

The role satellites (should) play in the protection and promotion of human rights, including the use of earth observation satellites in evidential matters

Introduction

The use of Earth Observation (EO) techniques including satellites, aircrafts and drones to generate evidence in the adjudication of serious crimes of concern to the international community in cases involving human rights violations has gradually but firmly become entrenched in international judicial system.

Over the years, the quality of remotely sensed information with respect to the spatial resolution of imagery and data processing techniques has improved tremendously. Remote sensing can be defined as the science of gathering data on an object or area from a considerable distance, as with radar or infrared photography, to observe the earth or a heavenly body¹. Data collection over a specific place or area is mostly time specific when the source of radiation passes overhead. This offers a unique opportunity to record data/information about phenomena on the surface of the earth.

This, in combination with rules and regulations in the legal field has contributed to its increasing acceptability as evidence in a court of law. Natural science technologies have made it possible to take a more active role in conflict reduction and the promotion of universal human rights. One of the most powerful of those technologies is satellite imagery². Information derived from EO techniques such as satellites based sensors are already playing a very important role in the protection and promotion of human rights.

¹ Remote sensing definition: <http://dictionary.reference.com/browse/remote+sensing> ; Accessed 13 June 2013.

² Jonathan Drake and Eric Ashcroft - Eyes in the sky: Remote sensing in the service of human rights, February 1, 2013
http://www.physicstoday.org/daily_edition/points_of_view/eyes_in_the_sky_remote_sensing_in_the_service_of_human_rights ; Accessed 14 June 2013

The use of EO techniques by the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) to garner evidence for court proceedings

This paper primarily addresses the use of EO information at the international judicial level and will focus on its use at the ICC. The OTP has increasingly used EO techniques to collect evidence for use in Court and this option is now routinely used in each situation being investigated by the Prosecutor's office.

Unlike the International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for former Yugoslavia (ICTY), Special Court for Sierra Leone (SCSL) which are ad hoc, the ICC is an independent permanent court established under the Rome Statute (RS) by the international community to investigate and prosecute the most serious crimes such as war crimes, crime of genocide, crimes against humanity and crime of aggression.

The ICC's mandate came into effect on the 1st of July 2002. This implies that the Court may exercise jurisdiction to investigate and prosecute War Crimes, Crimes against Humanity, Genocide and the crime of aggression set out in Article 5 of the RS in accordance to the Statute if:

- The state where the crime occurred is signatory to the Rome Statute thereby automatically accepts the jurisdiction of the Court³
- The crimes committed is referred to the Prosecutor by a State Party
- A situation in which one or more such crimes appears to have been committed is referred to the Prosecutor by the United Nations Security Council (UNSC)
- The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

The legal basis for EO Information use as Evidence by the OTP

The legal basis for the use of EO techniques to gather evidence for use in court lies in the Rome Statute of the International Criminal Court and the Rules of Procedure & Evidence (RPE). The Rules of Procedure and Evidence is an instrument for the implementation of the Rome Statute of the International Criminal Court, to which they are subordinate in all cases⁴.

Provisions for this are made under the headings - Jurisdiction, Admissibility and Applicable Law. These provisions are specifically referred to in the following articles:

- "Art.8.2.a (iv) **extensive destruction** and appropriation of property..."
- "Art.8.2.b (ii) **intentionally directing attacks against civilian objects...**"

³ The Rome Statute of the International Criminal Court: P. 11 http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf ; Accessed 13 June 2013.

⁴ The Rules of Procedure and Evidence of the ICC http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidence_Eng.pdf; Accessed; 13 June 2013.

- "Art.8.2.b (iii) Intentionally directing **attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission...**" and
- "Art.8.2.b (v) (v) **Attacking or bombarding**, by whatever means, **towns, villages, dwellings or buildings...**"

It is obvious that the above mentioned *structures, places or objects* have inherent spatial components which can be measured from space and at any moment in time with sensors onboard carriers such as satellites, aircrafts and drones.

The Chambers comprising of judges who preside over pre-trial matters, trials and appeals and the Office of the Prosecutor, are the two organs of the Court that are directly involved with the use of EO information as evidence at the ICC; defense teams may also use this technology in presenting their case. Article 64 (6) (a) of the RS provides that prior to or during the course of a trial, the Trial Chamber may, as necessary: "require the attendance and testimony of witnesses and the production of documents and **other evidence**". This means that apart from oral testimony and documentary evidence, the OTP can use EO material in support of their cases subject to Article 64 (2) which puts an obligation on the Trial Chamber to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

The roles of Chambers to determine issues regarding the relevance and admissibility of evidence are further outlined in the RS and Rules of Procedure and Evidence as can be seen for example in:

- Article 64 (8) (b) – At the trial, the presiding judge may give directions for the conduct of the proceedings, including to ensure that they are conducted in a fair and impartial manner. Subject to any directions of the presiding judge, the parties may submit evidence in accordance with the Statute.
- Article 9 (a) - Rule on the admissibility of relevance of evidence.
- Article 54 (1) (a) – The Prosecutor shall in order to establish the truth, extend the investigation **to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility** under the Rome Statute".
- RPE Rule 63 (2) A Chamber shall have authority, in accordance with the discretion described in Article 64, paragraph 9, to assess freely **all evidence** submitted in order to determine its relevance or admissibility in accordance with Article 69.
- RPE Rule 73 (4) – references are made in sub-rules (a) and (b) to "**other types of evidence**".

From provisions cited above, it is clear that use of EO material is envisaged both in the RS and RPE as long as such evidence is determined to be admissible by Chambers.

The parties to a proceeding under the guidance of Chamber strive to reach a common ground on the admissibility of evidence or testimony of an expert witness.

A proposed set of instructions exists for satellite imagery experts which the parties and the expert are supposed to adhere to⁵. However, this does not necessarily mean evidence cannot be contested.

In reality, such as in the Kenya situation – “The Prosecutor vs. William RUTO & Joshua SANG on the one hand and the Prosecutor vs. Uhuru KENYATTA on the other, the parties failed to agree on a common expert for satellite imagery analysis to serve as the recognized expert for EO evidence⁶. However, this notwithstanding, the OTP single handedly submitted satellite imagery evidence to the Chamber⁷. The defense’s disagreement in the Kenya situation is related to the procedure adopted by the prosecution rather than the use of satellite imagery as evidence⁸. This in itself is a positive development because the Prosecutor is obliged to prove the allegations against the person(s) charged and is entitled to use satellite imagery evidence to establish the truth in current as well as future situations before the ICC.

In situations where the jurisdiction of the ICC is contested by a state involved in heinous crimes, a referral by the UNSC is necessary provided the state is a member of the UN. Sudan and Libya for instance, are not state parties to the Rome Statute; as such, they do not recognise the jurisdiction of the Court. Even though both situations have been referred by UNSC, the OTP is conducting investigations without being on the ground. This makes the work of the OTP very difficult and challenging.

These fundamental setbacks mean that the OTP has to explore alternative ways of gathering evidence for a solid case without endangering the well-being of either witnesses or its staff. One crucial way the OTP is doing this is by using EO techniques to generate evidence for court use against alleged perpetrators of serious crimes within her mandate.

⁵ Proposed Instruction for Satellite Imagery Expert appearing before ICC Judges (Annex A) <http://www.icc-cpi.int/iccdocs/doc/doc1517947.pdf> ; accessed 17 June 2013.

⁶ Prosecution’s report on joint instruction of experts, P 3, 31 October 2012 <http://www.icc-cpi.int/iccdocs/doc/doc1499797.PDF> ; accessed 17 June 2013.

⁷ Prosecution’s third report on joint instruction of experts P.3, 15 February 2013 <http://www.icc-cpi.int/iccdocs/doc/doc1552991.pdf> ; accessed 17 June 2013.

⁸ Instructions for Satellite Imagery Expert (Annex B) <http://www.icc-cpi.int/iccdocs/doc/doc1552990.pdf> ; accessed 17 June 2013.

Reasons why the OTP uses EO techniques to generate evidence

There are many reasons why the Prosecutor uses EO techniques in order to generate evidence for court use. They include:

1. **Inaccessibility of Crime Scene** – it is often the case that situations before the Court happened in hostile or remote places where access to the scene of crime is a prohibiting factor. Security in on-going conflicts is a serious problem like in the Darfur region of Sudan & in the Kivu provinces of the Democratic Republic of the Congo (DRC). Furthermore, security is an issue for crimes committed in remote areas with limited access by the rest of the world. This is the case of the Lord's Resistance Army (LRA) in the border regions of Uganda, DRC, South Sudan and Central African Republic.
2. **Reliability of Scientific Evidence** – because EO information is considered unbiased and reliable if processed correctly, the OTP uses it as evidence in court and to corroborate witness statements.

Situations in which the OTP has used EO evidence in court

Depending on the nature of the crime, the OTP in most cases, use two sets of high resolution satellite images depicting the "**before**" and "**after**" scenes of the scene of crime to show that the crime(s) in question did take place. In some cases, a hybrid of high and medium resolution imagery is used especially if the coverage area is massive.

Comparison of high resolution satellite imagery of a place taken just before and after the crime occurred can clearly show disturbances that are tell-tale scars of crimes committed.

Chronologically, the OTP has used EO techniques in the following situations:

- **DRC 2007 - The Prosecutor vs. Germain KATANGA & Mathieu NGUDJOLO CHUI.** Bogoro scene of crime wherein high resolution satellite imagery and drone images have been used.
- **Darfur, Sudan 2009 - The Prosecutor vs. JERBO & BANDA.** This case involved the attack on the African Military Base (MSG Haskanita). It is alleged that rebels under the leadership of JERBO & BANDA attacked the base resulting into the death of 12 soldiers and 8 seriously wounded and the destruction of equipment and installations. The Prosecution is in possession of satellite imagery showing the MGS Haskanita before and after the attack. The imagery taken after the attack shows the extent of the destruction of the camp⁹.
- **Libya 2011 - The Prosecutor vs. Saif GADAFI & Ahmed SENUSSI**
- **Cote d'Ivoire 2012 - The Prosecutor vs. Laurent BAGBO**

⁹ Prosecutor's Application under Article 58 filed on 20 November 2008 now filed pursuant to the request of Pre-Trial Chamber I of 7 May 2009, P.20 <http://www.icc-cpi.int/iccdocs/doc/doc691428.pdf> ; accessed 17 June 2013.

- ***KENYA 2012 – The Prosecutor vs. Samuel RUTO & Joshua SANG and The Prosecutor vs. Uhuru KENYATTA.*** An analysis of high & medium resolution satellite imagery has been conducted by a UNOSAT expert Mr Lars Bromley¹⁰ upon the request of the OTP.

Conclusions

Crimes of concern to the international community have inherent time & location stamps embedded in them; in other words, they occur at specific times and places. Because EO data and the crimes they register have above-named characteristics, remote sensing information as a tool to fight human rights violation cannot be overemphasized.

EO information including, satellite imagery or other remotely sensed information has the unique advantage of being unbiased and scientific in nature. If use appropriately, it is capable of revealing the truth because it offers a unique window on events as they unfold during the course of time.

As already mentioned, there are prohibiting factors which influences the Prosecutor's ability to build an impeccable case against perpetrators of heinous crimes. Earth Observation techniques offer opportunities which the Prosecutor can use to circumvent some of the problems related to inaccessibility of remote areas and areas where hostilities are on-going and out of bounds to OTP staff.

The Office of The Prosecutor uses where necessary, EO evidence in court to prosecute crimes that fall within the mandate of the ICC. To date, none of the EO information used as evidence has ever been contested by the defence party.

¹⁰ Lars Bromley Principal Analyst and Research Advisor - Human Rights and Security - <http://www.icc-cpi.int/iccdocs/doc/doc1552988.pdf> ; accessed 17 June 2013.