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Using Old Evidence in Core International Crimes Cases

By Morten Bergsmo
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I

International criminal law does not recognize statutes of limitation for war crimes, crimes against humanity and genocide. Prosecution services should not – according to international law – lose their authority to prosecute these crimes even if several decades have passed. For this reason and as part of an international trend of increased use of accountability for such crimes, some serious violations that occurred during World War II, in Indonesia in the 1960s, in Bangladesh and Cambodia in the 1970s, and in ‘Iráq in the 1980s are currently being investigated and occasionally prosecuted. Many suspects are old and frequently frail. Victims and their family members are old. Although there are open wounds that undermine deeper reconciliation in the societies affected by the crimes, the younger generations may have limited knowledge of the victimization caused by the crimes. Political support for their prosecution may in some situations be unstable.

This Policy Brief is based on presentations made at the seminar ‘Old Evidence and Core International Crimes’ co-organized by the Forum for International Criminal and Humanitarian Law (FICHL), the UC Berkeley War Crimes Studies Center, and Amir & Amir Law Associates in Dhaka, Bangladesh, on 11 September 2011.[1] The seminar did not deal with the above-mentioned challenges in criminal cases for core international crimes that occurred decades ago. Rather, the focus was on more technical questions caused by the existence and use of old evidence in core international crimes cases.

Witnesses in such cases are old. Their memory may be affected. They may have told their story many times, including in the form of interviews that have been made public. They may have spoken extensively with other victims or potential witnesses. Documents and other physical evidence have sometimes passed through many hands. The chain of custody can be unclear. Archives are occasionally broken up, destroyed or have become illegible. Mass-graves and crime scenes may have been interfered with. Experts and other persons with particular knowledge of the context in which the crimes were committed may have died. Potential witnesses will often have moved on to such an extent in their lives that they do not wish to reopen a traumatic past by co-operating with criminal justice.

II

Barrister Shafique Ahmed (Minister of Law, Justice and Parliamentary Affairs, Bangladesh) explained that Bangladesh is proceeding with the trials of the alleged criminals who committed crimes during the 1971 war, as per the provisions of the International Crimes (Tribunals) Act of 1973[2] and the Rules framed on the basis of that Act. He stated that his Government is determined to conduct the trials in accordance with international legal and human rights standards, highlighting that they have already made some amendments to the 1973 Act in order to achieve the desired standard and transparency. The amendments contain provisions making the Tribunal independent in the exercise of its judicial functions, to ensure fair proceedings and due process of law, and also deleted the requirement of inclusion of an Army person in the Tribunal. He described the FICHL seminar on ‘Old Evidence and Core International Crimes’ in Dhaka on 11 September 2011

[1] For more information on the seminar, please visit its Internet pages at http://www.fichl.org/activities/old-evidence-and-core-international-crimes/.

[2] Act XIX of 1973, available at http://www.legal-tools.org/doc/c09a98/ .

– and the book it will produce – as important mechanisms for providing support to the professionals working in the ICT-BD.

Professor David Cohen (UC Berkeley) dealt with a group of related problems concerning the use of old evidence in proceedings for the prosecution of international crimes. Some of these problems concern general evidentiary issues, but his main concern was how such problems are exacerbated by the passage of significant amounts of time. The first issue was difficulties that arise in witness identification of accused persons after long lapses of time. The German Government has conducted war crimes trials from 1958 until the time of the seminar, involving particularly personnel of concentration camps and killing centres (*Vernichtungslagern*). Not only have difficulties in credibly identifying persons increasingly impeded prosecutions, but in the most recent trials there have at times been no living witnesses at all, thus presenting other evidentiary problems. The Demjanjuk Case, litigated over several decades in a variety of courts, was used to illustrate some of these issues.

Another set of issues addressed arises out of the combined impact of trauma and the passage of time on the ability of witnesses to testify credibly. These issues were considered in relation to ICTY and ICTR cases.

The final evidentiary problem addressed by Professor Cohen is linked to what the Akayesu Trial Judgment (ICTR) termed 'cultural factors' affecting testimony. He intends to develop this through the Tacaqui Case from the Special Panels for Serious Crimes in East Timor in the seminar anthology. The concept of 'collective memory' as employed in a number of contemporary social science disciplines will be used to try to clarify the notion of 'cultural factors' referred to by the Akayesu and other cases.

Mr. Md. Shahinur Islam (Registrar, ICT-BD) pointed out that the challenge of collecting and organizing evidence is not undefeatable even after as much as 40 years. In the Bangladesh Tribunal probative evidence is admitted regardless of its format, unless the rights of the accused are deemed to be prejudiced by the admission. Section 19 of the 1973 Act on the Tribunal provides for admitting all reports, photographs, films and other materials carrying probative value as evidence. This has been supplemented by Rule 44 of the Rules of Procedure. All proceedings before the Tribunal shall as the main rule be public. No oath shall be administered to any accused person (Section 10(5) of the Act), and statements made by an accused to an investigation officer during interrogation shall not be admissible as evidence (Rule 56(3)).

Judge Alphons M.M. Orie (International Criminal Tribunal for the Former Yugoslavia) asked what old evidence is. Preliminarily, he stated that 'evidence is evidence', whether in a national or an international criminal context, old or recent. There is the technical term 'evidence' that refers to evidence that is admitted into evidence in criminal trials, and there is 'evidence' as in information relevant to elements of crimes. There are also some important differences in understanding the concept of evidence between the different legal traditions.

Judge Orie further maintained that old evidence is not necessarily bad, just as fresh evidence is not necessarily good. 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 more imperative when inferences rely on witness statements, considered as the most 'vulnerable' evidence. These tests can be done in various ways, such as asking the witness further details about the circumstances in which he or she observed the event or using alternative ways of establishing the truth, like DNA tests. Other related issues are the degree of stress when the witness statement was collected and the respect of certain rules in witness interrogation and identification of suspects. In this regard, Judge Orie emphasised the role played by the judges and parties in presenting, digesting and interpreting the evidence in a professional manner.

Mr. Andrew Cayley (International Co-Prosecutor, Extraordinary Chambers in the Courts of Cambodia) stated that there are many lessons that can be learned from the Extraordinary Chambers' experience of prosecuting international crimes based on old evidence. Firstly, it 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, Mr. Cayley observed that the above circumstances 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, preserve, organize, analyze and disseminate evidence of crimes. These are invaluable tools to both those who are prosecuting and defending.

Mr. Cayley concluded by discussing political, bureaucratic, social and other extra-legal considerations that will impact the survival of evidence as well as the ability of investigators to gather such evidence. These pressures should be addressed with diligence and persistence on behalf of those investigating and prosecuting.

Judge Agnieszka Klonowiecka-Milart (Judge, Supreme Court, Extraordinary Chambers in the Courts of Cambodia) discussed the difficulty of establishing the context in which international crimes occur, drawing from her experience as a UN international judge on the Supreme Court of Kosovo. Despite the inherent fragility of old evidence, the passage of time has the advantage of establishing an historical record and smoothing conflicting versions in the mind of public consciousness. Yet, Judge Milart warned against 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 notoriety'. Such concepts might serve the economy of the trial, but they *de facto* lower the standard of proof. Therefore, it is important to allow the parties to contest such qualification.

In the meantime, when establishing the context, the judges should not rely exclusively on secondary sources. This is even truer when it comes to the first case, which carries the burden of establishing the historical context for subsequent cases. State support and international co-operation may be required for the court to access direct evidence, such as archives or confidential information.

Another problem raised by Judge Milart is 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 proceedings should be enhanced, if necessary through international involvement.

Dr. Patrick J. Treanor (CMN Senior Adviser, formerly Senior Research Officer and Team Leader, Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia) remarked that old documents can be and have been successfully used in international crimes cases. Such documents can provide both direct and contextual evidence of alleged crimes. Relevant documents are frequently preserved in public archives, but may also be found in the files of government agencies, private hands or with non-governmental organizations. The collection of documents should begin on the basis of on an analysis of all initially available information and evidence that would point to organizations and individuals of interest to the investigation. Relevant documents and files must then be located and reviewed, copies being made or originals seized as appropriate. Analysis of collected documents as well as of other evidence and information should be ongoing with a view to filling out and possibly changing the original analysis, identifying gaps and misconceptions and providing guidance for the further development of document collection and other aspects of the investigation. That is, at any given time the investigation must have command of what it knows and what it should still try to find out.

Once the collection of documents and the investigation as a whole have been concluded, final analysis may or may not point to individual criminal responsibility. An efficient way to introduce large numbers of documents into evidence at trial is through expert reports presenting objective analyses of their relevant contents. Ideally, specially tasked, qualified staff members conduct both the collection and analysis of documents. They can also prepare and present appropriate expert reports in court, Dr. Treanor observed.

Dr. Seena Fazel (Clinical Senior Lecturer in Forensic Psychiatry at the University of Oxford, and CMN Adviser) addressed the scientific evidence on the effects of trauma on memory. A preliminary survey of normal memory was provided, and a summary of the effects of delay on autobiographical memory in normal persons. In addition, the effects of delay in two groups – older adults and those with traumatic experiences – was reviewed.

Dr. Fazel argued that the scientific evidence to date suggests that traumatic memories are different than normal memories, and in particular, memories can be fragmented, with less recall of peripheral events, and occasionally vivid sensations and perceptions being remembered. Overall, there is no clear consensus wheth-

er stress improves or worsens memory, although there is some research to suggest that memory for the central emotional events is retained. Finally, it is highlighted that that the research findings imply the complexity of the relationship between memory and trauma, and one that varies by many psychosocial and biological factors individual to the person.

Mr. Sriyana (Head of Division of Monitoring and Investigation, Indonesian National Commission on Human Rights) presented the inquiry into a massacre that occurred in Indonesia in 1965-1966 undertaken by the Commission he serves. The case has been investigated since June 1998 and was still ongoing at the time of the FICHL seminar. He explained that the Commission had taken statements from more than 350 persons from areas of Indonesia such as Sulawesi, Sumatera, Java and Kalimantan. Based on this investigation, enough evidence had in his view been uncovered for a case of crimes against humanity (such as murder, extermination, enslavement, forcible transfer of population, imprisonment, torture, rape, persecution, and enforced disappearance). But there was still a long process before a report on the case would be submitted to the Attorney General. A recommendation by the House of Representatives to establish an *ad hoc* Human Rights Court was also required.

Mr. Sriyana highlighted several practical challenges faced by his Commission in investigating such crimes. Its limited financial and human resources complicate the collection of evidence in some remote parts of Indonesia, as well as abroad, where many victims and witnesses have sought refuge. The use of mass graves as evidence is also difficult, as it requires an authorisation from the Indonesian authorities as well as sufficient forensic expertise in investigations.

III

In the course of seminar discussions, it was pointed out that core international crimes trials entail considerable material, human and societal costs. Given these costs, it is important that countries make the most out of criminal justice for atrocities when they embark upon its path. States should ensure that each step along the way has maximum effect. They can not afford to spoil the effect by not being sufficiently diligent.

This is primarily a challenge of professionalism, which is shared by all criminal jurisdictions that deal with atrocities or core international crimes. As such, it is a common standard of achievement and responsibility. Investigators, prosecutors and judges should rise to this challenge whether they pursue war crimes justice for reasons of deterrence or reconciliation; whether the alleged crimes occurred a long time ago or more recently. In this light, working with old evidence is primarily a technical challenge to professionals involved in investigation, prosecution, defence and adjudication.

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 crimes processes, where penalties are particularly severe. If old evidence should not be an excuse not to prosecute, it requires great caution. The fact that it relates to events carrying highly emotional burdens may render it more fragile.

It was pointed out that it is important to always keep in mind the interest of the victim, which is 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.

Even against the background of these challenges, justice for old core international crimes can be as professional as justice for more recent crimes. The age of evidence is not a decisive factor either way. Old evidence can serve the legitimate interests of both deterrence and reconciliation, especially the latter when handled professionally and with care.

Morten Bergsmo is Visiting Professor, Georgetown University; Senior Researcher, University of Oslo; Visiting Fellow, Stanford University; and ICC Consultant (Coordinator of the ICC Legal Tools Project). He founded and directs the FICHL and the Case Matrix Network (www.casematrixnetwork.org). *Work on this Policy Brief was completed on 28 September 2011. It is available at www.fichl.org/policy-brief-series/. ISBN 978-82-93081-52-4.*

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