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Forensic Archaeology, Ad Hoc Counsel and the International Criminal Court

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This article includes much of what we discussed in our Libertas Webinar on 20 May 2021. The International Criminal Court in The Hague (ICC) simultaneously possesses jurisdiction over a "situation" and individual "cases". In the context of a situation there may be both victim participation and/or evidentiary issues which may affect the cases against individual accused yet to be identified by the Court. This can involve the appointment of so-called "ad hoc defence counsel" to represent the interests of these future accused. Preserving evidence of international crimes, such as war crimes and crimes against humanity, occurs in the pre-trial phase of the case before charges are pleaded or even confirmed. It generally falls into two categories: physical evidence and what has become known as 'vulnerable' evidence. It may occur when the identity of an accused person is unknown and it engages the duties of both counsel and experts: Defence counsel may be called on to test evidence (such as witness testimony) years before a trial and when that counsel is not eventually instructed to act for the accused. Recently in 2015, Article 56 of the Rome Statute was invoked to record the testimony of seven vulnerable victims of sexual and gender-based crimes in the pre-trial phase of the *Dominic Ongwen* case at the International criminal court which we discuss below.

Forensic archaeologists have been utilised in this context: Their expertise has been called upon in many famous UK criminal cases such as the murders committed by Fred and Rose West, the Moors Murders by Myra Hindley and Ian Brady and the excavations at the children's home on Jersey, Haut de la Garenne. Civil legal cases also call for archaeologists in situations where perhaps land surveys have not been conducted correctly on construction projects and outside of the legal industry, forensic archaeologists can also work on a *humanitarian*

level in disaster management situations. However, forensic archaeologists are most utilised in international crime scene investigations involving genocide excavations – one example we consider here was the subject of matters before the International Criminal Tribunal for the Former Yugoslavia (ICTY).

Article 56 of the Rome Statute – an overview

The Rome Statute of the International Criminal Court (ICC), together with the Rules of Procedure and Evidence (ICC Rules) and the Regulations of the Court, contain provisions aimed at securing a fair trial for the accused and achieving an "equality of arms" between the Prosecution and the defence. This includes protecting the rights of future accused during the investigative stage of the Court's operations by allowing the appointment of counsel to represent the interests of the defence even where no suspect has been identified or charged by the Court.

In the International Criminal Court (ICC), Article 56 of the Rome Statute confers specific powers on the Pre-Trial Chamber in relation to a "unique investigative opportunity". What that actually means is not defined in the Rome Statute, however paragraph 1(a) makes it clear that the purpose of Article 56 is the preservation of evidence for trial, to "take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial".

No specific procedure is set out as to the procedure to be followed in such an instance. Paragraph 1(b) states the Pre-Trial Chamber *may* take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence. Most interesting is paragraph 2(d): not only can counsel be authorized for a person who has already been arrested or appeared before the court by way of summons, counsel can also be appointed where there has not yet been any such arrest or appearance, in order to safeguard the interests of the defence. In respect of timing parameters, the power conveyed by Article 56 is therefore broad – there can be the use of ad hoc counsel, even where there is as yet no defendant. A safeguard remains through paragraph 4: evidence preserved under Article 56 is not automatically

admissible at trial, instead its admissibility is governed by Article 69 of the statute and will be "given such weight as determined by the Trial Chamber".

Physical evidence – an expert's example from the ICTY

Forensic archaeologists search, locate and excavate clandestine graves using archaeological techniques in order to collate evidence that can be applied to a legal investigation. They effectively work to reconstruct the actions of the perpetrator(s) alongside a multidisciplinary team of differing experts, to collate and reconstruct a series of events and provide methods of presentation in a court of law.

Forensic Archaeology lends itself to the importance of preservation of evidence due to the minute detail in which an archaeologist works, and the order and cataloguing of the tasks that take place during an excavation. Preservation of evidence is also a literal concept in this context, as archaeologists have the responsibility to excavate evidence under or near the ground's surface.

Once the Archaeologist has a suspicion of a burial being in a particular location, through say eyewitness accounts, they should conduct a land surface topographical survey of that area. This could yield a number of potential burial sites. Geophysical survey techniques then enable views beneath the ground without any invasive activity. These techniques should then be used to narrow down the suspected burial areas. Trenches in each area are dug to pinpoint the correct location. Once pinpointed, Forensic Archaeologists then extend the excavation to the whole burial area after setting up the cordon and appropriate forensic crime scene protocols such as the forensic tent with security. As the archaeologist excavates, they should log every layer of the burial 'backfill' and each item that they remove from the burial environment, along with coordinates within the grave and these items (or exhibits) are then sent off for analysis by other experts.

Archaeologists employed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Commission on Missing Persons (ICMP) conducted an exemplar investigation following the conflicts in the Balkans in the 1990s using forensic archaeologists, amongst many other

forensic experts. Specifically, the mass graves associated with the Srebrenica genocide yielded a unique find of preserved evidence which sought to help determine time since death estimations. Whilst time since death estimations are a typical element to consider in a forensic murder investigation, they very rarely afford the investigator the luxury of the precision of the potential *time*, *day* and *date* of the murder. Srebrenica was the exception.

Ten Seiko 5 automatic watches were excavated from the Srebrenica mass graves in 1997. All watches exhumed were examined to estimate the time it would have taken them to stop working. This allowed investigators to estimate timings. The Japanese watches rely on the wearer to wind the watch by simply wearing it, instead of winding the watch manually. Once the watch has been taken off or rests entirely, the mainspring progressively unwinds and can take around 36-48 hours to totally unwind, if the watch was fully charged and in good condition in the first place. In the case of the Srebrenica genocide, bodies were moved from a number of primary mass graves to secondary, and even some tertiary sites, in an attempt by the perpetrators to further hide the evidence of mass executions and it was the watch evidence that would be helpful in providing evidence of when the bodies stopped moving. This evidence, whilst not conclusive evidence of establishing when the person *died*, could be used with other contextual artefacts from the graves and could be used to potentially assist in strengthening other evidence, such as that which may pinpoint specific *perpetrators* to specific *events* in specific *locations* for instance – evidence which can only be used if preserved in the appropriate manner to then be used together to create a reconstruction of events for the court.

Aside of the evidential use in criminal courts, preserving this physical evidence correctly during the excavations was also critical for the future education of forensic archaeologists who would need to be aware of evidence of this nature so as not to jeopardise it by handling such watches incorrectly during excavation and post excavation retention of finds.

Vulnerable evidence – the decision in Ongwen

In terms of practical application, Article 56 has been deployed recently in the case of Dominic Ongwen. Ongwen was charged with 70 counts of war crimes and crimes against humanity, including murder, rape, torture and enslavement.

Specific charges were included of sexual and gender-based violence crimes directly perpetrated by Ongwen against seven women who were in his household at any time between 1 July 2002 and 31 December 2005. The Article 56 proceedings were concerned with the preservation of the evidence of those women.

In 2015, the Prosecution brought applications in the Pre-Trial Chamber to preserve testimony of 8 witnesses in total, alleged to be victims of sexual and gender-based violence. They brought the applications due to concerns the witnesses "have been subjected to pressure that may impact on their willingness to testify at trial and the content of their testimony. The Prosecutor requests that their testimony be taken as soon as possible and video recorded, on the grounds that their current willingness to give evidence represents a unique opportunity to obtain and preserve their testimony within the meaning of article 56 of the Statute."

Defence arguments that this would violate Mr Ongwen's rights were rejected by the PTC. The Single Judge was concerned by meetings being held in Uganda under the auspices of a Ugandan NGO, during which the Ongwen proceedings were discussed, including opinion as to the guilt or innocence of Dominic Ongwen and the collaboration of participants with the Court. The Single Judge concluded that there was "reasonable suspicion that the meeting in question was not innocuous but was held with a view to exercising some form of influence on persons who possess information relevant to the case". The Single Judge considered there to be specific and concrete indications of a risk of indirect pressure on witnesses. In particular, the Single Judge considered that Article 56 contained no wording to the effect that a unique investigative opportunity to take testimony is only present in case of a risk that the witness will not *be physically able* to attend trial. Rather, that the provision is not circumscribed in that way as it speaks more broadly of testimony which "may not be available subsequently for the purposes of a trial". The Single Judge's interpretation was therefore that physical conditions may pose a risk to future testimony, but equally such risk may arise from interference by a third party, causing witnesses not to attend when called, or to cause them to testify incompletely or insincerely. Clearly, a wide reading of the application of Article 56. As expected, the question of admissibility of the preserved evidence at trial remained for the trial chamber.

Upon application by the Prosecution, the Trial Chamber duly admitted the preserved evidence. The Defence argued that there was no statutory avenue for the admission of the Article 56 evidence. That was flatly rejected by the Trial Chamber who considered that Article 56(4) clearly gave them the power to consider the admissibility of Article 56 evidence under their Article 69 powers. The Defence raised further arguments seeking to limit the application of Article 56, stating there needed to be a temporal link of "imminent interference". Further, they argued there needed to be specified some standard or criteria for the "subsequently unavailable" requirement of Article 56. The Trial Chamber similarly rejected these limitations on Article 56, stating that any decision on whether evidence may not be available subsequently for trial necessarily involves some level of speculation and prediction.

In the trial judgement, the Trial Chamber determined that the Article 56 testimony was entirely reliable. In terms of the weight to be given to the evidence, the Chamber outlined that they had viewed both the video recordings and corresponding transcripts in their entirety and assessed the relevance and probative value of such evidence in the same was any other evidence before it. The Chamber had no qualms relying on the pre-recorded evidence, and considered it notable that the Defence identified no discrete credibility issues with those 7 witnesses in the closing brief. The evidence of those witnesses was considered in great detail and the Chamber ultimately convicted Ongwen of a number of offences on the basis of the pre-recorded testimony under Article 56.

Conclusion

Article 56 seemingly confers a broad power to preserve evidence, and the *Ongwen* case certainly indicates that it may be interpreted widely at the ICC. There are safeguards to Article 56 – just because the evidence is "preserved" does not mean it would automatically be admissible at trial and, if it is admissible at trial, consideration will be given to its relevance and probative value. The approach to vulnerable witness evidence in the Ongwen case is of course only one example and it will take further case law to determine how the parameters will develop.

In terms of physical evidence, and we recognise there may be an overlap between the two, forensic archaeology relies on the expertise of the archaeologist to have the foresight to understand the unique evidence and then preserve it appropriately for the investigators and legal teams. Forensic archaeologists also need to consider the conservation needs of the finds so that they too can be preserved – not just the information that they yield.

It certainly seems that preservation of evidence is here to stay, not only in the international sphere but also in a domestic context. For some time now, there have been pre-recorded ABE interviews in the domestic jurisdiction and there are more recently pre-recorded cross-examination in certain cases. The key for practitioner must be in ensuring that balance between preserving evidence and protecting interests of future defendants – certainly a theme in the *Ongwen* arguments and decisions.