonable opportunity of presenting his case to a court under conditions

²⁷ *Ibid.*, Rule 58(A)(1).

²⁸ ICTA, *supra* note 1, Section 10(4).

²⁹ *Ibid.*, Section 11(4).

which do not place him at a substantial disadvantage in relation to his opponent. The ICTA and the Rules of Procedure aim to achieve this by setting out key safeguards of the accused person.

Procedural fairness, as we see in the ICT-BD, covers the key and fundamental safeguards to the accused person before the Tribunal, including adequate time to prepare his defence and that he shall be presumed innocent until found guilty. Procedural fairness as recognised by the ICT-BD covers many rights of the accused which shall appear to be quite compatible with international human rights law, *id est*, the right to know of the offense charged, the right to trial within a reasonable time, and the right to safeguards against double jeopardy. All these fundamental rights, as already said, have been duly guaranteed by the ICTA and the Rules as well. The rights of the defence and the procedure set out in the Act of 1973 and the Rules of Procedure are manifestations of the due process of law and fair trial which make the legislation of 1973 jurisprudentially resonant.

It would be relevant to reiterate that the International Bar Association ('IBA') Committee, in a report, is of the opinion that the "1973 Legislation, together with the 2009 amending text, provides a system which is broadly compatible with current international standard".³⁰ It is to be borne in mind too that every war crimes trial is unique and different. A procedural standard followed in one may or may not be worthy of adoption in another. Lessons from contemporary war crimes trials suggest that procedural aspects are usually tailored to suit the specific circumstances of a given trial, and it is an evolving process. Finally, I would like to add that the mere incorporation of provisions either in the legislation or in the Rules does not ensure the maintaining standards and fairness of the trial process. The implementation of provisions contained therein has to be maintained by the acumen of the judges based on settled judicial norms and rational logic which shall appear to be globally compatible.

³⁰ IBA, "Full Opinion of the International Bar Association: International Bar Association, War Crimes Committee to the United Kingdom Parliament Human Rights Group", 29 December 2009, Conference on the Legality of the International Crimes (Tribunals) Act 1973, organised by the National Forum for Protection of Human Rights, 16 April 2010.

13.16. Conclusion

The Convention on the Prevention and Punishment of the Crimes of Genocide 1948 has defined an international crime, and spelled out obligations upon State Parties in terms of prosecution. It is thus significant to observe that the demand of trying the war crimes of the 1971 Independence War has received impetus in recent time.

War victims need justice to heal. Bangladesh considers that the right to remedy should also belong to victims of war crimes. The State has an obligation to remedy serious human rights violations. Bangladesh recognises Article 8 of the Universal Declaration of Human Rights and Article 2(3) of the International Covenant of Civil and Political Rights which ensure the right to an effective remedy for the violation of human rights.

The consistency between the crimes as described in the 1973 ICTA and international law would enable the ICT-BD to draw upon the steady stream of jurisprudence and judicial precedents of international criminal law in conducting its trial. While speaking at a workshop Sang-Hyun Song, the ICC President said, the “judicial system and legal experts of Bangladesh are adequate with considerable competence and knowledge to deal with the war crimes of 1971”.

To conclude, I sincerely hope that the result of this anthology will be the furthering of our fruitful interactions and thought provoking discussions with the distinguished judges and experts so as to benefit from their knowledge and wisdom through the exchange of ideas. I take the opportunity of thanking the Honourable Judges of the ICT-BD who have shown generosity allowing me to participate in these activities. Once again I extend my heartfelt thanks to the distinguished authors of this anthology.

Bangladesh's Attempts to Achieve Post-war (or Transitional?) Justice in Accordance with International Legal Standards

Otto Triffterer*

When Professor Suzannah Linton planned to comment on the International Crimes (Tribunals) Act of 1973 ('Act 1973') in a Special Issue of the Criminal Law Forum, she asked me to report on my contact with those persons who at that time drafted this law. Due to other prior commitments, I was not able to present the paper on time, which was to deal with the period from 1971 to 2009, the year in which the 1973 Act was amended.

Meanwhile, the Criminal Law Forum published its Special Issue on the topic of "Bangladesh and the Prosecution of International Crimes from the 1971 War of Independence from Pakistan". But as the establishment and execution of post-war justice always encounters and needs to overcome great political and legal difficulties, I have been asked to make the work I have done from the early 1970s available to readers, and point out the situation and preconditions facing the drafters of the Act 1973 in the early 1970s until this Act was revised in 2009. My contribution should illuminate the situation that Bangladesh was then in during the early 1970s and where it has been in since 2009 when it amended the Act 1973.

This review is not only desirable, but it seems also indispensable, since the above-mentioned Special Issue mentioned that: "[...] in Dhaka, one is repeatedly told that this 37 year old law was, at its time of adoption, the world's only such legislation and that it was progressive and cutting-edge".¹

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¹ Suzannah Linton, "Completing the Circle", in *Criminal Law Forum*, 2010, vol. 21, p. 207.

Also, since there is national opinion in Dhaka that this law has “withstood the test of time and does not need substantial amendment”,² with reference being made to Professor Hans-Heinrich Jescheck and myself in this context, I feel obliged to explain the nature and extent of our commitment at that time and developments thereafter, which is mentioned in the Special Issue.

However, I will only report on the general background existing at that time, and how far it is from the situation as commonly reported today, though the difference identified may only be of a nuance. It is for instance true that the Bangladesh Draft 1973, to the best of my knowledge, was the “world’s only such legislation”, but the conclusion that it was “progressive and cutting-edge” requires it to be assessed, for example, against the 1970 Draft of the Foundation for the Establishment for an International Criminal Court, the Wingspread Draft. Not only was this available in Bangladesh, but one national of Bangladesh had also participated in the elaboration and adoption of this Draft Statute.³

14.1. Introduction

At the end of 2009, the organisers of the Special Issue of the Criminal Law Forum on Bangladesh asked me to report on my meetings with members of the Bangladeshi community in the beginning of the 1970s. I had then been consulted on plans to prosecute crimes under international law at the national level, mainly those listed in the Nuremberg Charter when committed in context with the separation movement.⁴

The organisers also wanted to know, whether and to what extent, the Act 1973 had pushed forward the idea of an international criminal court and, directly or indirectly, influenced the Rome Conference and the Rome Statute, as recently asserted in the discussion about the revitalisation of this Act after it had been amended in 2009.⁵

² *Ibid.*, 208.

³ See R.K. Woetzel, “Wingspread Draft of 1971”, in *Foundation for the Establishment of an International Criminal Court – A Report on the First and Second International Criminal Law Conferences*, 1973.

⁴ The core crimes from Nuremberg are genocide, at that time included and later separated from the crimes against humanity, war crimes as well as aggression. See Nuremberg Statute, Article 6.

⁵ The International Crimes (Tribunals) Act 1973 can be found online under http://bdlaws.minlaw.gov.bd/pdf_part.php?id=435, last accessed on 9 October 2012.

I accepted both tasks, however, with the following expressed reservations:

Relevant publications about Bangladesh mention my name together with Professor Hans-Heinrich Jescheck, who was at that time the Director of the Max Planck Institute for Foreign and International Criminal Law in Freiburg, Germany. This reference, as formulated, could give rise to the impression that the two of us had always been consulted together and only at the Max Planck Institute.⁶ A more accurate representation is that we were in permanent close contact, but had also been consulted separately; I, for instance, in Geneva, where the President of the International Commission of Jurists organised one of the first meetings on Bangladesh.⁷

After Professor Jescheck passed away in September 2009, I had our separate files checked. However, it was as expected: no written protocol or other paper-trail was to be found about our discussions with persons from Bangladesh or about the agreements or consensus that we had achieved. Therefore, I only can speak for myself and to the best of my memory. But I can assure you that Professor Jescheck and I gladly accepted the Bangladesh plans to establish an 'International Crimes Tribu-

⁶ See for instance W. Rahman, "A Brief History of the Framing of the International Crimes (Tribunals) Act, 1973 incorporated in the constitution as Genocide Act", 2009, p. 37 *et seq.*

⁷ I was for this institution and several others in these years engaged as international observer for the protection of Human Rights, in particular in cases before military courts, several times in Athens under the regime of the junta, where Prof. Jescheck also was giving evidence as "Leumundszeuge" for our colleague, Prof. Georgios Mangakis, in Turkey, Namibia, South Africa and South Korea. For my mission in South Korea see O. Triffterer, *South Korea, Human Rights in the Emerging Politics. Report of a Mission* (together with Oxman and Cruz), International Commission of Jurists, 1987, Chapter II, The Right of Physical Integrity, pp. 28–56; Chapter III, Right to a Fair Trial, pp. 58–63; Chapter IV, Political and Civil Rights – The Situation in Universities and the Protest of 800 Professors, pp. 70–73; Conclusions and Recommendations, pp. 89–95. After several years at the Max Planck Institute, I had full time teaching and research commitments at the universities of Freiburg, Kiel, Bielefeld and Gießen, before I accepted my final position in Salzburg. However, all the time I stayed for a part time job with the Max Planck Institute and in addition I was working with Prof. Jescheck on research projects of international criminal law and its jurisdiction. See, for instance, Hans-Heinrich Jescheck, "Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht", 1952, where he started on this field and my "Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit", Nürnberg, 1966, where I continued part of this work after I had been for a few years already at the Max Planck Institute.

nal' in line with the Nuremberg laws. We strongly supported the idea and agreed to many of the proposals presented to us, for instance the jurisdiction of the tribunal over "any other crime under international law". We also pointed out our opposition to the death penalty as well our support for the provision of a possibility for appeal and revision.

Against this background and without any reliable documentation, my mere report about being consulted on some specific questions would have had a very limited value in the above-mentioned Special Issue and here. I therefore also describe the historical background and context of the international legal situation as it existed at that time. What was the state of international criminal law when we were consulted? What were, as far as Professor Jescheck and I got to know, the intention and purposes of the endeavours of those who got into contact with us? The handling of the last question further requires me to present here the guidelines that we had when analysing, supporting, or disapproving certain proposals to achieve post-war justice in Bangladesh.⁸

In Sections 14.2. and 14.3., I will deal with the principles which had to be respected at that time by those intending to prosecute crimes directly punishable under international law, and by enforcement mechanisms inherent to the international community as a whole. Are the first endeavours of Bangladesh in accordance with these and other international legal standards? The step of recalling past atrocities committed in 1971 on the territory of Bangladesh and subsuming them within the at that time applicable international law could in particular help us to understand the amendment of the Act 1973 in 2009 and its execution in 2010 until now. However, due to the space available, I can only summarise what I have experienced as well as the background against which it has to be understood.⁹

⁸ See for instance Jescheck, *ibid.*; Jescheck, "Die Entwicklung des Völkerstrafrechts nach Nürnberg", in *Schweizer Zeitschrift für Strafrecht*, 1957; see also O. Triffterer, *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit* (hereinafter 'Untersuchungen'), Nürnberg, 1966; and Triffterer, "Jurisdiction over States for the Crimes of State", in M.C. Bassiouni and V. Nanda (eds.), *A Treatise on International Criminal Law*, Charles C. Thomas, 1973, p. 86.

⁹ See for instance, "Special Issue Bangladesh and the Prosecution of International Crimes from the 1971 War of Independence from Pakistan", in *Criminal Law Forum*, 2010, vol. 21, no. 2.

The situation is similar with regard to the second question, namely, the influence of the Act 1973 on the later development of the international legal context, in particular the Rome Statute. The facts as to who and with what arguments shaped the discussion and the Statute, and in which way this was done, are not completely documented. Nor can these facts be otherwise exactly reconstructed, not even with regard to seemingly convincing examples as the famous so-called 'Singapore Clause'.¹⁰ In Section 14.4., I therefore am able to only scrutinise the development of international criminal law after 1973 in a summary manner. Nevertheless, I will try to outline what may perhaps have shaped or at least influenced these developments and whether amendments to the Act 1973 in 2009 were adopted according to new international standards as expressed in the Rome Statute of 1998. Or is perhaps the original Act 1973 no longer in accordance with the existing *status quo*? The last part of my considerations, which briefly touch on a few of those aspects, may be helpful for the execution of the Act 1973 as amended in 2009.

The time during which international criminal law rapidly developed, in a sudden manner, through the establishment of the International Criminal Tribunal for the former Yugoslavia ('ICTY') in 1993 and the International Criminal Tribunal for Rwanda ('ICTR') in 1994, finally culminating in the Rome Statute 1998 and the creation of the permanent International Criminal Court 2002,¹¹ is of special interest in this context. Even though the first two *ad hoc* tribunals were criticised at the beginning, they surprisingly became in a few years one of the main concerns of the international community as a whole. Their influence appears now in the context with hybrid, transitional, or alternative justice as at least a small but nevertheless helpful contribution to the prevention of terrible atrocities committed during, and dominating, the numerous belligerent

¹⁰ See M. Bergsmo and J. Pejic, "Article 16 – Deferral of investigation or prosecution", in O. Triffterer (ed.), *Commentary to the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (hereinafter 'Commentary'), second edition, 2008, pp. 595–604, margin 1, *et seq.*

¹¹ We have been asked whether Prof. Jescheck and I could give some reflections on the historic process that we were involved in all the way back in 1973, but Prof. Jescheck passed away in 2009 and no protocols could be found in his inheritance.

struggles in which mainly poor civilians had to suffer much more than members of the military forces in the past decades.¹²

Without anticipating any results, we further ought to keep in mind the fact that Bangladesh decided to apply not only its ordinary criminal law. By creating and implementing the special Act of 1973, the Tribunal received a general competence for “any other crimes” directly punishable under international law, when committed on its territory independent of the nationality of the perpetrators.¹³ In this manner, the approach taken by Bangladesh refers rather broadly to the indirect enforcement model for prosecuting such crimes, even those which have no context with the separation and independence movement of this country. This is because the Act came “into force at once” and supplies jurisdiction to the Tribunal over members “of any armed, defense or auxiliary forces” who commit or have committed “such a crime” “before or after the commencement of this Act”¹⁴, as stated by Article 1, paragraph 3 in connection with Article 3, paragraphs 1 and 2.

I remember well that around 1971 and 1972, the immediate establishing of a universal international criminal court or an *ad hoc* regional tribunal in the context of Bangladesh was not seriously discussed. Only with reference to the Dutch judge Röling and other members on the International Military Tribunal for the Far East was a national hybrid solution and who would be available for this shortly considered.¹⁵ Planning to es-

¹² See therefore the various statistics for World War I, World War II and now. See “Pro and Contra”, USA, March 2009, David Tolbert and others have presented in Washington Pro and Contra of the membership in the Rome Statute and the ICC. See also “Special Issue Bangladesh and the Prosecution of International Crimes from the 1971 War of Independence from Pakistan”, in *Criminal Law Forum*, 2010, vol. 21, no. 2; and the documentation of the “Third International Criminal Law Conference Dacca”, 26–29 December 1974. According to one lost source the killed persons in World War I compared to those in the Second and later wars are many times as long for civilians as for military persons.

¹³ The International Crimes (Tribunals) Act, 1973, 20 July 1973, preamble (‘1973 Act’).

¹⁴ *Ibid.*, Article 1(3) and Articles 3(1) and (2).

¹⁵ See for instance, http://en.wikipedia.org/wiki/International_Military_Tribunal_for_the_Far_East, last accessed on 9 October 2012. For the Tokyo Trial in general see for instance, A. Cassese and B.V.A. Roling, *The Tokyo Trial and Beyond – Reflections of a Peacemaker*, Polity Press, 1994; see also O. Triffterer, “Article 27 – Irrelevance of Official Capacity” (hereinafter ‘Article 27’), in *Commentary to the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article* (hereinafter ‘*Commentary*’), second edition, 2008, pp. 779–793; and “Irrelevance of

establish post-war or transitional justice through an indirect enforcement model tailored to the special situation seemed, however, more promising than striving towards a general solution that would also address crimes committed anywhere in the context of other armed conflicts.

14.2. The Nuremberg and Tokyo Trials: Laws and Principles Shaping International Criminal Law and Its Enforcement Mechanisms

With regard to the *ad hoc* situation, attention was however given to the argument that prosecuting in Bangladesh such crimes, which were already an issue at Nuremberg and Tokyo, would confirm the existence and the theoretical structures of international criminal law as an inherent field of international law with final priority over territorial national criminal jurisdiction. It therefore is worthwhile to look back at the *status quo* in 1973 to submit whether and to what extent international standards were respected by the Act 1973, and later on by its revitalisation and amendments in 2009.

14.2.1. General Remarks

Focusing on the above briefly noted aspects, I recall that the Nuremberg and Tokyo Trials appear till the last decade of the twentieth century as the most important milestones for the future development of this rather new field. This criminal law of the international community as a whole, however, is till today not nominated by an inherently separate English expression. Rather, it is subsumed in the very comprehensive term 'international criminal law', which covers also international cooperation and mutual legal assistance in criminal matters as well as all kinds of ordinary crimes with an international approach, like terrorism or drug offences when these cross state borders.¹⁶ Though international cooperation is most important

official capacity', Article 27 Rome Statute undermined by obligations under international law or by agreements, Article 98?", in I. Buffard *et al.* (eds.), *International Law between Universalism and Fragmentation – Festschrift in Honour of Gerhard Hafner*, Brill, 2009, pp. 571–662.

¹⁶ See O. Triffterer, *Untersuchungen*, 1966, p. 25 *et seq.*, *supra* note 8. See also *ibid.*, Present Situation, Vision and Future Perspectives, in A. Eser and O. Lagodny (eds.), *Principles and Procedures for a New Transnational Criminal Law, Documentation of an International Workshop*, Max-Planck-Institut für Ausländisches und Internationales Strafrecht, 1992, pp. 369–386.

for investigating and prosecuting crimes under international law, this chapter uses the expression in the narrow sense, using it to describe the penal law of the community of nations as a whole with its inherent direct and indirect enforcement mechanisms. Its most important part is now defined in the Rome Statute and executed according to the complementarity regime, as decided by the permanent International Criminal Court.¹⁷

When we consider the *status quo* after Nuremberg and Tokyo we also have to keep in mind that the younger history of international criminal law with respect to war crimes and other related atrocities that violate the peace and security of mankind had already started to develop its decisive parts in the middle of the eighteenth century. It is expressed in the various Geneva and Hague Conventions on the laws and customs of war. This international humanitarian law shaped the field till 1949 when the four Geneva Conventions defined in a more detailed but nevertheless still summary manner this subject matter, in particular with regard to grave breaches.¹⁸

Although the theoretical basis for an individual criminal responsibility directly under international law was increasingly acknowledged in the context of World War I, even for state organs acting in official capacity,¹⁹ its practical execution failed at the end of the war. It was for the first time realised on a large scale almost thirty years after World War I at Nuremberg and Tokyo, where it was implemented by the national jurisdiction of the Allied Powers, and in several liberated countries.²⁰ This is because during the time in between the two World Wars, all relevant endeavours within the League of Nations had also failed. The two Anti-Terror Conventions of 1937, for instance, provided for an international criminal court. Its jurisdiction however depended on an explicit transfer of the *ius puniendi* and thus a part of the sovereignty of a competent state to an international court. But just this dependence of the court on the goodwill of a member state was an issue which, after World War II, led to the emphasising of the permanent and independent character for any planned international criminal court. Since this was not achievable, the original

¹⁷ See Triffterer, *Untersuchungen*, p. 25 *et seq.*, *supra* note 8.

¹⁸ See in particular the Hague Conventions 1907, numbers I–IV.

¹⁹ See Triffterer, “Article 27”, see *supra* note 15.

²⁰ For details see for instance Triffterer, “Preliminary Remarks: The Permanent International Criminal Court – Ideal and Reality” (hereinafter ‘Preliminary Remarks’), in *Commentary*, pp. 15–47, margin 2 *et seq.*, *supra* note 10.

Act 1973 installed not only the classical national jurisdiction over war crimes and those against humanity, but also over “any other crime under international law”.²¹

In addition, World War II was the biggest armed conflict ever experienced and the atrocities by number and gravity of harm reached an unimaginable extent. Preparing post-war justice was therefore already one of the major aims of the Allied Powers during the war itself, and it was correspondingly well-prepared almost all around the world. Its execution therefore came to the attention of the whole world and continued to shape the international legal situation not only for at least one decade after Nuremberg, but also until today.

This is the reason why we have to look briefly at Nuremberg and Tokyo as well as the legal developments around these trials when we scrutinise and summarise the international legal standards which existed, and were acknowledged, when Bangladesh strove for post-war justice even before it finally became a separate and independent state. Though the development of this field slowed down for a while since the mid-fifties, the influence of Nuremberg and its laws still continued to shape international criminal law till the end of the last century. It even culminated in the establishment of the ICTY, the ICTR, and finally the International Criminal Court (‘ICC’) with the adoption of the Rome Statute.²²

Before I consider the attempts of Bangladesh to achieve post-war or transitional justice by the Act 1973, as well as its amendments 2009, I therefore summarise what are the most important relevant legal standards which had to be respected when establishing responsibility according to these ‘new’ laws, independent of whether this takes place on the international and the direct level, or on the national and the indirect enforcement level.

²¹ For the Draft Code of Offences against the Peace and Security of Mankind, see Report of the ILC on the work of its Third Session, 16 May – 27 June 1951, U.N. Doc. A/1858, and for the Draft Statute for an international criminal court, see Report of the Committee on International Jurisdiction on its Session held from 1 to 31 August 1951, U.N. Doc. A/2136.

²² See for instance O. Triffterer, “The Court in danger? Future perspectives for international criminal law and its enforcement mechanisms”, in J. Vogel and C. Burchard (eds.), *The Review Conference and the Future of the ICC – Proceedings of the First AIDP Symposium for Young Penalists*, Kluwer Law International, 2010.

14.2.2. Installing Jurisdiction: International Military Tribunals and National Courts after World War II – Complementarity without Tension

The Allied Powers had repeatedly and publicly announced their intent to prosecute war criminals.²³ Correspondingly, when approaching the end of World War II, they already began, in their Moscow Declaration of 30 October 1943, to prepare the legal basis for prosecuting the crimes committed by their enemies. They first agreed that perpetrators would “be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged”.²⁴ The Allies thus intended to apply the principle of territorial jurisdiction. They trusted and relied on the national justice systems of those countries either liberated by the Allied Powers or otherwise somehow involved in the war on the side of the victors. Correspondingly the USSR for instance started before the end of World War II a national trial at Minsk against 19 suspects – 18 German and one Austrian.²⁵ However, in the Moscow Declaration, the Allied Powers expressly exempted from this national jurisdiction those persons who had allegedly committed crimes without any geographical location. These individuals should be prosecuted according to a common declaration of the Allied Powers issued later.²⁶

Three months after the German *Wehrmacht* surrendered, the Allied Powers confirmed their Moscow Declaration and put the so-called “major war criminals” under the jurisdiction of the International Military Tribunal at Nuremberg pursuant to the London Treaty of 8 August 1945.²⁷ Attached to the Treaty was the Charter for this Tribunal. But the Treaty repeated that the regulations in the Moscow Declaration with regard to other war criminals should be kept untouched, in particular the jurisdiction of national or occupational courts for these crimes according to the territorial

²³ See London Agreement of 8 August 1945, Preliminary Remarks, para. 2.

²⁴ Moscow Declaration, Joint Four-Nation Declaration, Statement on Atrocities, 30 October 1943 (hereinafter ‘Moscow Declaration’).

²⁵ See for instance H. Heer, *Der Minsker Prozess*, 1998.

²⁶ See Moscow Declaration, *supra* note 36, last paragraph, where it reads: “The above declaration is without prejudice to the case of German criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the government of the Allies”. For the Moscow Declaration see <http://www.ibiblio.org/pha/policy/1943/431000a.html>, last accessed on 9 October 2012.

²⁷ London Agreement of 8 August 1945.

principle.²⁸ The division between direct international and indirect national enforcement also appeared necessary because of the large number of suspects, who could not all be handled by one central international court.²⁹

The London Treaty thus already established a sort of concurring or complementary jurisdiction between two enforcement mechanisms. Priority should be at the national level, because according to the London Agreement as well as Control Council Law Number 10, the consent of all four Major Powers was needed to transfer a person from a national jurisdiction into the group of the major war criminals. Practically each of the four Allied Powers could by a 'veto' prevent a suspect from being prosecuted before the International Military Tribunal.³⁰

The Charter for the International Military Tribunal for the Far East ('IMTFE') almost corresponds with the Nuremberg Charter for Europe. It was adopted on 19 January 1946, thus almost in the middle of the proceedings at Nuremberg. The competence assigned to this Tribunal focused on "the just and prompt trial and punishment of the major war criminals in the far east".³¹ Its Article 5 corresponds almost verbally with Article 6 of the Nuremberg Charter, defining "the jurisdiction over persons and offenses with regard to crimes against the peace, war crimes and crimes against humanity". Each group contains a few alternatives and the

²⁸ *Ibid.*, Article 4.

²⁹ With regard to former Yugoslavia and Rwanda see for instance O. Triffterer, "Comment on: Human Rights, Genocide and the International Criminal Court" (hereinafter 'Comment on: Human Rights'), in R. Minnerath *et al.* (eds.), *Catholic Social Doctrine and Human Rights, The Proceedings of the 15th Plenary Session of the Pontifical Academy of Social Sciences*, 1–5 May 2009, Pontifical Academy of Social Sciences, 2010, pp. 431–483, 471 *et seq.*

³⁰ With regard to Europe the Moscow Declaration with its rule "to transfer alleged war criminals to the countries where they had committed their atrocities", is not touched, according to Article 4 of the Nuremberg Charter. This in fact means that national jurisdiction has priority and only as far as the governors of the four occupying zones in Germany would agree that a person could be transferred to the International Military Tribunal. In addition, each of the four signatory states should, according to Article 3 of the London Agreement, care about these major war criminals, and transfer those or try to help transferring them, if they are not in their own territory. This meant, a governor of one of the zones, who was objecting the transfer to the Military Tribunal could achieve that the alleged perpetrator remains under the criminal *ius puniendi* of his zone. In this sense, Article 6 of the London Treaty provides expressly, that the competence of national and occupational courts remains untouched.

³¹ Charter of the International Military Tribunal for the Far East, Article 1,

last states the rather vague ‘catch clause’, namely “other inhuman acts”, which later verbally appeared in the Act 1973 and later in the ICTY and the ICTR Statutes.³²

Against this background, it may be taken for sure that the vast majority of the countries in the world, including in particular Pakistan and India, were informed at that time about what happened in Nuremberg and Tokyo and at some national levels in their region. The Allied Powers tried to avoid the failures of World War I and therefore also gave publicity to the preparation of Nuremberg and the prosecution of major war criminals including the execution of their final judgments.³³

14.2.3. The Judicial Importance of the Nuremberg Principles and Judgement

As underlined at the beginning and the end of these international trials, these trials were to serve as a preventive model for all, including those Allied Powers, who would commit relevant atrocities in the future. To achieve such an effect and to address any questions regarding the legality of these Tribunals it appeared necessary that the Allied Powers already, at the planning phase, emphasised that 23 states of the at that time 48 U.N. Members agreed or consented to the prepared proceedings. Consequently, after the final judgments at Nuremberg and Tokyo, they strove to receive the confirmation of the world community as represented in the United Nations regarding the various principles applied at Nuremberg and their legal basis.³⁴

However, Nuremberg and Tokyo, although broadly corresponding, had slightly different legal foundations. The Moscow Declaration and the London Treaty, with the attached Nuremberg Charter, were signed by the governments of the four Allied Powers; the second additionally by 19 states, thus sharing out the responsibility for the Nuremberg Charter, the Tribunal, and its trials.

³² See the International Crimes (Tribunals) Act 1973, *supra* note 2, Article 3(2)(a).

³³ For the fact that Pakistan and India were informed see Japanese Instrument of Surrender, 2 September 1945, available at http://en.wikisource.org/wiki/Japanese_Instrument_of_Surrender, last accessed on 9 October 2012.

³⁴ For the reference to the 23 states agreeing to the procedure, see Rahman, *supra* note 6, p. 39; and H. Kelsen, *Collective Security Under International Law*, third edition, The Law Book Exchange, 2001.

Such an act of solidarity could not be observed with regard to the Charter for the Far East. The IMTFE was not established by an official treaty including regulations for the Tribunal, but by a military order, issued and executed by the Supreme Commander of the Allied Powers in this region. It therefore was understandable that all endeavours to achieve an international confirmation for the post-war justice started under the name of the 'Nuremberg Principles'. However, all relevant documents right from the beginning expressly mentioned their comparability with those principles expressed in the Tokyo Charter and trial; they almost verbally correspond. Not only did the crimes to be prosecuted correspond, but also the relevant procedures to be applied were very similar.³⁵ Nevertheless the Tribunal for the Far East did not receive the same attention and authority beyond the Asiatic continent as the Nuremberg Military Tribunal did for Europe and the whole world.

A further reason for this differentiation was that the Far East Tribunal openly demonstrated military occupational power, while the Nuremberg Tribunal tried to raise the impression of being established and conducted by a largely accepted international treaty. For the Far East, other states on the side of the victors were not equal partners.³⁶

It therefore is not surprising that the confirmation and acknowledgement by the Allied Powers and the U.N. concentrated on Nuremberg,³⁷ with merely a short reference to the post-war justice in Tokyo. Anyhow, the Tokyo Trials can be seen as the first confirmation of the Nuremberg principles.

Consequently, only four months after the Nuremberg verdicts were executed, the General Assembly of the U.N. unanimously confirmed, on 11 December 1946, by Resolution 95(I), the Principles of International

³⁵ See Charter for the International Military Tribunal, Art. 16, and International Military Tribunal for the Far East Charter, Article 9.

³⁶ They had only the right "to assist" the Chief Council, for instance, by nominating judges from states "with which Japan has been at war"; Judge Röling from the Netherlands was one of these "proposals", as already mentioned above.

³⁷ The 19 states expressly joining the London Treaty either supported the Allied Powers while at war and thus the Military Tribunal or belonged to those states occupied by the Nazi regime. Article 6 of the London Agreement is applicable to their national courts or occupational tribunals, "established or to be established in any allied territory or in Germany for the trial of war criminals".

Law “recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal”.

This generalising acknowledgment contains no details with regard to any single principle. But it backs the altogether 23 states out of 48 members of the U.N. that expressly accepted the “Nuremberg Laws” and thus were “engaged” in the international post war transitional justice after the Second World War.

When dealing with the Nuremberg Principles for the first time, the General Assembly neither nominated them separately nor defined any single one in detail. The Resolution expressly notes the obligation of the General Assembly laid upon it by Article 13, paragraph 1, sub-paragraph (a) of the Charter of the United Nations to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification. Correspondingly the General Assembly directed its Special Committee:

[...] to treat as a matter of primary importance plans for the formulation in the context of a general qualification of offences against the peace and security of mankind or of an International Criminal Code.³⁸

In fulfilling this task, the International Law Commission (‘ILC’) emphasised that its mandate was to merely “formulate the principles”. When considering “whether or not the Commission should ascertain to what extent the principles contained in the Charter and the judgment constitute principles of international law”,³⁹ the ILC came to the conclusion that:

[...] since the Nuremberg principles had been affirmed by the General Assembly, the task entrusted to the Commission [...] was not to express any appreciation of these principles as binding international law but merely to formulate them.⁴⁰

³⁸ General Assembly Res. 94/I, 11 December 1946, available at <http://www.un.org/documents/ga/res/1/ares1.htm>, last accessed on 9 October 2012.

³⁹ See “Report of the International Law Commission Covering its Second Session, 5 June – 29 July 1950, Formulation of the Nürnberg Principles”, in *American Journal of International Law*, Supplement of Documents, 1950, vol. 44, p. 125.

⁴⁰ *Ibid.*, p. 125 *et seq.*

In this sense, the principles were comprehensively defined by the ILC and its Report 1950 comments on their scope and notion.⁴¹ They emphasise merely the substantive law aspect and not the question of jurisdiction. It further has to be noted that the first detailed Principles were presented after the Genocide Convention and the four Geneva Conventions had already been adopted in 1948 and 1949 respectively and, therefore, a few of these principles supersede some of the new formulations contained in these documents.

Accepted, acknowledged, ascertained, and confirmed by the ILC are seven already existing principles. They deal with major aspects of the general part of the (new) international criminal law: individual criminal responsibility and liability for punishment, irrelevance of impunity under internal law even when acting as Head of State, responsible government official or “pursuant to order of his Government or of a superior [...], provided a moral choice was in fact possible to him”.

Only one procedural principle, No. 5, guarantees “the right to a fair trial on the facts and the law”. But for more details the Nuremberg Rules of Procedure are relevant.⁴² Rule 2, for instance, emphasises the right to assistance of counsel.

Principle 6 lists “as crimes under international law” those falling within the jurisdiction of the Nuremberg Tribunal: these were crimes against peace, crimes against humanity, and war crimes. The enumeration of several alternatives for each of these three groups corresponds with those in the Nuremberg Charter, which has been broadly copied also by the Charter of the Far East and the Control Council Law No. 10. War crimes, for instance, are in these documents everywhere defined with reference to other legal sources, like “violations of laws or customs of war which include but are not limited to murder”, *et cetera*.

In particular, this principle demonstrates that not only the Nuremberg jurisdiction but also its substantial basis, the Nuremberg laws, were confirmed and accepted. This is even true with regard to additional

⁴¹ See therefore “Formulation of the principles of international law recognised in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal: Report by Mr. Spiropoulos”, in *Yearbook of the International Law Commission*, 1950, vol. I, p. 59 *et seq.*, available at <http://untreaty.un.org/ilc/publications/yearbooks/1950.htm>, last accessed on 9 October 2012.

⁴² See for instance Charter of the International Military Tribunal, Article 13.

crimes, not listed or nominated in the referring law, but the definition of which is established by other laws or customs of war.

Furthermore, all these documents have in common the fact that their definition of crimes against humanity contained the already mentioned ‘catch clause’: “other inhuman acts”, without any specification; and “persecution on political, racial or religious grounds” was equally stated without describing such acts listed as a crime “when such acts are done or such persecutions are carried on in the execution of or in connection with any crime against peace or any war crime”.⁴³

The last principle, Principle 7, defines only complicity; all other appearances of participation, like superior responsibility, seemed to be either self-evident or too complicated at that time to define an agreement on their scope and notion in a code. However, with regard to crimes against the peace, various alternatives like planning, initiating, preparing, or waging a war, were already expressly mentioned when defining aggression in Article 6 of the Nuremberg Charter. But when formulating the corresponding Principle 6, the ILC discussed some divergent opinions on a few of the alternatives.⁴⁴

Therefore, to anticipate one aspect, the Bangladesh Act of 1973, though issued approximately 20 years later and after entrance into force of the Genocide Convention, repeats the catch clause “other inhumane acts” and persecution on political grounds even though a political group is not an alternative in the Genocide Convention.⁴⁵ During the drafting process political as well as cultural and social groups appeared too difficult to be defined and not sufficiently clearly construed to serve as a material element of this crime. But since Article 3 paragraph 2 supplies the Tribunal with jurisdiction over “any other crime under international law”, the Bangladesh Tribunal exercises and thus substitutes the jurisdiction of the international community as a whole, thus applying the law by the indirect enforcement model. The Tribunal cannot create such crimes but can pros-

⁴³ See Charter for the International Military Tribunal, Article 6(c); Charter for the International Military Tribunal for the Far East, Article 5(c); Control Council Law No. 10, Article 2(1)(c).

⁴⁴ See “Report of the International Law Commission covering its Second Session”, 5 June – 29 July 1950, U.N. Doc. A/1316, in *Yearbook of the International Law Commission*, 1950, vol. II, pp. 364–385, 376 *et seq.*, available at http://untreaty.un.org/ilc/documentation/english/a_cn4_34.pdf, last accessed on 9 October 2012.

⁴⁵ International Crimes (Tribunals) Act 1973, Article 3(2)(c).

ecute those which are anyhow punishable directly under customary international law.⁴⁶

In addition, what counts for this chapter are not such differences, rather what is decisive is the conformity of the Act of 1973 with Nuremberg and later international standards or whether divergences were planned and appear admissible for convincing reasons.⁴⁷ For instance, persecution for political reasons was an issue after World War II because the Nazi regime had persecuted its political opponents before and during the war in order to destroy their political power. Such persecution also quite often appeared later in struggles for separation and independence. It was and still is typically committed in an open way to demonstrate political power; it therefore needs suppression and prosecution in order to prevent the political 'success' of such unlawful, illegal measures and the frightening of political opponents with serious violations of their human rights.

On the other side, false complaints about alleged persecutions could also be abused for political purposes to promote discrimination and thus prevent conflict resolution by reconciliation. It therefore has to be decided by each legal system or the competent court whether, and if, what kind of persecution for political reasons is a separate crime or should be punishable only when falling under criminal appearances which anyhow fulfill the material and mental elements of an ordinary crime like coercion. When Bangladesh adopted the 1973 Act it was up to the discretion of its legislative body to include persecution as genocide. However, it could not claim that it would be genocide according to the Convention because it was rather a broadening alternative that went beyond its international scope and notion. It therefore was disputed whether such a proceeding did need the high procedural international rules independent of whether such crimes are properly prosecuted by national courts. But perhaps, when neglecting such rules, Bangladesh takes the risk of deviating from generally accepted international procedural standards.⁴⁸

⁴⁶ See International Crimes (Tribunals) Act 1973, Article 3(2)(f).

⁴⁷ This later development is summarised in later sections.

⁴⁸ See for instance O. Triffterer, "Comment on Krzysztof Skubiszewski, Human Rights, Genocide and the International Criminal Court", in Minnerath, *Catholic Social Doctrine and Human Rights*, 2009, *supra* note 29, pp. 431–483; and O. Triffterer, "The object of Review Mechanisms: Statutes' Provisions, Elements of Crimes and Rules of Procedure and Evidence", in R. Bellelli (ed.), *International Criminal Justice – Law*

14.2.4. Minimum Consent Confirming and Creating International Criminal Law

Considerations about the detailed definitions of the Nuremberg Principles, either in the context of the general task to define crimes under international law or to be included into the Draft Code, intensified the discussion about what alternatives of which crimes were generally acknowledged, what formulations best expressed the existing law, and how their application could be improved.⁴⁹ Again, though “persecutions on political, racial or religious grounds” was listed several times in international documents, these three groups could not easily be sufficiently precisely described. Therefore, when searching for the unanimous acceptance of the Nuremberg Principles, decision-makers favoured alternatives which had been experienced during the Holocaust. This terrible, cruel, and so far unimaginable criminal behaviour should not merely fall under the ‘catch clause’ in Article 6 of the Nuremberg Charter, which does not fulfill the requirements of *nullum crime sine lege*⁵⁰, but should be separately prosecuted like attacks on members of racial or ethnic groups.

In addition it appeared desirable to describe by material and mental elements beyond the formulations already contained in the Nuremberg Principles those alternatives of a terrible praxis in the past which by all means had to be prevented in the future. The search for the common minimum requirements to be established as guarantees under positive law therefore shaped, as a side effect, the endeavours to formulate Nuremberg Principles in the late 1940s and the early 1950s.

In this situation the discussion also focused on crimes against the peace. Their definition in the Nuremberg Charter contains only four alternatives. In the second Draft Code, however, nine alternatives were already proposed, including economic and political aggression. The scope and notion of all these crimes were however so highly disputed, and thus beyond

and Practice from the Rome Statute to Its Review, Ashgate Publishing, 2010, pp. 355–382.

⁴⁹ All corresponding documents except Control Council Law No. 10 require a context with one of the other two groups as a material element to be established.

⁵⁰ See for this requirement for instance Triffterer, *Untersuchungen*, p. 92 *et seq.*, see *supra* note 8.

an acceptable agreement and description, that even when limited to the four Nuremberg alternatives, no consensus appeared to be achievable.⁵¹

But, as already mentioned, shortly after World War II, the Commission's intent was not only to formulate the Nuremberg Principles. It also aimed beyond its assigned task to improve them as far as possible through positive international law. In this regard, two particular effective endeavours have to be recalled.

14.2.4.1. The Genocide Convention 1948

With regard to “other inhumane acts” and persecution for political or social reasons, the task to clarify and fix a broad consensus appeared rather easy. Everybody was more or less unsatisfied about the two alternatives just mentioned. In particular, certain observed acts and appearances of criminological behaviour, like the enforced disappearances of opposition politicians, were difficult to be subsumed under not precisely defined alternatives, even though they characterised the criminal behaviour of the Nazi regime, for instance during the Holocaust. It therefore was demanded to shape and characterise these alternatives by additional elements, either to narrow their applicability and thus define them more precisely, or to explain aspects common to all these appearances by a material or mental element. What was decisive was to catch all grave violations of basic human rights, which appeared at Nuremberg as criminal according to the prevailing opinion and values of the international community as a whole, and which because of an abuse of power by perpetrators acting in official capacity could typically not be dealt with properly by the relevant national jurisdiction.⁵²

The first challenge for managing this task was to break the traditional link between persecution and war crimes or crimes against humanity. It appeared preferable to take what Lempkin called ‘genocide’, because of its gravity as an independent crime under international law, and add to it a few already experienced alternatives. Second was to list behaviours which should because of its gravity of harm constitute ‘comparable’ genocide and which might otherwise not be caught under the notion of crimes against humanity, like “deliberately inflicting on the group condi-

⁵¹ See ILC Report 1988, pp. 57–65, available at http://untreaty.un.org/ilc/documenta/tion/english/A_43_10.pdf, last accessed on 9 October 2012.

⁵² See Triffterer, Preliminary Remarks, see *supra* note 20, margin 25 *et seq.*

tions, calculated to bring about” threats to life, “imposing measures intended to prevent births”, or “forcibly transferring children from the group to another group”.

Since all these alternatives were characterised by an attack on individuals as members of a protected group, it was further agreed that these crimes should be decisively shaped by a convincing overall element. Because more material elements might too easily cause a deviation from prevailing objective appearances, without describing greater harm or personal guilt, a mental element was chosen: “acting with intent to destroy, in whole or in part” a protected group as such. This characterising intent does not have to cause any additional consequence. This is because even when the wilful act does not cause the intended consequence required, the perpetrator has committed a completed genocide.⁵³

Consensus could be further achieved on protecting national, ethnical, racial, and religious groups with an additional shelter by international criminal law. With regard to political, cultural and social groups, however, no majority could be reached although the first was included in the crimes listed in the Nuremberg and Tokyo Charters, as well as in Control Council Law Number 10, and consequently the acknowledged Nuremberg Principles. Nevertheless, the three groups are difficult to be defined as “strictly construed”. In addition, membership can be changed more easily as compared to the remaining groups where typically it exists for lifetime, like ethnical or racial affiliation.

In addition and beyond the framework of the Nuremberg Principles, participation as well as attempt were defined and also a unique modality, namely, “direct and public incitement”, even if the agitator was not successful in the sense of inspiring others to commit genocide. Acting in an official capacity was expressly mentioned as in no case exempting one from criminal responsibility under international law.⁵⁴

In Article 6, prosecution according to the territorial principle was established, and in addition ruled that genocide could be prosecuted “by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”. This theoretical structure promotes another approach as compared to that taken

⁵³ See for instance W.A. Schabas, “Article 6 – Genocide”, in Triffterer, *Commentary*, see *supra* note 10, pp. 143–157, margin 9 *et seq.*

⁵⁴ *Ibid.*, margin 14, *et seq.*

towards terrorism in the League of Nations: it is not the transfer of a part of state sovereignty, of its *ius puniendi*, that empowers the Court with jurisdiction. The basis for establishment of an international criminal court is the inherent jurisdiction of the international community as a whole. This *ius puniendi* only needs to be accepted by the member states in order to have the Court function as organ of the community of nations.⁵⁵

Though this was all broadly agreed upon, when later summarising the present situation, I will demonstrate that a few questions are still open. Still disputed is, for instance, whether there is a higher degree required for the intent to destroy the group as such in whole or in part. Does the wording demand or prohibit such a qualification for the mental element? Is it up to the Court to decide in relevant cases?⁵⁶

In addition, is the ordinary mental element concerning the *actus reus* to be established separately from the second mental element, the genocidal intent to destroy the group, or are both aspects comprehended by one genocidal intent? Whatever interpretation is preferable, the intent or part of it for the act and the '*erweiterter Vorsatz*' (extended intent) must have an equal degree: because equal words must be interpreted in the same way. And since for the mental side obviously nothing else is required than the ordinary intent in the sense of Article 30 of the Rome Statute and no convincing argument can be found that for the extended intent a higher degree should be demanded, *dolus eventualis* is sufficient for both aspects.

For our following considerations we therefore have to keep in mind that the definition of genocide in the Convention of 1948 specifies, amends, and separates two alternatives of the Nuremberg crimes against humanity, namely, "other inhuman acts" and "persecution". In addition, the Convention refers to an international criminal court with the inherent jurisdiction of the community of nations. All these regulations have resisted quite a few attempts to narrow, broaden, or otherwise change the original scope and notion – it has remained till today as it was in 1948 – and this seems to be a satisfying solution because it makes this crime on

⁵⁵ See Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III)(A), 9 December 1948, Article 6.

⁵⁶ See for instance O. Triffterer, "Genocide, its particular intent to destroy in whole or in part the Group as such", (hereinafter 'Genocide'), in *Leiden Journal of International Criminal Law*, 2001, vol. 14, pp. 399–408.

the material side more narrow, not only by excluding political, cultural and social groups, but also by describing the different variations precisely, and thus advancing the application, support and promotion of the rule of law.

It thus further contributes to the protection of individuals and certain groups equally and to the prevention of such crimes by a highly structured mental element: the genocidal intent, which justifies the punishment of an attack on a single member of a group as a completed crime on the group, even if the consequence intended, to destroy the group, was not realised with respect to the group as such.

This theoretical structure is independent of whether *dolus eventualis* is sufficient for the second mental element or *dolus directus* first degree, ('*Absicht*'), is required.⁵⁷ Since States are free to prosecute and punish more, for instance, the persecution of members of a political group as genocide, they then have to apply national law and not prosecute the crime under international law. The other way around is more difficult, namely to acquit because the perpetrator had not the qualified second mental element but only *dolus eventualis* in so far. It then is up to the Court to decide whether that state applied the Rome Statute properly.⁵⁸

14.2.4.2. The Four Geneva Conventions 1949

A broad common opinion existed for a long time also with regard to the laws and customs of war. Even though war crimes were referred to in several Geneva and Hague Conventions in force, the penalty of those crimes depended in a large scale on the additional laws or customs of war existing in domestic legal systems. Consequently, the scope and notion of these crimes were at Nuremberg and even thereafter widely disputed.⁵⁹

⁵⁷ See for instance Schabas, "Article 6 – Genocide", see *supra* note 53, margin 7 and 8. See also Triffterer, *Genocide*, *ibid.* See also K. Ambos, who presents in this context a new approach, differentiating according to whether the perpetrator is a leading person or not; at the second case he needs only to be aware of the genocidal context, in particular in cases of participation but also in cases of commanders responsibility; K. Ambos, "What does 'intent to destroy' in genocide mean?", in *International Review of the Red Cross*, 2009, vol. 91, no. 876, pp. 1–26.

⁵⁸ See Triffterer, "Comment on: Human Rights", see *supra* note 29, p. 479.

⁵⁹ See for instance R.K. Woetzel, "Toward a World Code of Criminal Justice", in *Third International Criminal Law Conference Dacca*, 26–29 December 1974, pp. 11–29.

Very early on, the International Committee of the Red Cross contributed again to the discussion by looking for a common basis to clarify all these humanitarian laws to the extent that could be agreed upon. In particular those violations which ought to be punishable directly under international criminal law and prosecuted by a direct enforcement model was to be listed and defined.

For many years the International Committee of the Red Cross has permanently considered a greater and better protection of individuals against the hardship of war. The experiences gained during World War II not only helped to trigger more humanitarian activities, but also to accomplish more and better protection by criminal measures to prevent future violations. Continuous meetings during and directly after World War II tried to collect, analyse, and structure what seemed to be necessary to make at least future wars more humane. The Conventions “for the Amelioration of the Condition of the Wounded in Armies in the field” and “for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea”, Numbers 1 and 2, are followed by Number 3, “relative to the Treatment of Prisoners of War” and Number 4 “relative to the Protection of Civilian Persons in Time of War”. India and Pakistan, for instance, were participating with delegations in the signing of the Final Act already at the closing session for these four Conventions and were therefore were familiar with what happened at Nuremberg and Tokyo.⁶⁰

The history of the various conventions demonstrates an up and down not only due to an adaptation of these regulations to the conditions of modern technological warfare. Though at the beginning there was no dispute about fundamental principles, in particular about direct individual criminal responsibility, repressing the breaches of the conventions by a direct enforcement model became more and more an issue. Now penal provisions are contained in all four conventions, emphasising individual criminal responsibility besides territorial responsibility for the effective enforcement of the Conventions. However these new regulations do not substitute those in earlier conventions; rather, they amend them. This is the reason why quite a few documents refer to the laws and customs of war or use the formulation “which include but are not limited to”.

⁶⁰ See for instance International Committee of the Red Cross, The Geneva Conventions of 12 August 1949, Preliminary Remarks therein.

In all four Geneva Conventions, the first of the relevant articles establishes and confirms individual criminal responsibility and provides penal sanctions for committing and ordering grave breaches. These regulations presuppose that there already exists such a responsibility and the High Contracting Parties are merely obliged to enforce these rules. In particular, they have to issue the necessary legislation to guarantee their effectiveness. This means, as far as international law is anyhow part of the national legal system, no explicitly formulated transformation is necessary because effectiveness is quasi-automatically ensured.⁶¹

Although all four Conventions mention in the first relevant article that the grave breaches are defined in the following article, there are only a few alternatives listed, of which not all are strictly construed. All these articles refer to “willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health”.

With regard to prisoners of war, Convention III describes in Article 130 additional grave breaches, like compelling prisoners of war “to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention”.

The longest listing of grave breaches is contained in Article 147 in the Fourth Convention for the Protections of Civilians. It starts also with the “classical” grave breaches but adds the:

[...] unlawful deportation with hostile power or [...] taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The last quoted words demonstrate that certain military acts are only punishable when there was no military necessity for the action and the behaviour was unlawful and wanton. These two reasons for excluding criminal responsibility open a broad scale of discretion because they depend on value-judgments. But though these four Geneva Conventions were discussed at a time when the Nuremberg Principles were still being drafted and there was sufficient time to consider new aspects, more precision with regard to the mental side for such an evaluation was not to be

⁶¹ See for instance M. Bothe (ed.), *National Implementation of International Humanitarian Law: Proceedings of an International Colloquium held at Bad Homburg, 17–19 June 1988*, Brill, 1990.

achieved. Rather, it was left to the Court to decide on a case-to-case basis whether the perpetrator, to fulfill the mental side, needs not only to know the underlying facts, but also has to evaluate them correctly. The consequence of such an approach is however no protection because a mere knowledge of the fact followed by a wrong evaluation would then trigger impunity.⁶²

14.2.4.3. Promising Perspectives for an International Criminal Code and Court: Delayed by the Need to First Define Aggression

When drafting the Act of 1973, Bangladesh had to take due consideration of the Genocide Convention and the four Geneva Conventions. They represent achievements of the first five years after World War II concerning the acceptable maximum of positive substantial international criminal law. But they were not the final aim or end point; they were rather mere priorities on the way to the goal of defining all laws and customs of international criminal law in the narrow sense.

The endeavours of the International Committee of the Red Cross were for instance at that time exhausted by adopting the four Geneva Conventions as it focused on the protection of individuals against hardships of wars. *Humanitas* should prevail and be exercised, even in *per se* inhuman armed conflicts. It should be enforced by regulating and, as *ultima ratio*, by punishing violations on the national level. Only to the extent that state enforcement does not function will the international community as a whole “step in” to protect humanitarian rights.⁶³

The other focal point of development focused right from the beginning on protecting legal values by repression and prosecution through an international criminal jurisdiction. The finally prevailing purposes of this

⁶² See for instance A. Eser, “Article 31 – Grounds for excluding criminal responsibility”, in Triffterer, *Commentary*, see *supra* note 10, pp. 863–893. See also O. Triffterer, “Ius in bello: Eskalation durch, Kollateralschäden wie durch Kriegsverbrechen – Beweisbarkeit und Vermeidbarkeit”, in R. Moos *et al.* (eds.), *Strafprozessrecht im Wandel – Festschrift für Roland Miklau zum 65. Geburtstag*, Studien Verl., Innsbruck, Wien Bozen, 2006, pp. 559–584. See also Elements of crimes, General Introduction, paragraph 5, available at http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf, last accessed on 9 October 2012.

⁶³ See for instance Triffterer, Preliminary Remarks, see *supra* note 14, at margin 50 *et seq.*

would thus contribute to the prevention of future crimes. This way of creating awareness and threatening with punishment is the so-called longer or indirect way of protecting individuals and at the same time common values, in particular peace, security and the well-being of the world.⁶⁴ Even in the intermediate period of the so-called ‘Cold War’, the work on developing and improving this international criminal law continued; three additional, promising perspectives under consideration at that time can be noted as representative and therefore had to be given attention by Bangladesh during its drafting process.

First of all, there were the already mentioned Nuremberg Principles. They comprehend major aspects for a general and special part, as well as the basic rule for proceedings, in particular for a fair trial. Although the detailed formulation of the Principles was submitted to the U.N. Member States for observation, the General Assembly never considered their answers in the context of having a separate vote on the formulated Principles.⁶⁵ The General Assembly silently waited till the ILC integrated the Principles into its Draft Code of Offences against the Peace and Security of Mankind, which mirrors the Nuremberg Laws, though this formulated most of the Principles only up to a certain degree, more broadly and not in detail, as already mentioned above.⁶⁶

This Draft Code reveals not just this “falsifying” tendency but also one of the weakest points which retarded its acceptance. With regard to aggression for instance, the original four Nuremberg alternatives of planning, preparing, initiating, or waging a war were carefully questioned by putting the alternative of “waging a war” into brackets, and thus demonstrating reservations to including this alternative into the Code. Aggression was obviously anyhow one of the major concerns of the International Law Commission because when revising its first draft and thus indirectly the relevant Nuremberg Principles, the Commission included five more alternatives as crimes against the peace. This broader group contains at the end the fact that:

[...] intervention by the authorities of a State [...] by means of coercive measures of an economic or political character in

⁶⁴ See for instance Triffterer, “Comment on Krzysztof Skubiszewski, Human Rights, Genocide and the International Criminal Court”, in Minnerath, *Catholic Social Doctrine and Human Rights*, 2009, pp. 431–483, *supra* note 29.

⁶⁵ See General Assembly Res. 488(V), 12 December 1950.

⁶⁶ See above 14.2.3.

order to force its will and thereby obtain advantages of any kind.⁶⁷

However, in particular, this alternative, named “economic” or “political aggression”, raised strong objections right from the beginning. It got lost one way or the other in the intensive discussion about lawful and unlawful globalisation or was at least substituted with a weaker version. It is rather vaguely included in the Resolution 3314 when defining aggression as:

[...] the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

Political independence may be endangered by armed force or an economic blockade concerning the supply on food, necessary for the survival of a population.⁶⁸ Finally, since disagreement on questions like this was too great, the debate about the Code was interrupted and delayed till aggression had been defined and placed into the Draft Code.⁶⁹ Now that Article 8*bis* has been included into the Rome Statute, this recommendation has become obsolete. But at the time, Bangladesh had to not only take into consideration the positive defined law, but also what was customary law and that which was on the way to being defined.

The same fate, as the Draft Code, had the Draft Statute for the International Criminal Court being presented to the General Assembly by the Commission on International Criminal Jurisdiction in the early Fifties. It proposed:

[...] to try persons accused of crimes under international law, as may be provided in conventions or special agreements among states parties to the present Statute. (Article 1)

Jurisdiction could correspondingly be:

[...] conferred upon the Court by state parties to the present Statute, by convention or, with respect to a particular case,

⁶⁷ See Report of the International Law Commission Covering its sixth session, 3 June – 28 July 1954, U.N. Doc. A/2693, Article 2, para. 9, p. 150.

⁶⁸ General Assembly Resolution 177 (II) available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/038/84/IMG/NR003884.pdf?OpenElement> last accessed on 9 October 2012.

⁶⁹ This happened shortly after Resolution 3314 (1974) was accepted.

by special agreements or by unilateral declaration. (Article 26)

The crux of this Draft was that “no jurisdiction could have been conferred upon the Court without the approval of the General Assembly of the United Nations”. In order to prevent such a veto and to guarantee the independence of the Court, the Rome Statute today strongly emphasises and demands more independence of the Court from referrals by States Parties.⁷⁰ Its entry into force on 1 July 2002 created the ICC.

With regard to the situation Bangladesh was in at the beginning of the Seventies, it has to be noted, that according to this Draft Statute, penalties could be imposed “as the Court may determine [...]” (Article 32). Thereby the death penalty was at the discretion of the Court unless there was a limitation “prescribed in the instrument conferring jurisdiction upon the Court”. This rule, nevertheless, would have violated the principle *nulla poena sine lege* and is now obsolete by Article 80.⁷¹

The Revised Report 1953 for the Draft Statute⁷² also dealt with enforcement modalities. It proposes that the Court be established by amending the Charter, adopting a multilateral convention, or adopting a corresponding Resolution by the General Assembly. Surprisingly the Commission not only recommended the “conventional solution”, it also proposed already in 1954 a “convention prepared by an international diplomatic conference convened under the auspices of the United Nations”. This way of creating an international enforcement mechanism was finally realised in 1998 when the Rome Statute was adopted by the Rome Conference. After its entry into force, the International Criminal Court was established in 2002 to at least address the impunity of those crimes committed after its entry into force.⁷³

All these interrupted and delayed activities demonstrate, however, how close the work in the early fifties mirrored the common opinion fa-

⁷⁰ See Articles 13–15 Rome Statute.

⁷¹ For details about the basic foundation of *nullum crimen sine lege* see for instance, Triffterer, *Untersuchungen*, see *supra* note 8, p. 77 *et seq.*

⁷² Report of the 1953 Committee on international criminal jurisdiction, 27 July – 20 August 1953 (Supplement XII/A/2645).

⁷³ The Court entered into force on 1 July 2002. For a chronology of the establishment of the International Criminal Court, see <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Chronology+of+the+ICC.htm>, last accessed on 10 October 2012.

avorable to developing and applying international criminal law standards. Though it was not strong enough to continue the “quick start” which could be observed during the first years after Nuremberg, this field profited from various common endeavours after World War II to prosecute crimes committed by the Axis Powers.

The Cold War, however, made the major powers hesitant to accept definitions of crimes, in particular with regard to aggression, which could be abused in the raising of invented complaints or otherwise in the false founding of criminal charges against political opponents to gain a political “profit” over other nations or international jurisdiction. Therefore, a board of inquiry and an investigating magistrate or pre-trial chambers were proposed to prevent, right from the beginning, unjustified or even completely invented allegations to discredit political “enemies”.⁷⁴ Therefore, the short version of crimes against the peace as introduced by the Nuremberg Statute, and the even longer listing of alternatives presented for these crimes by the ILC in 1954, were for these and other reasons suspiciously (*‘argwöhnisch’*) observed, not accepted, or opposed. Since no rapprochement of the different opinions could be achieved, the U.N. interrupted its work on defining the Nuremberg Principles in detail. And since these should become the decisive part of the Draft Code, which should be enforced by the Revised Statute for an International Criminal Court, those documents were also not further considered within the U.N.⁷⁵

These decisions were based on the relevant ILC Report 1953, according to which the General Assembly should decide, “what, if any, further steps should be taken towards the establishment of an international criminal court”.⁷⁶ And the Assembly caught the ball. It postponed all relevant activities till a definition of aggression had been agreed upon and

⁷⁴ See for instance the Draft Statute for International Commission of Criminal Inquiry, presented by the International Law Association on its Conference 1980 in Belgrade, Third Interim Report by Prof. L. Kos-Rabcewicz-Zubkowski (Canada), of the International Criminal Law Committee. See also Report on the First International Criminal Law Conference at Wingspread in 1971 sponsored by the Foundation for the Establishment of an International Criminal Court.

⁷⁵ “Yearbook of the International Law Commission 1953”, vol. II, Documents on the Fifth Session Including the Report on the Commission to the General Assembly, p. 231, available at [http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_1953_v2_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1953_v2_e.pdf), last accessed on 10 October 2012.

⁷⁶ See *ibid.*, para. 157.

adopted by the competent bodies of the U.N. This decision caused a delay of approximately 20 years until aggression was defined by Resolution 3314 of the General Assembly, and until 26 crimes of aggression had been defined and adopted in Kampala 2010. The Draft Code and the Draft Statute have in the meantime become obsolete, because both were substituted by the Rome Statute 1998, enforced since 2002, and needed to be amended in 2010 at the First Review Conference, as expressly provided already in Article 5, paragraph 2 of this Statute.

14.3. Warming Up during the Cold War: Towards Defining Aggression and the Final Goal (1998 at Rome)

The delaying of the just mentioned three major projects till aggression could be defined was however not to bar other activities in the field. This is in particular true because these years were shaped by different, unpredicted criminological appearances. They made visible legal aspects that were not recognised before and therefore causing impunity, and thus called for immediate reactions in particular by delivering arguments in favor of continuing prosecutions.

14.3.1. Statutory Limitations for War Crimes and Crimes against Humanity?

The enthusiastic feelings about the defeat of the German *Wehrmacht* and the well-prepared successful prosecution of the Nuremberg crimes received almost a shock when all of a sudden investigations became more and more difficult because requests for support remained unanswered or otherwise unsuccessful. Quite a few states did not cooperate anymore on this subject matter. Between silent obstruction of legal aid and open denial of extradition, observed since the 1960s, the investigation and prosecution of war crimes became for various reasons more difficult. One reason, presented as a “defense”, was that the alleged crimes were no longer under the jurisdiction of the requested state because time was running out according to its applicable statutory limitations. The ambivalent situation was clarified in 1968.

Once started, such defenses received more and more weight.⁷⁷ This was because the investigation and prosecution of crimes committed by the

⁷⁷ For the practical importance of this “defense” up till today, see for instance the trial against Karlheinz Schreiber before the criminal court of Augsburg/Germany. The leg-

Nazi Regime had not yet been brought to an end. Indeed, within the Nuremberg Laws and the Draft Code, this reason for granting impunity was not at all mentioned. Immediate clarification to avoid such a result therefore appeared necessary. It was felt to be a disgrace that contrary to all former announcements, suspects and perpetrators could not be caught. Since the Nuremberg Law and the trials were still well aware to everybody, it was feared that international criminal law could lose its decisive reputation if this considerable part of Nazi crimes could finally not be brought to court, just because international cooperation was not guaranteed, and a trial *in absentia* was in most of the states not permitted.

Searching for help, a careful analysis came to the result that war crimes and crimes against humanity, falling under the jurisdiction of Nuremberg or competent national courts, are according to principles of the law of nations not subject to any statutory limitation “irrespective of the date of their commission”.⁷⁸ This quickly drafted Convention refers with regard to its acknowledgement to all international documents concerning the two core crimes just mentioned and/or their legal definitions since Nuremberg. It thus not only confirms the international penalty of these crimes. It rather acknowledges also their ‘*Unverjährbarkeit*’ and thus demonstrates that impunity by ‘*Verjährung*’ was not a defense principle valid for this branch of international criminal law.⁷⁹

The Preamble of the Convention backs this interpretation by referring to the fact that “none of the solemn declarations, instruments or conventions relating to the prosecution or punishment of war crimes and crimes against humanity made provision for a period of limitation”. It continues “that it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period for limitation

islative passed a ‘*Lex Schreiber*’, according to which for the time when a suspect was out of the country and extradition requested, this time does not count nor serve as a bar to proceed because of the statutory limitation in a requested state. See for instance Mitsch, “Neuregelung beim Ruhen der Verjährung während des Auslieferungsverfahrens”, in *NJW*, 2005, p. 3036; see also W. Stree and D. Sternberg-Lieben, in Schönke/Schröder, StGB²⁷, §78b Rz 15.

⁷⁸ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (came into force 11 November 1970), available at <http://www1.umn.edu/humanrts/instreet/x4cnaslw.htm>, last accessed on 3 October 2012, Article 1(a) and (b).

⁷⁹ *Ibid.*

for war crimes and crimes against humanity, and to secure its universal application”.

The existence of this rule was further underlined by referring to genocide and apartheid as two crimes which typically result from state policy, and thus in principle is of such a gravity that time for their prosecution never runs out.

This former situation and now the Convention demonstrate, in addition, that time always passes quickly at the end of armed conflicts and this was particularly so after World War II. It therefore appeared urgent to exclude statutory limitations in order to prevent impunity in particular for participating in the above mentioned war crimes and crimes against humanity.⁸⁰ Taking this for granted, Bangladesh was in no hurry to prosecute the crimes committed in 1971 on its territory.

Very important for the issues that we deal with here, and correspondingly for Bangladesh, is the fact that the debate always refers to the same definitions of crimes as used in Nuremberg, and that their criminality is declared as independent from national laws. The principle denying the application of any period of limitation therefore may also be applied to “other crimes under international law”, as listed in the Bangladesh’s Act 1973 under Article 3(e).

14.3.2. Convention against Apartheid 1973

How differentiated relevant crimes can be is, in addition, demonstrated by regulations concerning apartheid. Since the delay of major projects set free some manpower, new criminological appearances could be more carefully observed and theoretically structured. This is true, as already mentioned above, also for aspects which were previously not in the centre of international criminal law. Some of these, compared with Nuremberg and Tokyo, were rather remote fields and called for new judicial activities in, for instance, certain racial discriminations in various fields of social life, in particular in South Africa and Namibia.

⁸⁰ See for instance O. Triffterer, “Können Mord-Gehilfen der Nationalsozialisten heute noch bestraft werden? – Ein Beitrag zur Verjährung der Beihilfe”, in *NJW*, 1980, 2049 ff. Aggression was not mentioned because crimes of this group were not defined or not yet “strictly construed” to be used for excluding certain behaviour from statutory limitations so that they could be prosecuted under the international level.

By broadening apartheid beyond its original scope and notion in the Nuremberg Statute and the Genocide Convention, quite a few inhuman activities acquired penalty directly under international criminal law. The triggering situation was the handling of apartheid in South Africa. It violated, by abuse of state power, basic human rights to such an extent and clarity that the traditional regulations in international criminal law to protect people concerned, individually and as a discriminated group, seemed no longer sufficient.

Some inhuman activities, not qualifying as genocide or crimes against humanity in the sense of Nuremberg, were obviously threatening international peace and security when “committed for the purpose of establishing and maintaining domination by one racial group of persons over any other and by systematically oppressing them”.⁸¹ Such appearances obviously required an abuse of power expressed through an “extended intent”, ‘*erweiterter Vorsatz*’, which means this second mental element does not need to be realised to have completed the crime.⁸²

When defining these crimes of apartheid, independent of whether they would fall under the definition for establishing jurisdiction of the Nuremberg Tribunals, their political element was emphasised. Apartheid was not only shaped through an inhuman act, but mainly through the tendency of governments and their practices “of segregation and discrimination to prevent a racial group [...] from participation” in ordinary branches of life or “measures [...] designed to divide the population along racial lines”.⁸³

This was already the situation when Bangladesh was faced with its obligation to address war crimes and crimes against humanity committed on its territory when struggling for separation and independence. At that time a new concept of apartheid was discussed and this overlapped with preparing the definitions of aggression, the Nuremberg Principles, and

⁸¹ See International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068 (XXVIII), 30 November 1973, Article II; and Kampala also did not include one or both of these groups into the Statute.

⁸² See for instance O. Triffterer, “Commentary on subject IV: Die völkerrechtlichen Verbrechen und das staatliche Strafrecht”, Teil 1: Bemühungen um Anerkennung und Kodifikation völkerrechtlicher Verbrechen, General Report for the XIV; “International Congress on Criminal Law in Vienna, 1989”, *Zeitschrift für Rechtsvergleichung*, 1989, pp. 83–128; see also O. Triffterer, *Österreichisches Strafrecht AT*, 1994, kap. 9, margin 72.

⁸³ See *ibid.*, Article II, *Chapeau* and lit. (c) and (d).

partly with genocide and crimes against humanity. The Tribunals in Bangladesh, therefore, will have to analyse, whether this form of extended apartheid was already punishable under customary international law before the Convention entered into force. For Bangladesh now, in 2010, the alternative is the application of the Apartheid Convention or customary international law on relevant behaviour. The Rome Statute is not applicable, as ruled in its Article 11, but can be consulted to interpret the scope and notion of apartheid falling under the jurisdiction of Bangladesh's war crimes Tribunals.

14.3.3. Further Criminological Appearances Challenging States to Intensified Jurisdictional Cooperation in Criminal Matters

The above-discussed two conventions demonstrate the need to intensify cooperation between states in order to contribute to the prevention of such crimes. After the Second World War, numerous belligerent struggles and armed conflicts demanded similar mutual assistance. International criminal law depends on such cooperation of the international court with states as well as between states for its direct and its indirect enforcement respectively.

But crimes committed outside this field do not depend less on international cooperation. This is documented in numerous conventions concerning such crimes.⁸⁴

14.3.3.1. International Terrorism and Drug Offenses

In particular, "terroristic acts" and "international trafficking of illicit drugs" are in need of such cooperation. They represent, according to the Final Act, Annex E to the Rome Statute, "serious crimes of concern to the international community" respectively "a very serious crime [...] destabilizing the political and social and economic order in States". The Rome Conference was in addition "[d]eeply alarmed at the persistence of these

⁸⁴ The Lex Schreiber for instance is a good example that regulates for Germany how the extradition procedure interrupts the 'Verjährung'. Considered only to be whether it is adequate to interrupt the procedure in the requesting and/or in the requested state. See for instance Mitsch, "Neuregelung beim Ruhen der Verjährung während des Auslieferungsverfahrens", in *NJW*, 2005, p. 3036; see also Stree and Sternberg-Lieben, in Schönke/Schröder, StGB²⁷, §78b Rz 15, *supra* note 77.

scourges, which pose serious threats to international peace and security”. It therefore regretted that “no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion, within the jurisdiction of the Court”; and finally it recommends to reconsider this question at the First Review Conference “with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court”.⁸⁵

But in the intermediate period not only did these two crimes play an important role in the international praxis, but since criminals are increasingly taking advantage of international mobility to cross borders between countries in order to find support or just a “safe haven”, states have had to react by combining their efforts and supporting each other, even in individual cases that are not directly related to their own country. Correspondingly, within the United Nations, numerous conventions have been adopted and have entered into force, under general headings of international organised crimes, in particular relating to terrorism and drug offences. Besides some others I refer to the listing of “related treaties” mentioned in *supra* note 74. The situation is mirrored also in the United Nations Convention against Transnational Organized Crimes under the aspect of corruption.⁸⁶

Since terrorism and drug offences, however, were not even scheduled in Kampala, the international community obviously does not yet evaluate these criminological appearances as such serious threats to international peace and security that it should react by putting them within the jurisdiction of its permanent International Criminal Court.⁸⁷ Stronger than this optional task, the Rome Statute obliges the State Parties to definitely

⁸⁵ See Final Act to the Rome Statute, Annex I, lit. E, reprinted in C. Rosbaud and O. Triffterer (eds.), *Rome Statute of the International Criminal Court including the Final Act – English, Francais, Español, Deutsch*, Nomos, Baden Baden, 2000, p. 94.

⁸⁶ See for instance with regard to drug related treaties as listed in <http://www.unodc.org/unodc/en/treaties/index.html#Drugrelated>, last accessed on 19 October 2012.

⁸⁷ See for instance Triffterer, “Comment on Krzysztof Skubiszewski, Human Rights, Genocide and the International Criminal Court”, in Minnerath, *Catholic Social Doctrine and Human Rights*, p. 453, *supra* note 29.

define aggression after seven years, as prescribed by Article 5, paragraph 2.⁸⁸

14.3.3.2. Attacks on Civil Aviation

Parallel to the promotion of “universal counter-terrorism” and a “Convention on the Safety of United Nations and Associated Personnel”, international cooperation in 1963 began to improve the safety of civil aviation. Emphasis should be made in particular on the Tokyo Convention concerning “Acts committed on Board Aircraft”, followed by several others, each of which covers separate aspects of attacks on civil aviation. These endeavours culminated on 19 April 2009 in a special event calling for increasingly effective national measures in the interest of all states targeted.⁸⁹

However, as overwhelming as this amount of activities and conventions are, for the purpose of this paper, it needs only to be kept in mind that all these activities focus on a better, more effective protection of values anchored in the national legal systems. Whether the values of the international community as a whole are also violated in a certain situation, – for instance on 9/11 – has to be decided on a case-to-case basis. It does however not change the character of these international law documents that deal with “more” cooperation and not with the protection of values, inherent to the international community as a whole such as sovereignty, independence as well as international peace, security and well-being of the world.

⁸⁸ See for instance A. Zimmermann, “Article 5 – Crimes within the Jurisdiction of the Court” (see Section on para. 2), in Triffterer (ed.), *Commentary*, p. 17 *et seq.*, *supra* note 10; and in general for the decision making on aggression see for instance K. Ambos, “The Crime of Aggression after Kampala”, in *German Yearbook of International Law*, 2010, vol. 53, pp. 463–509; and Beth van Schaack, “Negotiating at the interface of power and law: the crime of aggression”, in *Columbia Journal of Transnational Law*, 2011, vol. 49, pp. 505–601.

⁸⁹ On 19 April 2009 in Jamaica, a plane was hijacked, see for instance <http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/jamaica/5186255/Jamaica-plane-hijack-Passengers-released-but-crew-remain-hostage.html>, last accessed on 10 October 2012; for the Tokyo Convention (enter into force 4 December 1969), available at <http://www.dipublico.com.ar/english/convention-on-offences-and-certain-other-acts-committed-on-board-aircraft-tokyo-convention/>, last accessed on 10 October 2012.

14.4. Endeavours to Prepare Delayed Projects for the Day after Aggression has been Defined

Before, during, and after World War II, international criminal law has been developed by quite a number of scholars and politicians. I recall here only Renaud Donnedieu de Vabres, Stefan Glaser, Hans Heinrich Jescheck, Hans Kelsen and Vespasien V. Pella. But on an almost equal ranking, a few Special Rapporteurs have to be mentioned, like Jean Spiropoulos and Alfaro, who were in charge for the Draft Code and the Draft Statute, and who analysed all relevant national and international documents as well as the relevant jurisprudence when presenting their evaluation of decisions by the ILC.⁹⁰

Against this background, and after more than ten years waiting for an agreement on defining aggression, it was not surprising that in December 1967 the U.N. appointed a Special Committee to collect and summarise what has been achieved so far. This political body however held only seven sessions, once a year, before the General Assembly adopted in 1974 the well-known Resolution 3314 on aggression by consensus.

14.5. The Need for More Comprehensive Research to Clarify Basic Structures and Details

The intermediate period 1956–1974 was however not only shaped by these rather poor governmental activities. The world's civil and legal society was also considering and proposing on several levels drafts not only with regard to aggression, but also with regard to other core crimes and issues related to the enforcement of international criminal law as a matter of concern to the international community as a whole. The inspiration for such mondial activities was triggered not only by slow governmental procedures with regard to aggression but also the globalising response of parts of international law, as just mentioned above. Also, the fact that the world-wide 'Cold War' slowly changed into a 'hot war', like in Vietnam,

⁹⁰ For others see Triffterer, *Untersuchungen*, pp. 224–241, see *supra* note 8; and with regard to Jescheck see Triffterer, "Völkerstrafrecht im Wandel", in T. Vogler (ed.), *Festschrift für Hans Heinrich Jescheck zum 70. Geburtstag*, Duncker and Humblot, 1985, p. 1477 *et seq.*; for Kelsen, see Triffterer, "Hans Kelsens Bedeutung für die Entwicklung des Völkerstrafrechts und einer Völkerstrafgerichtsbarkeit", in Walter Robert (ed.), *Hans Kelsen und das Völkerrecht: Ergebnisse eines internationalen Symposiums in Wien*, Manz, Wien, 2004, pp. 139–142.

alerted various institutions to the need not only for the definition of aggression, but also the preparation of more international criminal justice by the *ultima ratio* realisation of international criminal law.

It therefore was not surprising, that already in the early 1960s the World Peace through Law Centre in Washington started for several years a discussion about these issues in its annual meetings around the world.⁹¹ Comprehensive volumes on relevant subjects united between 20 and 35 authors to spread their opinion and propose means and methods on how to realise more justice in the world.⁹² It therefore was not surprising that in 1970, the Foundation for the Establishment of an International Criminal Court was created and held its first congress already in 1971 in Wingspread, Illinois. It drafted a substantive criminal law as well as a Draft Statute for an International Criminal Court closely related to historical examples. Bangladesh was not yet included into these circles.⁹³

However, when in September 1972 the Second Conference of this Foundation was held in Bellagio, it already scheduled a special session “to deal with relevant problems involving Bangladesh”. The Report mentions already two participants from Bangladesh: the Minister of Law and Parliamentary Affairs, and the Attorney at Law and Chief Counsel of the War Crimes Tribunal, Dacca. The list of participants for the second Conference mentions in addition a third person from Bangladesh – Chief Counsel, War Crimes Tribunal. Assuming correct reporting, those two persons were already assigned to the War Crimes Tribunal before its Act entered into force in 1973.⁹⁴

The author of this paper, being a member of Working Group II at the conference, dealing with the Draft Statute for an International Crimi-

⁹¹ For the World Peace through Law Centre, see <http://www.worldjurist.org/>, last accessed on 3 October 2012.

⁹² See for instance Bassiouni and Nanda, 1973, *supra* note 8.

⁹³ See Report on the First International Criminal Law Conference at Wingspread in 1971 sponsored by the Foundation for the Establishment of an International Criminal Court.

⁹⁴ Before this comprehensive scientific research on a feasible international criminal court and the treaties on international criminal law were published, a single man, also present at the Conference, had collected all relevant documents as well for the definition of aggression as for an international criminal law in altogether four huge volumes. Benjamin Ferencz, *Defining International Aggression: The Search for World Peace*, Oceana Publications, 1975.

nal Court, remembers that proposals to admit an appeal were refused by the majority with the argument that this was not provided at Nuremberg either. However, Article 47 admits a revision for the accused under the condition that the Court was satisfied about new facts discovered which were at the time of the judgment “unknown to the Court and the applicant”.

As much as some regulations were influenced by, or even copied from, the Nuremberg law and practice, others were shaped by the particularities of the Cold War. I remember well the disputes, in Working Group II and in the Plenary at Wingspread, about the need to prevent the Court from being abused for political purposes by the raising of unfounded and merely alleged criminal charges against political opponents, states, or individuals in this peculiar war.

Against such abuses the establishment of “an Agency for the purposes of investigation into crimes specified in Section 3” was provided. It should serve through an “Investigating Officer” like a filter before a situation or an individual case summoned to the Court could trigger official investigations or prosecutions there. Compared with the Foundation’s Draft the Agency should work like a Magistrate. It later was extended in an ILA Draft Statute to an “International Commission of Inquiry”.⁹⁵ All such special institutions should prevent official proceedings at the court from commencing before the complaint presented has been controlled so that it would be by itself coherent and conclusive and, if proven, could lead to a fair trial in prosecuting one of the crimes under international law.⁹⁶

With regard to the crimes committed when Bangladesh struggled for separation and independence, some “hardliners” would have preferred to quickly establish an international criminal court. However, considering the former’s slow development of corresponding plans it was feared that several years would be needed to accomplish this goal. In addition, the majority of the participants in the Congresses of the Foundation wanted to supply the court with a broad competence that included crimes such as pi-

⁹⁵ See for the Commission the International Law Association, Belgrade Conference (1980), International Criminal Law Committee, Third Interim Report by Prof. Kos-Rabcewicz-Zubkowski.

⁹⁶ See for instance A. Cassese, *International Criminal Law*, second edition, 2008, p. 395, *et seq.*

racy, the classical crime under international law, as well as slavery and drug offences. Every state then should have the chance to “pick and choose” what it wanted to be decided by its “own Court”. It should be the *ad hoc* acceptance of the jurisdiction which permitted the admissibility; and the supporters of this approach expected that such a practical handling of crimes would one day satisfy not only individual member states, but also the majority of states and the slow entrusting of the Court with a general inherent jurisdiction by the international community as a whole over the four classical core crimes.

For the next two years after Bellagio, no report about relevant activities in Bangladesh was available. But after the General Assembly adopted Resolution 3314 on Aggression by *consensus* on 14 December 1974, Bangladesh reacted very quickly. It referred to the fact that the Secretary General had reminded this new state and other states to continue the interrupted work on defining crimes against the peace. Correspondingly, Bangladesh called for the Third Conference in Dacca between 26 and 29 of December in the same year. The Conference confirmed the Bellagio-Wingspread Draft and the Act 1973.⁹⁷ This is not surprising because Resolution 3314 states in its introductory remarks that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor and that this would “simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interest of, and the rendering of assistance to the victims”.

In Article 6, it further becomes obvious that “a war of aggression is a crime against international peace. Aggression gives rise to international responsibility”. But the Report as well as the reference to state responsibility demonstrates that it is not a question of this resolution to define crimes against the peace. It only defines aggressive acts, which are the pre-requisites for crimes against the peace. The other elements of this crime were left to be elaborated by the International Law Commission.

It may be well supposed from the relevant parts in the Act 1973 that Bangladesh was familiar with the differentiation above when drafting some alternatives of crimes against the peace which should fall under the competence of the Tribunal. Therefore there was no need to review these

⁹⁷ See documentation of the Third International Criminal Law Conference Dacca, 26–29 December 1974.

definitions because they are based on the Nuremberg principles and represent a selected choice of alternatives adapted to the *ad hoc* situation before Bangladesh became independent.

Parallel to these rather newly organised endeavours of the Foundation, the International Association of Penal Law revitalised its former engagement after aggression was defined. Referring to a 1926 Draft, the new approach summarised in two volumes, titled *A Treatise on International Criminal Law*, what was discussed in competent circles. After aggression had been defined in the First Draft Code of the Association, which was published in 1980, and the creation of the Institute of Higher Studies in Criminal Matters in Syracuse, Sicily, another highlight was the establishment of the *Nouvelles Etudes Pénales*, a new series of publications which continued what before had already been distributed by the *Revue Internationale de Droit Pénal*.⁹⁸

The first big Conference of the Association was held in 1985 and titled “‘New Horizons’ in International Criminal Law”. It assembled approximately 90 participants who presented more than 40 papers and several statements at various panels on the structure, scope, and notion of the revised international crimes as well as on purposes and political enforcement modalities for this new field. As far as I recall, the justification and the necessity of an international criminal court was for the first time above others based on the fact that grave violations of fundamental human rights are typically committed by those in power and besides existing international institutions, like the European Court of Human Rights in Strasbourg, there needs to be an additional preventive measure, namely international criminal law, as *ultima ratio*.⁹⁹ Everybody at the Conference was enthusiastic though not optimistic with regard to the possibilities of realising and enforcing one day this new criminal law, which is an inherent part of the legal system of the nations, and which as such should and

⁹⁸ See Bassiouni and Nanda, 1973, *supra* note 8; Thomas, 1973, *supra* note 8; M.C. Bassiouni, *International Criminal Law*, volumes I–III, second edition, Transnational Publishers for vol. 1 (1999) and Brill for vol. 2 and 3 (2008); J.L. de la Cuesta (ed.), “Resolutions of the Congresses of the International Association of Penal Law (1926–2004)”, in *Nouvelles Études Pénales*, 2009, no. 21.

⁹⁹ See for instance “New horizons in international criminal law”, in *Nouvelles Études Pénales*, 1985, vol. 6, p. 45, *et seq.*, International Conference, 7–12 May 1984, Noto (Italy), by the Rapporteur Anthony D’Amato.

could contribute to the prevention of the core crimes confirmed at Nuremberg.

The Association decided to deal with these subject matters on its next of every five years congress held in 1989 in Vienna. Already in 1987, a Preparatory Colloquium analysed and considered the matter in Hammamet, Tunisia. It confirmed by majority decision the need for an international criminal law in the narrow sense, as part of the legal system of the community of nations, to be differentiated from the international criminal law in the broader sense governing international cooperation and mutual assistance in criminal matters. The new narrow part however could be enforced directly on the international level though at the moment there was no such organ and it therefore had to rely on national enforcement mechanisms. The fourteenth AIDP Conference 1989 in Vienna was in this regard an unlimited success. The General Report concerning Section IV and the Final Resolution of the section shaped and established the legal basis for the further development of an International Criminal Court.¹⁰⁰

I cannot summarise here all activities of this Association or other non-governmental organisations; but I would like to present an example for the diversity of endeavours and opinions which finally founded, together, the promotion of the realisation of the great idea. The new spectrum of alternatives, proposals, and convincing details looked on the whole like a puzzle. When belligerent struggles on the territory of former Yugoslavia shattered the world and raised the fear of another (Third) World War, several resolutions of the Security Council demanded with more and more intensive wordings a stop to these wars and the crimes committed with them. After consulting the members of the U.N., it was finally possible to follow through with a Report of the General Secretary from 3 May 1993 and establish the International *ad hoc* Tribunal for former Yugoslavia, and later a corresponding one for Rwanda.¹⁰¹ Both en-

¹⁰⁰ See for instance Triffterer, “Die völkerrechtlichen Verbrechen und das staatliche Strafrecht”, Teil I: Bemühungen um Anerkennung und Kodifikation völkerrechtlicher Verbrechen, General Report for the XIV, *supra* note 82; “International Congress on Criminal Law in Vienna, 1989”, in *Zeitschrift für Rechtsvergleichung*, 1989, pp. 83–128, *supra* note 82.

¹⁰¹ See for instance O. Triffterer, “Von ‘Nürnberg’ zu einem Internationalen Gerichtshof zur Verfolgung der Kriegsverbrechen im ehemaligen Jugoslawien – Zum Schutz der Menschenrechte durch das Völkerstrafrecht”, in Neisser (ed.), *Menschenrechte als politischer Auftrag*, 1993, pp. 61–136; for the Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), see U.N. Doc. S/25704,

forcements applied, for the first time directly, international criminal law by a truly international body. The crimes to be investigated and prosecuted were those inherently within the jurisdiction of an international court and did not need the consent of the states addressed for its establishment.

However it took a while till the two *ad hoc* Tribunals and their jurisprudence were accepted worldwide. But the legal and political community of the world received a strong drive to continue this line of development. Examples for instance are the Syracuse Draft I and the updated Syracuse Draft II. They tried to receive consensus between the different legal systems with regard to the general part of this new field and the crimes which should fall under this jurisdiction.¹⁰²

It is not my task to recall further all activities thereafter, and not even to summarise those, leading finally to the Rome Statute of 1998 and its operation since 1 July 2002 through the International Criminal Court. The amount and value of the work that started slowly but that continued then for years in the special Preparatory Commission is mirrored by the Zutphen Draft: there are approximately 125 articles filled with approximately 1,200 brackets, containing amendments, changes, and deletions. These should have enabled the Plenipotentiary Delegations in Rome to choose, define, and finally adopt out of the many available direct enforcement models one to set into praxis the decisive part of international criminal law in the narrow sense.

In this complex process decisive contributions can only be traced very rarely, like the Singapore clause with regard to Article 16. Those influences cannot be found in the summarising literature because there is no protocol. However, Bangladesh is mentioned in some unofficial protocols at least three times concerning matters not of major importance.¹⁰³ But Bangladesh was in a different situation. Instead of following the proposals of the Foundation, it developed its own “solution” of post-war justice by limiting competence to the three core crimes including “initiation or wag-

3 May 1993, available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf, last accessed on 9 October 2012.

¹⁰² The 1995 Syracuse Draft and the 1996 Updated Syracuse Draft, for the two Syracuse Drafts, see <http://www.iccnw.org/?mod=browserdoc&type=22>, last accessed on 9 October 2012.

¹⁰³ See Bassiouni and Nanda, 1973, *supra* note 8; Bassiouni, *International Criminal Law*, 1999 and 2008, *supra* note 99.

ing of a war of aggression, or a war in violation of international treaties, agreements, or assurances”, in Article 3 of the Act 1973. At that time this Act assigned jurisdiction to the Tribunals also with regard to “any other crimes under international law”, which were already punishable at the time when committed under relevant law. This requirement has practical importance up till now; because the ICC does not have competence for crimes committed before the 1 July 2002, as ruled in Article 11 of the Rome Statute. Therefore, whether Bangladesh, after its signature, ratifies the Rome Statute is not of major importance in this context. National jurisdictions may prosecute the relevant crimes committed even prior to the Act 1973 and its amendments of 2009. Thus Bangladesh’s criminal justice system may become of importance for the interpretation of the Rome Statute and for perpetrators who can be held responsible by the Rome Statute and through its organs. In this sense we can only wish that Bangladesh holds fair trials and interprets the law bearing in mind the need to strictly construe it according to the international accepted standards. Good luck.

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