Forensic sciences (anthropology/archaeology/pathology) and international criminal justice

In her seminal Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions [Cambridge University Press, 2010], Nancy Combs shed light on the serious impediments faced by international criminal justice in establishing facts in order to convincingly assess individual criminal responsibility for the most atrocious deeds. Gathering reliable evidence was a challenge for the ad hoc International Criminal Tribunals for Rwanda [ICTR] and for the Former Yugoslavia [ICTY] and very much remains a live issue at the International Criminal Court [ICC].

One element however seems to set the ICTY experience apart, namely, its increasing reliance on forensic evidence. Following the war which devastated the Former Yugoslavia, one of the reactions of the international community was to launch – for the first time – a scientific search for, and subsequent identification of, the dead victims. With the work of the Bosnian Missing Persons Institute and that of the International Commission on Missing Persons [ICMP], 6,959 out of the 8,372 Srebrenica victims [1] have now been found and identified [2]. The pioneering forensic work conducted in Bosnia-Herzegovina does not serve an exclusively humanitarian role and has been pivotal in revealing the criminal modus operandi of the perpetrators and in establishing criminal intent – including genocidal intent – before the ICTY.

In its first conviction for genocide against General Radislav Krstić, the ICTY Trial Chamber expressly recorded the scientific analyses of the evidentiary elements related to the executions carried out in Srebrenica to find that “[t]he forensic evidence presented by the Prosecution provides corroboration of survivor testimony that, following the take-over of Srebrenica in July 1995, thousands of Bosnian Muslim men from Srebrenica were killed in careful and methodical mass executions” [3]. The medico-legal analyses resulting from the exhumation of the mass graves were also instrumental in determining that the victims were civilian military-aged men [4], a decisive element in this case for the qualification of genocide, the men of Srebrenica having been targeted to ensure the destruction of the group as a whole [5].

More recently, forensic evidence has assisted the Trial Chamber in the Karadžić case to determine the number of victims, their gender, their civilian character as well as the cause and time of their deaths. Likewise, in the ongoing case against Ratko Mladić, exhumations and forensic evidence have facilitated the Prosecution’s demonstration of the civilian character of the victims found in the mass graves, notably at Tomašica, none of whom were wearing military clothing [6].

This is not to say that forensic evidence will give all the answers, if only because forensic search itself is dependent on a series of factors, such as weather conditions, staff training, financial resources, not to mention finding the corpses of the victims. And even in optimal conditions (if such conditions are ever met), determining the exact number of victims or the place of death might be problematic, notably when secondary and tertiary burial sites have been used by perpetrators [7] and bodies are co-mingled, damaged and fragmented; establishing the exact date of death or its cause might be difficult, if not impossible, depending on the degree of decomposition and a level of errors undoubtedly exists [8].

More generally perhaps, there are two inherent limitations to the use of forensic evidence in the judicial context. First, legal fact-finding and scientific fact-finding cover different realities and, in a courtroom, forensic evidence is not used to unveil the entire truth about a particular event or to identify the victims: it is there to assist the court in assessing the responsibility of the individual facing criminal charges. This limited function is in line with the ICC’s finding that “in case of mass crimes, it may be impractical to insist on a high degree of specificity. In this respect, it is not necessary for the Prosecutor to demonstrate, for each individual killing, the identity of the victim and the direct perpetrator. Nor is it necessary that the precise number of victims be known” [9]. Specific and precise forensic identification of victims is thus not necessary for trials to occur and for individuals to be convicted; an admittedly reasonable position which allows for trials to take place in a context where victims may have been disappeared and their corpses concealed, mutilated or destroyed.

Second, the lawyers involved in the case also need to know how to approach such evidence while the judges need to be able to assess its reliability, based on the professionalism, knowledge and methodology of the experts called to testify. This is a crucial point as, at pointed out at the beginning of this short editorial, gathering reliable evidence in international criminal trials remains a challenge and the reliance on witness testimonies or NGO reports might prove insufficient to convict an individual beyond all reasonable doubt.

This is not to say that the use of forensic evidence will prove an infallible evidentiary tool. In fact, some might claim that it is not necessary at all. Notwithstanding the archaeological work being conducted in several Nazi death camps, in relation to Nazi crimes, forensic anthropology was used to prove the medical experimentations, not the genocide as such. More recently, very little forensic science was used to assess individual criminal responsibility in the Rwanda genocide. Exhumations were conducted but were short-lived due to poor weather conditions and time pressure put on the investigators. Yet, this has not stopped the International Military Tribunal at Nuremberg or the ICTR from establishing individual guilt and one could thus convincingly argue that forensic expertise is not needed to prove international crimes.

And yet, the ICTY experience shows another side to the issue. Not only have the exhumations conducted enabled the Tribunal to base its findings on more solid scientific grounds than its Rwandan counterpart and to convincingly establish individual guilt but, and even if these were not their primary goals in the eyes of the tribunal, they have also led to an unprecedented effort to find and identify all the victims. Not only has forensic work assisted in proving the crimes, in countering defendants’
claims and in linking the deaths of the victims to the accused perpetra-
tors, it has also allowed for the victims to be searched for, identified and decently buried, thereby helping survivors to know what happened to their loved ones and sending perpetrators the clear mes-
sage that their enterprise of destruction had ultimately failed. Forensic work has given back to the victims a name and a humanity they had in reality never lost. Even if this is still considered ‘not necessary’ from the strict point of view of international justice, it may well be a goal worth thinking of.

References

[1] This is the number engraved on the Memorial stone in Potočari. By 11 July 2016, 6,368 victims had been buried in Potočari.


[4] Ibid., paras 74 and 75.

[5] Ibid., paras 73 and 79.


[8] See testimony of Ian Hanson, deputy director of forensic science at the ICMP and main forensic in charge of the Tomašić case. Prosecutor v. Mladić, supra note 6, p. 36347, lines 4-10.

[9] ICC, Prosecutor v. Bemba Gombo (case no. ICC-01/05-01/08), Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the charges of the prosecutor against Jean-Pierre Bemba Gombo, Pre-Trial Chamber II, 15 June 2009, para. 133.

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