

cause of non-respect of the principle is linked to the various aims and objectives assigned to punishment in international criminal law. By being mostly oriented towards prevention and retribution, and less on rehabilitation, international penalties are then more severe and there is less room for flexibility. As a result, we observe less proportionality between penalties and non-respect of the material criteria of the *nulla poena sine lege* principle.

In the second section of the second part, the author pleads in favour of an important redefining of aims and objectives assigned to penalties and for a diversification of international sanctions. It is notably highlighted that prevention, whether general or special, should be challenged considering its failure to bear fruits. Moreover, international criminal law would benefit from having its own referents (*dénationalisation des peines*). Scalia shares the view of other scholars and practitioners when pressing for the adoption of sentencing guidelines and for a scale of penalties that would categorize the various international crimes according to their gravity. The establishment of an international criminal code with various penalties — other than imprisonment — would fully ensure the respect of the principle of legality of penalties. With such a system, international criminal law could then focus on two aims identified as crucial by Scalia, namely, retribution and rehabilitation. Other mechanisms of restorative justice would need to complement and to take over the responsibility for the other aims currently assigned to punishment in international criminal law.

Du principe de légalité des peines en droit international pénal is an essential study for both academics and practitioners. Well documented, it provides an in-depth analysis of legality in international punishment. Perhaps the most significant contribution of this text is to suggest practical solutions aimed at ensuring that a fundamental principle of criminal law is respected by modern international criminal jurisdictions. In this regard, it is worth noting that in July 2012, the Trial Chamber of the ICC, in the *Lubanga* case, refused to adopt a consistent baseline for sentences with a starting point established at approximately 80% — or 24 years — for all sentences. The trial judges underlined that the sentence must be proportionate to the crime. An automatic

starting point, identical for all crimes, as proposed by the prosecution, would undermine that principle. If the Chamber did not pronounce on the opportunity to establish sentencing guidelines, it will be interesting to follow the evolution of case law on this issue. This book by Damien Scalia is, and will remain, a useful resource to answer the numerous and complex questions that international punishment raises.

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Morten Bergsmo and Cheah Wui Ling (eds), *Old Evidence and Core International Crimes* (Torkel Opsahl Academic EPublisher, 2012), 313 pp. ISBN 978-82-93081-60-9

The anthology *Old Evidence and Core International Crimes* puts a topic on the agenda of high relevance for international and internationalized criminal courts as well as for domestic courts addressing human rights violations of a predecessor regime. Typically, these courts deal with cases where between the commission of crime and commencement of trial lies a considerable time span, sometimes even decades. Therefore, gaining and evaluating 'old evidence', as it is referred to here, plays a crucial role.

The anthology appears in the publication series of Torkel Opsahl Academic EPublisher, a non-profit publisher committed to open access publishing of high international standard in the fields of international criminal law, transitional justice and international law.¹ The book is edited by the publisher's editor-in-chief, Morten Bergsmo, together with Cheah Wui Ling. Most of the chapters of the book were presented as papers at a seminar organized by the Forum of International Criminal and Humanitarian Law in Dhaka, Bangladesh, on 11 September 2011. The background to this

1 This book can be downloaded freely from <http://www.fichl.org/fileadmin/fichl/documents/FICHL16.Web.pdf> (visited 27 January 2013). It is also available on Amazon.

seminar was the decision taken by Bangladesh to initiate investigations into massive crimes committed during the war in 1971. Therefore, while the first part of the book examines the question of old evidence in international criminal law from a rather general perspective, the second part focuses on questions regarding the latest developments in Bangladesh.

In the first chapter, David Cohen identifies three main areas that arise when dealing with the question of old evidence: first, using old documents in order to prove the identity of the accused, as had happened in the *Demjanjuk* case; second, the problem of differentiating a witness' own testimony from the collective memory of a rural society; and third, the impact that the passage of time and experience of trauma has on the testimony of witnesses. Alphons M.M. Orié presents a number of practical challenges that courts are facing in trials in the field of international criminal law. He points out that the question of old evidence is an important one, but in the end it is only one piece in a mosaic of difficult questions regarding evidence in the practice of international criminal law. As regards the usability of old evidence, Agnieszka Klonowiecka-Milart comes to a differentiated conclusion: according to her, eyewitnesses are more reliable for proving low-level criminality whereas in contrast, documentary evidence is more suited to prove high-level command responsibility. From this it follows that the former normally retain their reliability with the years and are therefore still useful as 'old evidence'. Martin Witteveen presents a number of procedural issues, which may engage national courts dealing with international crimes, and gives insights into the implementation of provisions on international crimes in the Dutch legal order. In his view, a way to enhance evidential quality could, in fact, be to strengthen the rights of the defence. Very instructive is the contribution of Andrew Cayley, who examines the question of old evidence from the perspective of an international prosecutor. He scrutinizes four areas of evidence 'each of which has its own unique challenges and opportunities in respect of the passage of time': crime scenes, documents, witnesses and expert evidence.² Sriyana gives

insights into the work of the Indonesian National Commission with regard to human rights violations in Indonesia in 1966 and 1967. Patrick J. Treanor deals with a highly interesting topic by showing what role historians may play in international criminal trials. This brings to mind that expert reports by historians played an important role in the *Auschwitz* trials, which took place in Frankfurt in the 1960s. On the basis of their reports, the court was able to draw a comprehensive picture of the concentration camp system and the role the accused had played in it. It seems that this type of evidence is becoming an increasingly important feature in the field of international criminal law. Anya Topiwala and Seena Fazel examine the question of traumatized victims from a medical expert's point of view. According to them, a traumatized victim is not necessarily an unreliable source as long as some guidelines of interrogation are respected. Whether their proposals will realistically serve as practical guidelines for an interrogation of a witness in court — for example, the recommendation that 'proposing alternative hypotheses in court should be resisted'³ — remains, however, to be seen.

Mahdev Mohan builds the bridge to the second part of the anthology, which focuses on Bangladesh. By way of comparison with the Extraordinary Chambers in Cambodia, he gives advice to the newly established tribunal in Bangladesh, paying special attention to the rights of victims. M. Amir-Ul Islam then gives a detailed historical overview of the war in Bangladesh in 1971 and the crimes committed in this context, which are only now being tried before the Bangladesh International Crimes Tribunal. The author sheds light on the astonishing fact that the legal framework for this tribunal had already been established in 1971 and 1973. However, the description of how a culture of impunity emerged before trials could take place is paradigmatic. The author considers that one of the main reasons for Bangladesh's violent history in subsequent decades was the absence of trials in the aftermath of war. In contrast to some critical

(eds), *Old Evidence and Core International Crimes* (Torkel Opsahl Academic EPublisher, 2012) 109, at 112.

2 A. Cayley, 'Prosecuting and Defending Core International Crimes in Cases Using Old Evidence', in M. Bergsmo and W.L. Cheah

3 A. Topiwala and S. Fazel, 'Memory and Trauma', in Bergsmo and Cheah, *ibid.*, 155, at 165.

voices in this anthology regarding the legal basis and the first outcome of the Bangladeshi trials, H.E. Shafique Ahmed assures in a brief statement that Bangladesh, a member state to the International Criminal Court (ICC), 'is determined to conduct these trials in accordance with international legal and human rights standards'.⁴ Perpetrators of war crimes should 'be brought to justice, in a manner, needless to say, that maintains fairness and due process of law'.⁵ These words raise, in fact, high hopes that Bangladesh will manage to conduct the trials in a balanced manner, taking into account the interests of victims as well as rights of the accused. However, to some extent, the following chapter of Md. Shahinur Islam already creates serious doubts in this regard. Even though he points out that the legal framework for the trials is in line with international legal standards in many ways, he stresses that it 'can only be interpreted in light of the framework set out by [the Bangladesh International Crimes (Tribunals) Act of 1973], and not any other legal instruments of international nature'.⁶ Some features of the Act presented in this chapter, however, give the impression that a stronger orientation towards international legal standards would have in fact been desirable, for instance with regard to some rather vague and broad provisions or the absence of appeal provisions against interlocutory decisions. In addition, the author's remarks on procedural fairness remain unclear and rather alarming — according to him it should not be 'a bull in a china shop' and in general be such that it 'aims for a good conscience in a given situation, nothing more but nothing less'.⁷ Finally, Otto Triffterer sheds light on the status of international criminal law at the time the legal framework for the tribunal in Bangladesh was created, which was, in fact, one of the world's first legal frameworks on international criminal law after the

Nuremberg trials, and analyses its influence on the creation of the Rome Statute of the International Criminal Court.

Even though the question of old evidence in international criminal law is clearly the underlying topic, this anthology goes way beyond it, as it neither confines itself strictly to the question of old evidence — many contributors address the challenges concerning old evidence in connection with other procedural issues in the field of international criminal law — nor to core international crimes. For example, in the *Demjanjuk* trial, which is referred to from time to time, the court did not apply international criminal law provisions but the German penal code. This can be regarded, indeed, as a strength of this anthology, as it shows that the question of old evidence can hardly be treated apart from general procedural questions — international standards of proof, as some of the authors rightly stress, must be applicable for any evidence, regardless whether it can be considered as old or new, otherwise procedural fairness might be called into question.

As Cayley puts it in his chapter, the topic of old evidence 'is both timely and of increasing significance'.⁸ This anthology offers a comprehensive analysis from various angles and gives valuable insights. The editors must be highly commended for what they have achieved with this volume.

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8 Cayley, *supra* note 2, at 109.

4 S. Ahmed, 'The Importance of Prosecuting Core International Crimes: The International Criminal Tribunal's Objectives and Experience', in Bergsmo and Cheah (eds), *supra* note 2, 239, at 241.

5 *Ibid.*, at 241.

6 S. Islam, 'The International Crimes (Tribunals) Act of 1973 and the Rules: Substantive and Procedural Laws', in Bergsmo and Cheah (eds), *supra* note 2, 243, at 245.

7 *Ibid.*, at 253.

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*Is There A Court For Gaza? A Test Bench
for International Justice* (T.M.C. Asser
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The search for international justice within national systems requires that the international community entrust the making of justice, including the investigation, prosecution and reparation of wrongs, to a national system