Forensic Evidence: International Criminal Courts and Tribunals

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1 To achieve their aims of qualifying acts as criminal conduct and of establishing the guilt or innocence of the accused, criminal law systems necessitate the collection of reliable evidence (→ *Collection of Evidence;* → *Production of Evidence;* → *Assessment of Evidence*). In the specific context of international criminal justice systems, which adjudicate international crimes - namely, → *War Crimes* [MPEPIL], → *Crimes Against Humanity* [MPEPIL], and → *Genocide* [MPEPIL] – this collection may prove an arduous task and may be hampered by a series of factors inherent to the very nature of such crimes, including their massive scale, the time that usually has elapsed between their commission and the investigations, not to mention the trials, the particular trauma suffered by victims and witnesses, as well as possible ongoing conflicts where investigations are to take place (→ *Investigations: International Criminal Courts and Tribunals*; → *Evidence (International Criminal Courts and Tribunals);* → *Assessment of Evidence: International Criminal Courts and Tribunals*). As noted by Schurr and Ferstman,

> [c]ollecting evidence abroad in post- or actual conflict situations and transporting such evidence to a court situated thousands of miles away, thereby bridging the gap between the realities on the ground where the crimes were committed to the courts sitting abroad, without diminishing the credibility of such evidence, remains challenging. (Schurr and Ferstman, 2010, at 23).

2 These 'realities on the ground' may explain why in international criminal justice rules of evidence are fairly flexible, leaving judges with a rather wide array of discretion in deciding what type of evidence will be admissible as long as the principle of fairness of proceedings is respected (see Freeman, 2018, at 291-2). So far, before → *International Criminal Courts and Tribunals*, → *witness* → *testimony* has been key in proving international crimes (→ *Deposition;* → *Forms of Evidence*). As reported by Combs, 'the vast bulk of the evidence presented to the current international tribunals comes in the form of witness testimony' (2010, at 12), which

generally fails to be 'supported by a substantial quantity of documentary or forensic evidence' (2010, at 6). This lack of support can prove problematic as witness testimonies are not infallible evidence: memory can fluctuate and be affected by the recollection of traumatic events years after the facts (see eg *Prosecutor v Ntawukulilyayo*, 2011, para 25). Witnesses may also be subject to fear, threats or corruption.

3 This is not to say that other types of evidence – such as scientific or technologically derived evidence - have not been resorted to in international criminal justice (see Freeman, 2018) and forensic evidence – here understood as 'evidence obtained through scientific testing' (Brammertz and Jarvis, 2016, 157, fn 291) – has not remained absent from the international criminal courtroom. It has been used to establish the perpetration of the crimes, to corroborate witness evidence and to determine → *Individual Criminal Responsibility* [MPEPIL]. On a number of occasions, forensic experts have been called to testify, precisely to assist judges in reaching their verdict of guilt or innocence (→ *Experts*; → *Expert Witness*). For the purposes of this analysis, forensic experts refer mainly to archaeologists who excavate mass graves and preserve the evidence collected (human remains, personal effects), anthropologists who analyze and identify human remains and pathologists who determine the cause and manner of death (see Zanetta, 2009, 335-50). Other types of forensic evidence – and in particular digital evidence – fall outside the scope of this entry, although reference to technologically derived evidence is made where relevant. Suffice here to note that their admissibility in court does raise a number of issues, in particular with respect to credibility and fairness of proceedings, and that technological advances will inevitably confront the ICC with digital challenges (for excellent analyses of the admissibility of digital evidence in international criminal justice, see Freeman, 2018; Freeman and Vazquez Llorente, 2021; Koenig and Egan, 2021).

4 Resort to forensic archaeology, anthropology and pathology was admittedly fairly discreet – if not altogether absent – at the → *Special Court for Sierra Leone (SCSL)*, the → *Extraordinary Chambers in the Courts of Cambodia (ECCC)* and the → *International Criminal Tribunal for Rwanda* [MPEPIL] (ICTR)), regarding which forensic anthropologist Baraybar regretted that

> [w]hile it was a sheer impossibility for the Rwanda Tribunal to collect all forensic evidence to prove that genocide took place, the ICTR could still have collected much more information regarding the *modus operandi* of more discrete groups by using forensic evidence. While other kinds of forensic evidence were collected on a smaller scale (primarily crime scene evidence) the bulk of evidence was lost by mid-1996 (2017, at 175).

5 Intriguingly, the situation was the diametrical opposite before the → *International Criminal Tribunal for the Former Yugoslavia (ICTY)* [MPEPIL], where forensic evidence was presented and used in the majority of cases. According to Wilson,

> The top three types of experts in ICTY trials are medical experts with 141 appearances, *forensic scientists* (126), and social researchers (100). The prosecution relies much more on expert testimony than the defense, calling 357 (74%) experts to the defense's 124 (26%). At the ICTY, prosecution teams summoned medical experts (123), *forensic scientists* (83), and social researchers (77) most frequently and indeed, the prosecution called experts more regularly in every category, with only a few exceptions. Defense counsel relied most on *forensic scientists* (43), social researchers (23) and medical experts (18) and they commissioned legal and human rights experts more often than prosecutors (2017, at 185, emphasis added).

6 Such substantial – and so far unparalleled – resort to forensic archaeology, anthropology and

pathology at the ICTY is perhaps unsurprising considering its import in unveiling a criminal *modus operandi* which would most likely have remained unnoticed without it. The timing of the investigations may also have played a role. As Freeman reports, '[a]s the ICTY and ICTR cases progressed over two decades, forensic anthropology techniques became more precise' (2018, at 286). Yet, it is essentially at the ICTY that they were key in proving some of the crimes perpetrated, including → *Genocide* [MPEPIL]. The evolution of these techniques was admittedly pivotal in the *Ayyash* case before the → *Special Tribunal for Lebanon (STL)* [MPEPIL] in which '[t]he forensic evidence relating to the attack involves DNA profiling and analysis of human remains' (Freeman, 2018, 310). The STL devoted a considerable part of its judgment to the forensic findings relating to both the explosion and the human remains (*Prosecutor v Ayyash et al.*, 2020, 1028-1375 and 1376-1446) but the legal findings themselves are rather cursory, leading to the overall conclusion that the investigations ultimately led to the 'reliable collection of the key evidence' (*Prosecutor v Ayyash et al.*, 2020, 1447). Proceedings at the → *International Criminal Court (ICC)* [MPEPIL] thus admittedly provide a more solid ground on which to assess its value – in terms of reliability and admissibility. Against this background, the present entry will focus on ICTY and ICC case law to determine the rules applicable to the judicial assessment and admissibility of forensic evidence, used as decisive even if not sole evidence (A) and as corroborative evidence (B), including in cases of crimes of sexual violence (→ *Gender-Based Crimes* [MPEPIL]) (C).

A. Decisive Forensic Evidence at the International Criminal Tribunal for the former Yugoslavia: Proving Patterns of Mass Graves

7 Following the war that raged through the Former Yugoslavia (→ *Yugoslavia, Dissolution of* [MPEPIL]), the → *International Community* [MPEPIL] launched an unprecedented search for

the corpses of the victims with the dual aim of proving the crimes committed and of identifying the victims. As a result of the work carried out by the Bosnian Missing Persons Institute ('MPI'), co-founded by the International Commission on Missing Persons ('ICMP'), 7,000 out of the 8,372 Srebrenica victims have, as of July 2021, been found and identified – 6,964 by DNA and 36 by non-DNA, traditional, methods (ICMP, 2021).

8 The pioneering forensic work conducted in Bosnia-Herzegovina was instrumental in revealing the criminal *modus operandi* of the perpetrators and their use of a pattern of mass graves to conceal their crimes and/or disguise them as combat losses. The scientific analyses – including the use of DNA – of the mass graves made it possible to link different gravesites to one another and to establish that, at some point during the conflict, heavy machinery was used to disturb the mass graves and rebury (parts of) the corpses of the victims in other secondary sites, leaving the bodies mutilated, fragmented and co-mingled (→ *Scientific Evidence)* (see eg *Prosecutor v Mladić,* 2015, 36272-300; Jugo and Wagner, 2017, 202).

9 At the Tribunal, several forensic experts on numerous occasions testified of this pattern of mass graves and the judges attached considerable weight to these testimonies, as evidenced not only by the substantial parts of judgments devoted to forensic evidence (see eg *Prosecutor v Krstić*, 2001; *Prosecutor v Popović et al*, 2010; *Prosecutor v Karadžić,* 2016; *Prosecutor v Mladić,* 2017) but also by the conclusions the judges were able to draw from this evidence. The ICTY constantly saw in this reburial strategy 'a concerted campaign to conceal the bodies of the men' (see eg *Prosecutor v Krstić,* 2001, para 78; → *Krstić Case* [MPEPIL]) and a 'covert operation to exhume human remains […] in an effort to hide them' (*Prosecutor v Mladić,* 2017, para 3002). Aside from hiding corpses of victims, this concealment campaign also aimed at heavily complicating, if not altogether impeding, forensic investigations. The mutilation of the

bodies generated by the use of large earth-moving equipment can substantially affect the exact determination of the number of victims as well as of the date, cause and manner of death (see eg *Prosecutor v Karadžić*, 2016, para 5543), thus paving the way for Defence arguments pointing to the limits and unreliability of forensic science (→ *Defence Office*).

10 Yet, at the ICTY, judges afforded much weight to the forensic evidence presented before them and notably relied on it to refute the Defence arguments that the victims had died in the course of combat. In *Krstić*, the forensic evidence – corroborated by aerial images (para 230) – allowed the *Trial Chamber* to find that

> Most significantly, the forensic evidence presented by the Prosecution also demonstrates that, during a period of several weeks in September and early October 1995, Bosnian Serb forces dug up many of the primary mass gravesites and reburied the bodies in still more remote locations. […] *Such extreme measures would not have been necessary had the majority of the bodies in these primary graves been combat victims* (*Prosecutor v Krstić,* 2001, para 78, emphasis added).

Further, the Trial Chamber inferred from the use of primary and secondary gravesites the genocidal intent of the perpetrators to destroy the Bosnian Muslims of Srebrenica:

> Finally, there is a strong indication of the intent to destroy the group as such in the concealment of the bodies in mass graves, which were later dug up, the bodies [were] mutilated and reburied in other mass graves located in even more remote areas, thereby preventing any decent burial in accord with religious and ethnic customs and causing terrible distress to the mourning survivors, many of whom have been unable to come to a closure until the death of their men is finally verified (*Prosecutor v Krstić,* 2001, para 596; see also paras 73-9).

11 Aerial images, provided by the United States Government, were also used by the investigators to locate mass graves, as reported in the *Blagojević and Jokić* judgment (2005, fns 1397-8). In *Popović et. al.* the Prosecution relied on aerial images 'to establish the alleged burial and reburial operation' (*Prosecutor v Popović et. al.*, 2010, para 72). The Trial Chamber found them 'to be authentic and reliable, and has accorded them due weight' (para 75). Likewise, in the *Tolimir* case, the Trial Chamber found that aerial images – here also provided by the United States Government – 'have often complemented forensic archaeological or anthropological reports. The fact that [investigators and forensic experts] first identified and then indeed located gravesites by aerial images points to their authenticity and utility as evidence. In addition, the interpretation or authenticity of an aerial image has often been corroborated by witnesses' testimony. The Chamber thus finds aerial images generally to be reliable and of probative value' (para 70). As Freeman notes, 'this ruling remains significant today, since it places a burden on the Defense to make a showing that digital images lack reliability or are not authentic before allowing them to challenge the admissibility of the evidence on those grounds' (Freeman, 2018, at 302).

Other corroboration of forensic evidence came from demographic evidence, regularly resorted to by the Prosecution to prove the murder of Bosnian Muslim civilians and relied upon by the Trial Chambers in reaching their verdicts of guilt (see eg *Prosecutor v Mladić*, 2017, para 4087 and fns 15019-20; see Fournet, 2020c, at 33).

12 By relying on the scientific analyses of the mass graves, corroborated notably by aerial images and/or demographic evidence, the Tribunal was able to reconstruct the identities of the victims – civilians and in majority Bosnian Muslim men – and deconstruct the Defence argument that the victims had died in the course of combat; two key elements in the qualification of the crime of genocide, which requires acts to be committed with the intent to

destroy a protected group (ICTY Statute, Art 4), and of crimes against humanity, which are crimes directed against civilian populations (ICTY Statute, Art 5) (→ *Civilian Population in Armed Conflict* [MPEPIL]).

13 Used as decisive, even if not sole, evidence in a majority of cases to prove the murder of civilians, forensic evidence at the ICTY was deemed reliable by the judges who thus afforded it due weight in reaching their verdicts. If the ICTY experience thus provides a compelling illustration of the importance of forensic evidence in international criminal justice, the practice at the ICC is also gradually exemplifying the significance of this type of evidence when collected following thorough investigations and presented in court as corroborating (see Fournet, 2020a, 1-6).

B. Corroborating Forensic Evidence at the International Criminal Court : Proving Patterns of Mass Crimes

14 Just like at the ICTY, at the ICC, forensic evidence is presented to the judges via in-court expert testimonies. According to the ICC Statute and its → *Rules of Procedure and Evidence (RPE)* [MPEPIL], judges 'must be convinced of the guilt of the accused beyond reasonable doubt' (Art 66 (3)) and '[t]he onus is on the Prosecutor to prove the guilt of the accused' (Art 66 (2)). Although the rules governing evidence are fairly flexible, what is clear is that the evidence presented must be relevant (Art 69 (3); Rule 64 (3)), that the Trial Chamber may 'base its decision only on evidence submitted and discussed before it at the trial' (Art 74 (2)), and that fairness of proceedings must be guaranteed in the evaluation of evidence (Art 69 (4)). Ultimately, the judges will 'rule on the relevance or admissibility of any evidence' (Art 69 (4)); this judicial margin of appreciation could explain the lack of a clear set of guidelines and the necessity to proceed with a case-by-case approach.

15 This flexibility and judicial margin of appreciation notwithstanding, forensic evidence at the ICC appears to be approached with caution, if not suspicion. If this seems to be rather at odds with domestic settings in which forensic evidence is generally seen as the most reliable, if not the sole, way of linking a crime to an accused, this reservation can be explained by the very particular context within which the Court operates. When it comes to international crimes, forensic evidence as linkage evidence can indeed be problematic: the evidence might simply be too remote from the accused him/herself to establish his/her individual criminal responsibility. This might hold particularly true for the ICC which tries only individuals in a position of authority. In other words, those who stand accused before the Court might not have participated in the physical perpetration of the crime, thus leaving no trace at the crime scene. As Axboe Nielsen and Kleffner note, it is probable that linkage evidence should be found elsewhere: '[a]mong other things, this involves identifying and reconstructing the key decisions, exchanges of information and orders between the persons present at the crime scene before, during, and after the commission of crimes. For political, military, and police structures, the chain-of-command must be reconstructed, with particular attention to joint structures.' (2011, at 43).

16 Unsurprisingly therefore, in the first cases before the ICC, forensic evidence was judicially approached with circumspection. In the → *Lubanga Case* [MPEPIL], radiology and pediatric imagery were used for age assessment to prove the recruitment of child soldiers (→ *Children and Armed Conflict* [MPEPIL]). Ruling that 'these forensic assessments of age lack precision, and they provide an inadequate basis, *taken alone*, for determining an individual's age' (*Prosecutor v Lubanga Dyilo*, 2012, para 423, emphasis added), the Trial Chamber refuted this evidence and stressed that it needed to be 'treated with care' (*Prosecutor v Lubanga Dyilo*, 2012, para 176). The Appeals Chamber (→ *Appeals Chamber: International Criminal Courts*

and Tribunals) qualified this approach as 'not unreasonable' (*Prosecutor v Lubanga Dyilo*, 2014, para 236), stressing the need for forensic evidence to be presented as corroborating.

17 In the → *Katanga case* [MPEPIL] and in the *Ngudjolo Chui* case, in which the Prosecution (→ *Office of the Prosecutor: International Criminal Court (ICC)*) had conducted partial exhumations of human remains in the Democratic Republic of the Congo, the Trial Chamber emphasized two distinct conditions for forensic evidence to be admissible. First, its collection and analysis must comply with the rights of the defence, and notably with the right to 'comment effectively on expert reports' submitted by the opposing party (*Prosecutor v Katanga and Ngudjolo Chui*, 2009, para 68). In this case, the Prosecution was rather sharply criticised by the Trial Chamber which expressed its 'surprise' at the 'entirely unilateral' actions of the Prosecution (*Prosecutor v Katanga and Ngudjolo Chui*, 2009, para 66) and regretted an 'unfortunate situation' which

> could have been almost entirely avoided if the Prosecution had invited the Defence to take part in the expert mission to Bogoro from the beginning, as the Chamber had clearly requested. The Chamber sees no reason why the Defence could not have been consulted about the selection of the experts or indeed the formulation of the questions that were asked from them […]. Depending on the precise circumstances, it may even have been conceivable for the Defence to participate in the expert mission as observers or to assign their own experts to accompany the mission (*Prosecutor v Katanga and Ngudjolo Chui*, 2009, para 74).

The Trial Chamber thus rejected the Prosecution's request for late submission of the forensic reports (*Prosecutor v Katanga and Ngudjolo Chui*, 2009, para 75). Second, to be considered as significant (*Prosecutor v Katanga and Ngudjolo Chui*, 2009, para 56), forensic evidence must be as complete as possible. In its judgment, the Trial Chamber stressed that: '[i]t is equally

desirable, whenever practicable, *to make as many factual findings as possible, in particular forensic findings* which are often crucial to the identification of victims, expeditiously and in the *loci in quo.* In the case at bar, *the absence of such evidence* made it necessary to rely primarily on the statements of witness and reports of MONUC investigators' (*Prosecutor v Ngudjolo Chui*, 2012, para 117 and *Prosecutor v Katanga*, 2014, para 61, emphasis added). Indeed, in this case, 'the Chamber ruled that the probative value of the findings in the forensic experts' reports was insufficient to warrant their late submission' (*Prosecutor v Katanga*, 2014, fn 104), thus resulting – rather radically – in an 'absence of such evidence'.

18 In the trial of Laurent Gbagbo and Charles Blé Goudé, resort to forensic evidence was rather extensive; numerous forensic experts, including a forensic DNA scientist (*Prosecutor v Gbagbo and Blé Goudé*, 2017a, 7), an expert in forensic investigation of biological traces and DNA and in DNA kinship analysis (*Prosecutor v Gbagbo and Blé Goudé*, 2017a, 10), and several forensic pathologists (*Prosecutor v Gbagbo and Blé Goudé*, 2017b, 3-81; 2017c; 2018a, 2-83; 2018b, 1-91) were called to testify. Yet, on 15 January 2019, the Trial Chamber,

> having thoroughly analysed the evidence and taken into consideration all legal and factual arguments submitted both orally and in writing by the parties and participants finds, by majority, that there is no need for the Defence to submit further evidence as *the Prosecutor has not satisfied the burden of proof* in relation to several core constitutive elements of the crimes as charged (*Prosecutor v Gbagbo and Blé Goudé*, 2019a, 3, emphasis added).

19 If these acquittals (→ *Acquittal*) can of course not be exclusively linked to the use of forensic evidence, it is however noteworthy that, in the *Gbagbo and Blé Goudé* case, the Prosecution seems to have overlooked the warning issued in the *Katanga* and *Ngudjolo Chui* judgments as

to the risks of presenting partial forensic evidence. In particular, it decided not to submit as evidence all the autopsy reports relating to the alleged victims of 15 March 2011 but only those of the bodies which had been identified, arguing that they 'were simply trying to not overload [judges] with material that is not relevant and probative' (*Prosecutor v Gbagbo and Blé Goudé,* 2017b, 34); a strategy sharply criticized by the Defence who argued that:

> the Prosecutor simply did not investigate from the very beginning in an autonomous and professional manner, […] and they did not accomplish the forensic activities necessary on time. And since the Prosecutor did not act in time, they did not present authentifiable, verifiable and reliable or direct evidence which could be crosschecked (*Prosecutor v Gbagbo and Blé Goudé,* 2018c, 32-33).

20 In light of the judgment of acquittal and the minimal consideration granted to the forensic evidence presented, it seems fair to assert that the prosecutorial strategy backfired. When acquitting the accused, the Trial Chamber specified that '[t]he majority's analysis of the evidence is contained in Judge Henderson's reasons' (2019b, para 29). This analysis barely mentions the forensic evidence presented, only to highlight that '[s]ignificantly, none of the autopsy reports submitted by the Prosecutor indicate the calibre of the bullets that caused the deaths' (2019c, para 1776) and to conclude that '[g]iven that *no information is available* in this regard, no reasonable trial chamber could conclude that any of the women were killed or injured by direct shots fired by the FDS convoy' (2019c, para 1777, emphasis added). Put differently, the forensic evidence here was also deemed to be absent.

21 In the *Ntaganda* case, the Prosecution relied on several exhumations conducted in Sayo and in Kobu in the Democratic Republic of the Congo (*Prosecutor v Ntaganda*, 2015, 44-45, 53, 56) and called several forensic experts to testify, including an expert in legal medicine

(*Prosecutor v Ntaganda*, 2015, 73), an expert in archaeology and anthropology (*Prosecutor v Ntaganda*, 2016a, 7-128 and 2016b, 1-47), an expert on DNA identification (*Prosecutor v Ntaganda*, 2016b, 51-88), and a forensic pathologist (*Prosecutor v Ntaganda*, 2016c, 68). Although the Defence used the inherent limits of forensic evidence and the at times impossibility to 'conclusively determine the cause of death' (*Prosecutor v Ntaganda*, 2015, 53 and 56), the forensic evidence in this case was not presented as the sole and decisive evidence but rather as corroboration. In issuing their verdict of guilt, the judges of Trial Chamber VI expressly specified that 'expert witnesses on forensic and exhumation evidence provided additional corroboration' (*Prosecutor v Ntaganda*, 2019, para 276) and showed that they understood both the limits of forensic evidence in estimating the cause and manner of death (*Prosecutor v Ntaganda*, 2019, fn 1971) and the Prosecution's sampling strategy, which relied on a limited number of forensic analyses to show a pattern of mass crimes. Regarding this strategy, Trial Chamber VI explicitly acknowledged that '*the overall number of persons killed in Kobu would be greater than the number of bodies exhumed* in Kobu and Tchudja' (*Prosecutor v Ntaganda*, 2019, fn 2020, emphasis added). This judgment could thus be interpreted as a confirmation that, when forensic evidence is collected in a sound and rigorous manner and presented as corroborating, it cannot only be considered as admissible but also as reliable and significant.

C. Scientific Evidence as Pattern Evidence for Crimes of Sexual Violence

22 In a judgment rendered by the ICC in 2021 (*Prosecutor v Ongwen*), scientific evidence was successfully presented by the Prosecution to establish the crime of forced pregnancies; a development which sheds light on the potential importance of scientific, medical and forensic evidence in cases of crimes of sexual violence, even years after the facts (see Fournet, 2020b, 364-86).

23 Medical evidence in cases of sexual violence can be fragile and ephemeral and should thus be collected promptly; a requirement which may well prove impossible to fulfil in conflict or post-conflict contexts in which there is no immediate access to adequate medical care. Yet, although the physical injuries caused by the violence are prone to disappearing fairly fast, this is not the case of all the other physical and/or mental consequences that stem directly from the violence. These long-lasting medical impacts of the violence can thus be assessed even by delayed medical examinations of the victims and can constitute strong evidentiary tools, as confirmed in several policy documents (see ICTR, Office of the Prosecutor, 2008, para 43 and 2014, para 189; Brammertz and Jarvis, 2016, 152; ICC, Office of the Prosecutor, 2014, para 97) and, as detailed below, in case law.

24 When medical doctors and physicians are faced with several anamneses of victims that all indicate past sexual violence committed in similar conditions against similar groups within the population, these may become key evidentiary elements to identify patterns of occurrence (see Aranburu, 2010, 619) and to qualify sexual violence as an international crime. This crime may be a 'widespread or systematic' crime against humanity against a civilian population (ICC Statute, Art 7 (1)), a campaign of sexual violence aimed at destroying a protected group and thus constituting genocide (ICC Statute, Art 6), or a war crime when sexual violence is used as a weapon in the context of an armed conflict (ICC Statute, Arts 8 (2) (b) (xxii) and 8 (2) (e) (vi)).

25 In several cases, the Prosecution has thus turned to scientific and medical evidence to establish the perpetration of sexual violence crimes. In the trial of Laurent Gbagbo and Charles Blé Goudé, a forensic examiner was called by the Prosecution to report to the Trial Chamber

the gynaecological examinations he conducted on certain victims of sexual abuse (*Prosecutor v Gbagbo and Blé Goudé*, 2017d, 19). In acquitting the defendants, the judges did not even discuss this evidence, thus leaving open the question of whether in different circumstances it would have had significant probative value (*Prosecutor v Gbagbo and Blé Goudé*, 2019b and 2019c). This question was also left unresolved in the guilty verdict issued against Bosco Ntaganda. At trial, an expert in 'forensic medicine with a specialty on clinical examination' was called to testify on medical evidence referring to the charges of sexual violence (*Prosecutor v Ntaganda,* 2016d, 7) but this evidence is absent from the judgment, which however – as mentioned earlier – does rely on forensic evidence with respect to other crimes. Considering that substantial parts of the judgment address crimes of sexual violence and that the defendant was found guilty on all counts, it could be that this evidence was deemed not to have any added value. In this context, the Trial Chamber's judgment in the case of Jean-Pierre Bemba Gombo could have been informative, if it had not been followed by an acquittal on appeal. At trial, a forensic psychiatrist with training in gynaecology and obstetrics presented to the Trial Chamber his expert report on recourse to sexual violence used as a weapon of war (*Prosecutor v Bemba Gombo,* 2011a, 51) and gave evidence that the Trial Chamber explicitly referred to in its judgment (*Prosecutor v Bemba Gombo,* 2016, 567 and fn 1761), including the 'connection, between the rape and […] unwanted pregnancies' (*Prosecutor v Bemba Gombo,* 2011b, 15 and 2016, fn 1761). In this case, the Trial Chamber thus attached some weight to the value of this medical evidence.

26 This scientifically established link between sexual violence and – to employ the terminology of the Rome Statute of the ICC (Art 7 (1) (g)) – forced pregnancies was of particular importance in the conviction of Dominic Ongwen. In this case, the Prosecution 'requested scientific proof by DNA testing of the kinship between Dominic Ongwen and the children that these women

have said that he fathered' (*Prosecutor v Ongwen*, 2016, 27). An expert in biological tracing and forensic science thus testified before the Court that the testing of the DNA profiles of twelve children revealed that, in eleven cases, 'the probability that Mr Ongwen was the biological father was the same percentage, 99.99 per cent' (*Prosecutor v Ongwen*, 2017, 12).

27 In its judgment, the Trial Chamber specifically affirmed – on two distinct occasions – the reliability of this scientific evidence. It first noted that:

> Professor Kloosterman is a forensic reporting expert at the Netherlands Forensic Institute, who testified live before the Chamber. Ate Kloosterman provided expert reports, which were submitted under Rule 68(3) of the Rules. Professor Kloosterman testified about his analysis of the kinship between Dominic Ongwen and twelve children. Further, he offered detailed information about the DNA testing process and the interpretation of his findings, which were also not contested by the Defence. *His expert testimony is fully reliable*, and the Chamber relies on it (*Prosecutor v Ongwen,* 2021, para 594, emphasis added).

Later in the judgment, the Trial Chamber re-asserted that:

> Professor Kloosterman performed a DNA kinship analysis of children imputed to have been fathered by Dominic Ongwen. The Chamber is fully satisfied that Professor Kloosterman is qualified to perform these tests and did so accurately. As particular proof of the reliability of Professor Kloosterman's work, the Chamber notes that Professor Kloosterman's testing reveals that Dominic Ongwen fathered all children whom the parties agree he did (*Prosecutor v Ongwen,* 2021, para 2068).

The Trial Chamber also saw in these – scientifically established – forced pregnancies evidence of a pattern of sexual violence, holding that 'while 10 of the 13 children fathered by Dominic Ongwen were born outside the period relevant to the charges, they further support the existence

of a *pattern of sexual violence* with which Dominic Ongwen is charged' (*Prosecutor v Ongwen,* 2021, para 2070, emphasis added). Ultimately, Ongwen was found guilty of both Count 58 – crime against humanity of forced pregnancy – and Count 59 – war crime of forced pregnancy (*Prosecutor v Ongwen,* 2021, para 1075). These two findings of guilt were admittedly made possible precisely by the presentation of DNA evidence, which the Trial Chamber deemed admissible and reliable. In so doing, the Trial Chamber brought the case law of the Court not only in line with that of the ICTY, where DNA evidence was successfully used to prove the pattern of mass graves (see eg *Prosecutor v Popović et al,* 2010, paras 653-4 and 664), but also in line with that of domestic criminal courts, where DNA evidence has been increasingly used. While it would obviously be too hasty to infer from this single precedent that DNA will generally be considered as reliable and significant evidence at the ICC, the fact that the Court here seems to follow the path taken by domestic courts and by the ICTY could indicate that DNA has a rather bright future ahead of it in international criminal justice.

D. Concluding Remarks

28 Writing on digital evidence, Freeman points out that 'decisions are made on a case- by-case basis and there is still minimal guidance on how the Chambers will rule based on different sets of facts' (Freeman, 2018, at 298). It is likely that a similar conclusion could be reached with respect to forensic evidence. As explained earlier, its validity as linkage evidence in cases involving a multiplicity of crimes and the individual criminal responsibility of high-ranking accused who might not be physical perpetrators can be questionable. In this context, for forensic evidence to contribute to establishing the violence perpetrated and assist the judges in determining the individual criminal responsibility of the accused, it must be presented as corroborating evidence. As the case law indicates, the judicial assessment of its reliability will then depend on the facts of each case.

29 Even though they do share a similar aim of unveiling the truth, law and forensic science are two distinct disciplines and their differences should be acknowledged and borne in mind. In particular, it must be recalled that scientific knowledge is limited and cannot simply be expected to explain everything. This may be the reason why the ICC, on different occasions and in different cases, has stressed the dual need for complete forensic investigations and for the use of forensic analyses as corroborating evidence. There can also be a form of defiance towards scientific knowledge which may appear as a type of discourse (see Lyotard, 1984), thus vulnerable to a certain bias or at least vulnerable to allegations of bias. This might hold particularly true in cases of international crimes and mass violence, for which, in all likelihood, the forensic experts will have knowledge of the events before starting their work. Yet, in its *Karadžić* judgment, the ICTY Trial Chamber was prompt in unequivocally refuting such allegations of partiality, stating that 'the fact the experts were provided with limited background information about the bodies in the gravesites and, more generally, about the fall of Srebrenica, does not, in and of itself, taint their reports with bias or make them less reliable' (*Prosecutor v Karadžić*, 2016, para 5530). In any event, as recalled by the ICC Trial Chamber in the *Katanga and Ngudjolo Chui* case, 'the role of experts is to assist the Chamber in establishing the facts in a neutral and impartial manner. It is not their role to support either side of the case' (*Prosecutor v Katanga and Ngudjolo Chui*, 2009, para 68).

30 Ultimately, legal → *Fact-Finding* [MPEPIL] and scientific fact-finding differ: while the former is solely concerned with assessing the responsibility of the defendants for the specific crime(s) they stand accused of, scientific fact-finding can have wider aims of uncovering the entire sequence of events (→ *Fact-Finding Powers of International Prosecutors*; → *Fact-Finding: International Criminal Courts and Tribunals*). The selection of the forensic evidence to be presented in court must thus be directly relevant to the case at hand (see ICC

Statute, (Art 69 (3) and ICC RPE Rule 64 (3)) for it to be robust evidence on which the judges will be able to rely in reaching their verdict.

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