

FRONTLINE EVIDENCE COLLECTION

The Gaza Experience

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COMPLIMENTARITY - ICC

- Requires States to investigate War Crimes and Crimes Against Humanity in the first resort
- The collection, management and storage of forensic evidence is an essential component of investigation of such crimes
- Palestine, including Gaza, has a well-established British-modeled criminal justice system set up during the British Mandate, including Legislation and Regulations relating to criminal evidence collection
- One of the ICC justifications for its slowness to open a full investigation into the situation in Palestine was its insistence that it could not obtain the evidence required for a successful conviction because of Israel's refusal to permit ICC personnel to enter Israel or Palestine, particularly Gaza.

NEGATIVE CONNOTATIONS

- Such attitudes undermine Palestinian sovereignty
- They can be inherently racist, in that they denigrate the capacity of Palestinian professionals, particularly Gazan law enforcement and health professionals, to perform and/or continue to develop the skills and experience to perform these functions to an international standard
- Gazan entities have risen to the challenge, both of the evidentiary situations confronting them on the ground, and the lack of action by formal international bodies.
- While not perfect, Gazan entities have systems in place, and continue to develop their capacity, to conduct competent, independent evidence collection to international standards.

ADMISSIBLE EVIDENCE

Legal Evidence is defined as:

“information that is admissible in court.”

Standards for admissibility

- **RELIABLE**

Verifiable, Authentic, Proven Chain of Custody

- **RELEVANT**

Helps prove elements of a crime, Not Prejudicial

PROMPT COLLECTION CRITICAL

- Evidence must be collected as soon as possible after the violation, to preserve and protect it until required for judicial procedures
- If **not** collected immediately, evidence is likely to have deteriorated or be gone by the time investigators (eg ICC) arrive — sometimes hours, days, or even years later — if at all.
- Most injured and dead present to health facilities, so it's the obvious place to begin.
- This presentation will concentrate on the most challenging files and the efforts to collect evidence in relation to them: prohibited weapons.

Gaza Situation

- Increasingly characterized by the use of experimental and prohibited weapons
 - white phosphorous, depleted uranium, explosive bullets
- This significantly impacts evidence collection, as well as medical treatment and research
- Inadvertently expanded medical practice to encompass a dual role of ‘criminal evidence’ collection – why?
- **weapons fragments** and **biological samples** taken from victims not only serve to inform medical treatment, but also **constitute evidence essential for obligatory judicial processes under domestic and international law.**
- Domestic legislation, policies and procedures have not always kept up with this role expansion.

LAWS GOVERNING CRIMINAL EVIDENCE COLLECTION

Domestic

PALESTINIAN PENAL PROCEDURE LAW NO 3 OF 2001

- **Article 19:2** “Judicial officers shall ... **gather the evidence necessary** for the investigation in the trial.”
- **Article 27** “...the judicial officer ... to proceed immediately ... to **inspect the material evidence and secure same.**”
- **Article 72:1** The **objects seized** are placed in sealed containers ... placed in the warehouse of the Prosecution ...

LAWS GOVERNING CRIMINAL EVIDENCE COLLECTION

International

ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

- **Article 64:6(b)** [the Trial Chamber may...] Require the ... production of ... evidence by obtaining... the assistance of States ...
- **Article 69:3** ...The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.
- **Article 70:1(c)** [The Court shall have jurisdiction over the ... **destroying, tampering with or interfering with the collection of evidence;**
- **Article 70:2** ...The conditions for providing international cooperation ...**shall be governed by the domestic laws of the requested State.**
- **Article 70:4(a)** Each State Party shall ... penalizing offences against the integrity of its own investigative or judicial process **to offences against the administration of justice ...committed on its territory, or by one of its nationals.**

Situation 1

A person is found unconscious lying in the street outside the Municipality Building with a bleeding chest wound with a knife protruding from it.

What usually happens next?

Situation 2

A person is found unconscious lying in the street outside the Municipality Building with a bleeding chest wound with shrapnel protruding from it after an Israeli airstrike.

What usually happens next?

TAKE-AWAY POINTS

1. Preserve life.

2. Preserve evidence.



PHYSICAL AND BIOLOGICAL EVIDENCE

RIGHTS-BASED BENEFITS HEIRARCHY

- **Doctors**

PRESERVE LIFE

Individual benefit (Victim - UDHR Article 3 - right to life, health)

- **Judicial Officers**

PRESERVE EVIDENCE

Individual benefit (Victim - UDHR Article 8 - right to justice)

Public Good (UDHR Article 28 – right to just social and international order)

- **Lawyers**

PRESENT EVIDENCE TO COURT

Individual benefit (Victim - UDHR Article 8 - right to justice)

Public Good (UDHR Article 28 – right to just social and international order)

- **Researchers**

ADVANCE SCIENCE

Individual benefit (Researcher - reputation/career)

Public Good (Population - improved medical treatments, health outcomes)

GUIDELINES AND STANDARD OPERATING PROCEDURES FOR EVIDENCE COLLECTION

- While clear processes and procedures existed in Gaza for ‘ordinary’ crimes, researchers, ethics committees, hospital administrations and local law enforcement authorities in the past were left without clear guidance, and with little education or training in best practice for war crimes evidence collection.
- In Gaza this resulted in the loss of important criminal evidence, in turn compromising Palestine’s legal obligations under international instruments to which it is signatory, such as The Rome Statute.
- It also compromised the possibilities for victims to avail themselves of both justice, and restitution at a future date.
- There was thus an urgent need for the improvement of statutory and ethical guidelines and Standard Operating Procedures (SOPs) to cover all evidence collectors – health personnel, judicial officers such as police, researchers and NGO personnel.

even if only to meet international obligations

- **STATUTE OF THE INTERNATIONAL COURT OF JUSTICE**
- Article 44(1) ...the Court shall apply direct to the Government of the state upon whose territory the notice has to be served. (2) The same provision shall apply **whenever steps are taken to procure evidence on the spot.**

DIFFICULTIES ON THE GROUND

- it is not always immediately clear to health personnel whether a presentation to an ED/OT is a victim of a crime
- Health personnel are too busy saving lives to collect evidence
- Health personnel are usually not trained crime scene officers
- Non-health personnel (NGO/investigators/researchers) may get in the way of medical personnel in life-critical situations
- Doctors/Researchers with foreign delegations may think they are helping by “smuggling” evidence out of Gaza

Admissibility Issues

REQUIRES AN UNBROKEN CHAIN-OF-CUSTODY FROM VICTIM TO COURT

Victim Bagging & Tagging Documentation Storage Court Justice



JUDICIAL OFFICER

&

TRAINED INVESTIGATOR/NGO



RESEARCHER



GAZA LIMITATIONS

PERSONNEL

- Gaza's MOH **Ethics Committee** has **no formal guidelines or criteria** for assessment of research protocols involving criminal evidence, either in peace or in conflict/war;
- **no education/training of Ethics Committee members on WC/CAH obligations**
- Gaza **government ministries** (health, justice, interior) **have, or are in the process of developing, formal protocols and systems** governing the interface between the ministries re peacetime criminal evidence collection, but
- these **do not function adequately during periods of conflict/war**;
- We have completed training for some frontline staff, but currently **no education/training of managers** on WC/CAH obligations

GAZA LIMITATIONS

FOREIGN DOCTORS/MEDICAL DELEGATIONS

- **Judicial Officers, Doctors, Researchers** are generally aware of their responsibilities re criminal evidence management in peace time in their own countries, but **not during conflict/war**
- **no education/training on entering Gaza** on domestic Palestinian law, ethics committee approval process, WC/CAH obligations
- **Medical Conference organisers and Medical Journals** have **no formal guidelines** to ensure upholding of WMA Helsinki Declaration eg adherence to evidence collection and management protocols, or proof of informed consent of participants in **research conducted in conflict zones**

SOPS AND GUIDELINES NEEDED

- Development and implementation of ***SOP for the Collection of Criminal Evidence by Judicial Officers and Health Personnel*** for all health facilities, applicable to both peacetime and times of armed attack – in progress
- Development and implementation of ***SOP for the Collection of Criminal Evidence by NGO Investigators*** for all NGOs conducting human rights documentation activities, applicable to both peacetime and times of armed attack – in progress
- Development by and for national Ethics Committees of ***Guidelines for Medical Research involving victims of WC/CAH*** with particular attention to the handling and management of criminal evidence, researchers' obligations under national law and international Declarations – needs action
- Development by and for international journals/conference committees of **performance indicators** to enable assessment of researchers' **compliance with SOPs and ethical standards** for research/sample collection conducted in conflict zones – needs action

EDUCATION AND TRAINING

Educational **materials** must be produced, and **training provided** to:

- **National staff** of hospitals, clinics, NGOs, researchers, judicial officers and forensic evidence teams, on the SOPs and Guidelines above – GCHR in progress
- all **foreign doctors, researchers, and NGO personnel BEFORE entering Palestine** or on arrival but before commencing work, on their **obligations** regarding criminal evidence collection and management
 - under Palestinian domestic law, and international law, and
 - under Palestinian ethics requirements, and the WMA Declaration of Helsinki
- **members of Ethics Committees** on implications of obligations under international law for medical and other research involving victims of war crimes, and the management of criminal evidence - unmet need

WHAT HAS THIS GOT TO DO WITH GTP?

- For optimal credibility, GTP must ensure that all the evidence it considers meets international standards
- Similarly, it must ensure that all its personnel are adequately trained in the standards relating to evidence collection, management and storage
- GTP must also endeavour to adequately resource Gazan entities to continue perform their essential work on the ground in a timely manner. Why?

GTP, or who?

- ICJ holds States accountable, but has no powers of enforcement, little if any power to provide individual remedies
- ICC only includes those victims that will be witnesses in the specific incidents for which it issues arrest warrants, thus individual victims may never have their injury acknowledged
- Formal bodies such as OPCW have demonstrated that they are subject to political pressure and that their integrity, independence and impartiality is too easily compromised eg report on the chemical attacks in Syria
- GTP is the only remaining possibility where every victim has the possibility:
 - to have a voice, and break the silence
 - to have their case form an integral part of the historic record,
 - to have the evidence relating to their case publicly and independently analysed and documented, if they so wish,
 - to have ongoing assistance in advocating for justice on their behalf, including seeking restitution for their losses.