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Medical Evidence at the International Criminal Court – Dosage and Contraindications

Caroline Fournet

Abstract

One of the aims of criminal justice is to qualify the criminal conduct and determine the guilt or innocence of the accused. International criminal justice is no exception. Yet, due to the scale of the crimes perpetrated, the time that has usually elapsed between the crimes and the trials, the particular trauma suffered by victims and witnesses, collecting reliable evidence to prove what happened and determine who was responsible is particularly difficult. Although heavily relied upon in international criminal justice, witness evidence is not always accurate: memory can be imprecise and witnesses may be subject to fear, threats or corruption. In this context, scientific evidence – including medical evidence – may prove a sound means of establishing the perpetration of the crimes, of corroborating witness evidence and of assigning individual criminal responsibility. Notwithstanding certain constraints, medical evidence has played a significant role in international criminal justice, in particular before the International Criminal Court. This contribution proposes to critically review the use of medical evidence in international criminal proceedings, both by exposing its inherent limits and by presenting its potential as a useful – even if not indispensable – evidentiary tool.

Keywords

medical evidence – clinical examination – pattern evidence – sexual violence – International Criminal Court

1 Introduction

One of the aims of criminal justice is to shed light on the events that led to, and constituted, the criminal conduct and determine the guilt or innocence of the accused. International criminal justice is no exception. Yet, proving international crimes encounter specific difficulties due to the nature of the

crimes themselves. International crimes are in essence massive crimes leading to lengthy investigations, sometimes in unsafe territories where evidence is hardly accessible. This, in turn, leads to trials which, if and when they take place, occur decades after the crimes – a time lapse which holds the risk of seeing the evidence disappear (death of witnesses, damage to, or voluntary destruction of, evidence). International criminal justice has nonetheless succeeded in adjudicating international crimes and ‘the vast bulk of the evidence presented to the current international tribunals comes in the form of witness testimony’.¹ If witnesses are crucial to the proceedings, they are however not infallible: trial transcripts and judgments reveal that memory can be an imprecise tool and recollecting details of traumatic events years after the facts can legitimately and understandably generate some confusion and discrepancies in the testimonies.² This situation is aggravated by the fact that ‘virtually all of this testimony is provided by fact witnesses’³ and generally fails to be ‘supported by a substantial quantity of documentary or forensic evidence’,⁴ which could however prove to be a sound corroborating tool.

This is however not to say that scientific evidence has been absent from international criminal courtrooms and, on a number of occasions, experts have been called to testify, precisely to assist judges in reaching their verdict of guilt or innocence. Among these scientific experts, medical experts play

1 Nancy A. Combs, *Fact-Finding Without Facts – The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, Cambridge, 2010), p. 12.

2 On this, see e.g. the judgment of the Appeals Chamber of the International Criminal Tribunal for Rwanda (ICTR) in the *Ntawukulyayo* case. In upholding the Trial Chamber’s assessment of diverging testimonies, the Appeals Chamber stressed that ‘corroboration may exist even when some details differ between testimonies’ [paras. 24 and 121] and accepted that the passage of time and the traumatic nature of the events may affect the precise recollection of witnesses [see para. 25], including their ability to accurately remember the exact date on which an incident took place [see para. 36]. ICTR, *Prosecutor v. Ntawukulyayo*, Case No. ICTR-05-82-A, Appeals Chamber, Judgment, 14 December 2011. For further analysis of this case, see Caroline Fournet, ‘Judgement, Prosecutor v. Ntawukulyayo, Case No. ICTR-05-82-A, A. Ch., 14 December 2011’ in André Klip and Steven Freeland (eds.), *Annotated Leading Cases, Volume LIII* (Intersentia, Antwerp, 2018), pp. 543–548.

3 Combs, *supra* note 1.

4 *Ibid.*, p. 6. With respect to the ICTR, see José Pablo Baraybar, ‘On the Need for a Scientific Advisory Unit’, in Morten Bergsmo, Klaus Rackwitz, Klaus and Song Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, FICHL Publication Series No. 24 (Torkel Opsahl Academic EPublisher, Brussels, 2017), pp. 173–182 at p. 175: ‘While 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.’

a substantial – even if fairly discreet – role in providing evidence of international crimes, namely, war crimes, crimes against humanity and genocide. This chapter thus critically reviews the use of medical evidence in international criminal proceedings, with a particular emphasis on the practice at the International Criminal Court (ICC), and presents both its significance and its limits. For the purpose of this research, '[m]edical evidence is a sub-category of forensic evidence [evidence obtained through scientific testing] and is acquired through the medical examination of a victim or physical perpetrator.'⁵

To conduct this research, all the ICC cases for which charges were confirmed at the pre-trial stage and for which trial has already started as per June 2020 have been analyzed. To ensure grounded findings, the empirical study of the cases had to be as exhaustive as possible. To this end, all the publicly available transcripts and judgments have been reviewed and the following keywords have been used to search these documents: expert(s), doctor(s), physician(s), scientific, medicine, medical, clinical, biology(ist-s), gynaecology(ist-s), psychiatry(ist-s), torture, rape(s), sexual, violence.⁶ As this list implies, a certain emphasis in the research has been put on crimes of sexual violence; a choice of focus that was prompted by a preliminary search of the terms 'medical' and 'doctor(s)' which indicated a link – albeit not exclusive – with such crimes. Just like the crime of torture, these crimes indeed entail a physical assault on the bodily integrity of the victims and are perhaps more susceptible of leaving traces which can be diagnosed via a medical examination. The analysis of this case law, coupled with principles and rules of investigation and collection of evidence identified by legal doctrine and by practitioners, shows that both the medical examination of the victims and the medical assessment of the impact of the violence – if they are to serve as solid evidence – are constrained by, respectively, a duty of care (section 2), a certain timeline (section 3) and methodological rigour (section 4). The research also demonstrates that, in spite of these limits, and provided it is adequately understood by the judges, medical evidence can be a useful – even if not indispensable – tool in establishing a pattern of occurrence, in proving an international crime and in determining individual criminal responsibility.

5 Serge Brammertz and Michelle Jarvis, *Prosecuting Conflict-Related Sexual Violence at the ICTY* (Oxford University Press, Oxford, 2016), p. 157, note 291. Illustrating the fact that medical experts play a substantial, yet discreet, role, Wilson found that at the ICTY, 'with 141 appearances' – 123 called by the Prosecution and 18 by the Defence – medical experts were 'the most numerous category of all experts'. Yet, he also reported that, at 11.7 per expert, '[their] average rate of citation per judgment' was '[i]ntriguingly' low. Richard Ashby Wilson, *Incitement on Trial – Prosecuting International Speech Crimes* (Cambridge University Press, Cambridge, 2017), pp. 185 and 187.

6 For an analysis of the use of forensic evidence at the ICC, see Caroline Fournet, 'Forensic evidence in atrocity trials: A risky sampling strategy?', 69 *Journal of Forensic and Legal Medicine* (2020), article 101852.

2 The Medical Examination of Victims of International Crimes: Specific Patient Care

Medical evidence, that is evidence collected via a medical examination of the person, is – by its very nature – a very intimate and thus sensitive issue which can, when the patient is a victim of a crime, induce a re-traumatization. Investigators and medical practitioners thus not only have to comply with technical rules: they must also act with ethics and cultural awareness and sensitivity. Several authors have stressed these obligations of investigators and medical practitioners, in particular when envisaging the collection, gathering, and release of medical evidence to prove crimes of sexual violence. If there is admittedly ‘great potential for the use of scientific techniques to investigate sexual violence’,⁷ collecting medical evidence in this context must be cautiously approached. As explained by Reis,

[w]hile collection of medico-legal evidence is a standard component of post-rape care in some developed settings, even when properly collected and used, this evidence may not be dispositive. Medico-legal evidence should only be collected and released to authorities with full consent of survivors and should, if possible, be collected at the same time as the medical exam, and by the same individual to minimize possibly traumatic invasive exams.⁸

Investigators and practitioners must thus keep in mind that ‘physical examinations, including photographing injuries, can be potentially traumatic for some survivors.’⁹ In fact, if forced, such examinations can violate the absolute prohibition of inhuman treatment.¹⁰ Paying due regard to this risk, the United Nations’ High Commissioner for Human Rights’ *Manual on the Effective*

7 Alexa Koenig, Eric Stover, Peggy O'Donnell, Camille Crittenden, *Beyond Reasonable Doubt – Using scientific evidence to advance prosecutions at the International Criminal Court – Workshop report 23–24 October 2012* (Human Rights Center, Berkeley Law, University of California, 2012), p. 10, https://humanrights.berkeley.edu/sites/default/files/publications/hrc_beyond_reasonable3.pdf, accessed 1 July 2020.

8 Chen Reis, ‘Ethical, Safety and Methodological Issues Related to Collection and Use of Data on Sexual Violence in Conflict’, in Anne-Marie De Brouwer, Charlotte Ku, Renée Römkens and Larissa Van Den Herik (eds.), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia, Antwerp, 2013), pp. 189–209, at p. 197. Footnotes omitted.

9 Koenig *et al.*, *supra* note 7.

10 See e.g. European Court of Human Rights, *Yazgül Yılmaz v. Turkey*, Application No. 36369/06, Judgment, 1 February 2011.

Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol) specifies that,

[s]ubsequent to the acquisition of background information and after the patient's informed consent has been obtained, a complete physical examination by a qualified physician should be performed. Whenever possible, the patient should be able to choose the gender of the physician and, where used, of the interpreter. If the doctor is not of the same gender as the patient, a chaperone who is should be used unless the patient objects. *The patient must understand that he or she is in control and has the right to limit the examination or to stop it at any time.*¹¹

Consent of the patient is a fundamental and absolute pre-requisite: as the Istanbul Protocol further indicates, '[g]enital examination should be *performed only with the consent of the patient* and, if necessary, should be postponed to a later examination. A chaperone must be present if the examining physician's gender is different from that of the patient.'¹²

Far from remaining a dead letter, the issue whether or not such obligations are respected in practice is one to which courts – and in particular the ICC – give due consideration. In the ICC trial of Laurent Gbagbo and Charles Blé Goudé, a forensic examiner was called by the Prosecution to tell the Trial Chamber of the gynaecological examinations he conducted on certain victims of sexual abuse. While he testified that such examinations were 'part of [his] normal work',¹³ the Defence nonetheless highlighted possible flaws in his practice. Upon questioning by the Defence, the expert confirmed that he was present when the investigator obtained informed consent from the patient and when the medical examination was explained to the patient. Yet, he also conceded that he himself was not the one who obtained consent, nor was he the one who explained the examination to the victim. By his own admission, his

11 Office of the United Nations, High Commissioner for Human Rights, *Istanbul Protocol – Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (United Nations, 2004), p. 34, para. 173. Emphasis added.

12 *Ibid.*, p. 36, para. 185. Emphasis added.

13 ICC, *Prosecutor v. Gbagbo and Blé Goudé*, Case No. ICC-02/11-01/15, Trial Chamber, Transcripts, ICC-02/11-01/15-T-218-Red-ENG CT WT 07-12-2017 19/66 GB T, 7 December 2017, p. 19, lines 1–20.

presence was there for the purposes of providing clarification to the patient and to the investigator, but it was not necessary because the explanations were clear enough. ... I think the investigator fully understood that we were proceeding to a medical examination, and he knew even before I did that for victims of sexual violence, there would be gynaecological examinations and so on and so forth. So there was nothing else to add. The investigator informed those people that there would be a gynaecological examination, and that's it.¹⁴

In the light of the obligations described above and of the specific trauma generated by crimes of sexual violence, it seems unsurprising that the Defence put into question a medical practice that does not seem to fully comply with the duties of care and caution that should apply. Such duties are reflected in the Istanbul Protocol, which stresses the need for trained investigators, practitioners and even interpreters and highlights the attention that is to be paid to gender:

Ideally, an investigation team should contain specialists of both genders, permitting the person who says that they have been tortured to choose the gender of the investigator and, where necessary, the interpreter. This is particularly important when a woman has been detained in a situation where rape is known to happen, even if she has not, so far, complained of it. Even if no sexual assault takes place, most torture has sexual aspects ... The re-traumatization can often be worse if she feels she has to describe what happened to a person who is physically similar to her torturers, who will inevitably have been mostly or entirely men. In some cultures, it would be impossible for a male investigator to question a female victim, and this must be respected. However, in most cultures, if there is only a male physician available, many women would prefer to talk to him rather than a female of another profession in order to gain the medical information and advice that she wants. In such a case, it is essential that the interpreter, if used, be female. Some interviewees may also prefer that the interpreter be from outside their immediate locality, both because of the danger of being reminded of their torture and because of the perceived threat to their confidentiality ... If no interpreter is necessary, then a female member of the investigating team should be present as a chaperone throughout at least the physical examination and, if the patient wishes, throughout the entire interview.

14 *Ibid.*, p. 26, lines 1–21.

When the victim is male and has been sexually abused, the situation is more complex because he too will have been sexually abused mostly or entirely by men. Some men would, therefore, prefer to describe their experiences to women because their fear of other men is so great, while others would not want to discuss such personal matters in front of a woman.¹⁵

These reviews of different scenarios in the Istanbul Protocol are all but theoretical and it is striking that, when reflecting on their experience at the International Criminal Tribunal for the Former Yugoslavia (ICTY), Prosecutors Brammertz and Jarvis pointed to the need for access to medical care and to trained and trustworthy practitioners:

It may be difficult or impossible for prosecutors and investigators in conflict-related sexual violence cases to access such evidence. There were many factors that limited our ability to collect forensic evidence of sexual violence crimes in the former Yugoslavia. First, the investigations generally began years after the crimes had occurred. By then, most forensic evidence relating to sexual violence had been lost. Second, at the time the crimes were committed it was difficult, if not impossible, for victims to access hospitals or clinics. Even where accessible, wartime hospitals or clinics often lacked the expertise, technical ability, or facilities to collect and store such evidence. Many of our cases involved sexual violence in prisons, where many victims were unable to access any medical care. Third, the fact that national law enforcement personnel were among the perpetrators of sexual violence meant it was unlikely they collected and preserved forensic evidence of sexual violence. Even where law enforcement personnel were open to collecting such evidence, the breakdown of law and order in the region meant there was no capacity to do so.¹⁶

It should be emphasized here that the need for trained medical practitioners is not confined to cases of crimes of sexual violence and applies – or should apply – to all cases of international crimes for which medical examinations could be performed for evidentiary purposes. Yet, and while it seems obvious that '[m]edico-legal evidence should not be collected in the absence of medical and other services for survivors',¹⁷ the ICTY Prosecution team's experience

15 Istanbul Protocol, *supra* note 11, pp. 30–31, para. 154.

16 Brammertz and Jarvis, *supra* note 5, pp. 157–158. Footnotes omitted.

17 Reis, *supra* note 8, p. 196.

aply demonstrates that this requirement can face several obstacles 'in war and post-war settings where ... trained clinicians are unavailable to perform medical examinations'.¹⁸ Even when they are available, the safety of the patients – via confidentiality and anonymity – must also be secured. This might prove extremely challenging and complicated in conflict and/or post-conflict contexts so much so that, out of fear, victims often only report crimes perpetrated against them 'after much time has elapsed',¹⁹ rendering the collection of medical evidence more difficult.

3 The Medical Assessment of the Impact of the Violence: Specific Time Constraints?

'Sometimes, old evidence loses its probative value.'²⁰ This statement holds very true when it comes to medical evidence, which can *sometimes* disappear (3.1). At other times however, the physical injuries are such that they remain visible and/or lead to permanent and identifiable medical consequences, making the anamneses of victims an important evidentiary tool to establish pattern evidence (3.2), including in the specific case of sexual violence being used as a weapon of war (3.3).

3.1 *The Disappearing Nature of Medical Evidence*

Physical traces of violence are not immune to the passage of time. This fragility of medical evidence is perhaps increased in the case of crimes of sexual violence for which this evidence 'can degrade and disappear quickly'.²¹ As per the Istanbul Protocol, '[i]t is rare to find any physical evidence when examining female genitalia more than one week after an assault.'²² One week might even be too long a time frame. According to Reis, '[p]hysical evidence may be collected within [a] certain time period. ... After 72 hours, the amount and type of evidence which can be collected will be limited.'²³ 'Ideally' therefore,

18 Koenig *et al.*, *supra* note 7, p. 10: 'sex crimes often take place in war and post-war settings where rape kits or trained clinicians are unavailable to perform medical examinations'.

19 *Ibid.*

20 Alphons M. M. Orie, 'Adjudicating Core International Crimes Cases in which Old Evidence is Introduced', in Morten Bergsmo and Cheah Wui Ling (eds.), *Old Evidence and Core International Crimes*, FICHL Publication Series No. 16 (Torkel Opsahl Academic EPublisher, Beijing, 2012), pp. 29–40 at p. 37.

21 Koenig *et al.*, *supra* note 7.

22 Istanbul Protocol, *supra* note 11, p. 43, para. 228.

23 Reis, *supra* note 8, p. 196. Footnote omitted.

'a victim should be able to access immediate medical assistance following a sexual assault and a trained clinician should record any injuries and the other health impacts in a confidential medical record which a survivor can access at any time.'²⁴

As previously noted however, immediate access to adequate medical care might be difficult, if not altogether impossible, in conflict or post-conflict contexts; a situation which may obstruct the collection of medical evidence and altogether impede the prosecution of acts of sexual violence as international crimes. Indeed, international crimes are by essence mass crimes, as reflected by the text of the Rome Statute of the ICC:²⁵ while crimes against humanity have to be part of 'a widespread or systematic attack',²⁶ war crimes will fall under the jurisdiction of the Court 'in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes',²⁷ and genocide will be easier to prove in cases where there is a substantial number of victims.²⁸ Practically speaking, this means that a significant number of medical examinations would need to be conducted in the immediate aftermath of the sexual violence; a requirement which, as stressed above, might simply be unattainable.

The testimony of an expert in 'forensic medicine with a specialty on clinical examination'²⁹ during the ICC trial of Bosco Ntaganda confirmed the ephemeral nature of medical evidence in cases of sexual violence. When asked by the Prosecution to 'describe the healing in time in which an injury [to female genitals] might be observable by a forensic specialist',³⁰ she responded that,

24 *International Protocol on the Documentation and Investigation of Sexual Violence in Conflict – Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law*, First edition (June 2014), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/319054/PSVI_protocol_web.pdf, accessed 1 July 2020, p. 62.

25 Rome Statute of the ICC, 17 July 1998, 2187 U.N.T.S. 3–9, 13–16, corrected by *procès-verbaux* of 16 January 2002 (entered into force on 1 July 2002).

26 *Ibid.*, Art. 7(1).

27 See Rome Statute of the ICC, *supra* note 25, Art. 8(1).

28 It is to be noted here that, under the Elements of Crimes attached to the Rome Statute of the ICC, 'one or more persons' may be the victim of genocide. See Elements of Crimes, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002* (United Nations publication, Sales No. E.03.V.2 and corrigendum), part II.B., Art. 6. The case law so far however seems to indicate that only acts which result in a 'substantial' number of victims can qualify as genocide. See e.g. ICTY, *Prosecutor v. Mladić*, Case No. IT-09-92-T, Trial Chamber, Judgment, 22 November 2017, para. 3536. The ICC has yet to rule on the crime of genocide.

29 ICC, *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Trial Chamber, Transcripts, ICC-01/04-02/06-T-143-Red-ENG WT 29-09-2016 6/51 CVZ T, 29 September 2016, p. 7, line 21.

30 *Ibid.*, p. 19, line 11.

for such injury to heal it takes 10 to 15 days, although the defloration remains. But there is no exact science in establishing these time frames, 10, 15, maximum 15 days in much the same manner as scarring on ordinary tissue, which usually takes some time. And beyond the scarring it is no longer possible to assign a date to how much time it took. If we're talking about normal defloration, I have had the opportunity in other circumstances to examine clinically victims of sexual aggression with other types of injury, I have examined cases where it takes a longer time for them to heal and sequelae remain in place for a much longer time.³¹

She unequivocally stated that having 'examined thousands of victims of sexual assault', 'it is very rare to find any traces several years after the event'.³² Yet, all medical evidence is not necessarily lost within a few hours or days as other injuries and/or medical consequences of the physical assault can last for much longer and may even be permanent:

Depending on the time frame involved and the nature of the injuries, survivors of sexual violence may have physical signs on their bodies in the form of marks or injuries that corroborate their accounts of the attack. They may also have medical consequences of the assault, including internal physical injuries, pregnancy, sexually transmitted diseases and mental trauma.³³

The lasting medical impact of violence is not limited to crimes of sexual violence and may be identified for other crimes involving bodily injuries. For instance, in the *Gbagbo and Blé Goudé* trial, a forensic expert explained how an explosion can have long-term medical effects, which can be diagnosed at a later stage and linked back to the explosion:

This is something that you can see as a result of an explosion, that is, initial loss of hearing, but fortunately this improved much later. But then you have specifically these wounds, large wounds, in the upper left limb as well as the respiratory symptoms, because an explosive blast can have an effect on the respiratory system. So I understood that the symptoms

³¹ *Ibid.*, p. 19, lines 11–25.

³² *Ibid.*, p. 21, lines 4–9.

³³ International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, *supra* note 24, p. 62.

were compatible with the account of the victim relating to the event as well as the chronology. So this seems to me to be coherent or consistent with the account of the victim. That is why I linked these symptoms to the initial wounds or trauma.³⁴

Put differently, if the physical injuries caused by the violence are prone to disappearing fairly fast, such is not the case of all the other physical and/or mental consequences that also stem directly from the violence. A delayed medical examination may thus still uncover evidence of violence.

3.2 *Long-lasting Medical Effects of the Violence: Anamneses to Establish Pattern Evidence*

By its very nature, sexual violence is not constrained to the actual assault. It is a type of violence whose effects – be them physical, mental or social – continue long after the assault has ended. In practice, this means that the anamnesis of a victim may reveal that he or she is receiving a particular medical treatment that is usually prescribed in the aftermath of sexual assaults to address their physical and/or mental effects. As expressed in the Istanbul Protocol, ‘the most significant component of a medical evaluation may be the examiner’s assessment of background information (for example, correlation between allegations of abuse and acute injuries observed by the individual) and demeanour of the individual’.³⁵ This might explain why both policy documents and case law have devoted particular attention to the durable impacts of sexual violence as evidentiary tools. Indeed, when physicians are faced with several anamneses that all indicate past sexual violence committed in similar conditions against similar groups within the population, these anamneses may become key evidentiary elements to establish sexual violence as an international crime, be it a ‘widespread or systematic’ crime against humanity against a civilian population,³⁶ a campaign of sexual violence targeting a specific group for genocide,³⁷ or the use of sexual violence as a weapon in the context of an armed conflict.³⁸

34 ICC, *Prosecutor v. Gbagbo and Blé Goudé*, Case No. ICC-02/11-01/15, Trial Chamber, Transcripts, ICC-02/11-01/15-T-217-Red-ENG CT WT 06-12-2017 2/63 SZ T, 6 December 2017, p. 17, lines 18–25 and p. 18, lines 1–5.

35 Istanbul Protocol, *supra* note 11, p. 43, para. 228.

36 See Rome Statute of the ICC, *supra* note 25, Art. 7(1).

37 See Rome Statute of the ICC, *supra* note 25, Art. 6.

38 See Rome Statute of the ICC, *supra* note 25, Art. 8(2)(b)(xxii) and Art. 8(2)(e)(vi).

To use Aranburu's words, '[t]he data on medical treatment of the victims may constitute important pattern evidence',³⁹ which, in the context of international crimes' investigations, has the great advantage of standing the test of time, even if, as nuanced by Aranburu, it is still subjected to certain significant requirements, namely, 'that the victims did seek medical assistance, the providers did adequately record their services, and eventual biases (due to uneven access to medical services, political factors, or other things) can be identified and controlled.'⁴⁰ These conditions notwithstanding, the importance of medical evidence as pattern evidence has been recognized by legal practitioners in the field of international criminal justice. The ICTR's Office of the Prosecutor itself stressed that:

Prosecution counsel should also, whenever possible, bring *evidence from expert witnesses and medical professionals* such as physicians, physicians' assistants, psychologists, psychiatrists, clinical social workers, psychiatric nurses, and other mental health professionals such as counselors, researchers, and college professors with expertise in the dynamics of sexual assault crimes and the *impact of sexual assault victimization*.

Such testimony can be used in the following ways:

- a) to assist the Chamber in better understanding and evaluating the evidence presented by factual witnesses to demonstrate that the victim's behaviour is consistent with that of someone who has been sexually assaulted and thus bolster witness testimony; and,
- b) medical professionals such as physicians can be called to enhance our evidence on the "mental harm" and "bodily harm" aspects of the crime of rape as Genocide. Expert testimony can help to establish a proper record on the impact of sexual assault victimization and the long term physical and mental effects.⁴¹

39 Xabier Agirre Aranburu, 'Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases', 23 *Leiden Journal of International Law* (2010) 609–627, p. 619.

40 *Ibid.* Emphasis added.

41 Office of the Prosecutor, *Best Practices Manual For the Investigation and Prosecution of Sexual Violence Crimes in Situations of Armed Conflict – Lessons from the International Criminal Tribunal for Rwanda* (2008), <http://www.endvawnow.org/uploads/browser/files/Best%20Practices%20Manual%20Sexual%20Violence%20Int%20Criminal%20Manual%20Rwanda.pdf>, accessed 1 July 2020, p. 10, para. 43. Emphasis added. The 2014 edition specifies that: 'The presentation of evidence from expert witnesses and medical professionals with expertise in the dynamics of sexual assault and the impact of sexual assault

A similar position was adopted by the ICTY's Prosecutors:

Despite our limited experience with presenting expert evidence to prove sexual violence charges,⁴² we believe that experts can play an important role in bolstering victim credibility and in connecting sexual violence with the broader campaign of violence. We have also found that expert evidence can be useful for sentencing by demonstrating the *impact of sexual violence crimes on victims*, particularly where there is an absence of specific victim impact information.⁴³

More recently, the ICC's Office of the Prosecutor also followed the same path:

The Office will consult with experts, and, where appropriate, propose their testimony on different aspects, such as the socio-political, psychological, and *medical aspects*, of sexual and gender-based crimes. Such experts may also be useful in *identifying patterns of sexual and gender-based crimes*, the nature of injuries and their consistency with

victimization can be another important source of evidence. Expert testimony can be used to assist a court in better understanding and evaluating the evidence presented by factual witnesses, or to demonstrate that the victim's behaviour was consistent with that of someone who had been sexually violated. Medical experts also might be called to strengthen evidence regarding the "mental harm" and "bodily harm" aspects of the crime of rape as genocide.' See Office of the Prosecutor, *Best Practices Manual For the Investigation and Prosecution of Sexual Violence Crimes in Situations of Armed Conflict – Lessons from the International Criminal Tribunal for Rwanda* (2014), <https://unictr.irmct.org/sites/unictr.org/files/publications/ICTR-Prosecution-of-Sexual-Violence.pdf>, accessed 1 July 2020, p. 60, para. 189.

42 As the ICTY Prosecutors further explain, 'the only instances in which we relied upon forensic evidence to prove sexual violence charges were in the *Milutinović et al.* and *Slobodan Milošević* trials. These cases concerned sexual violence committed during the 1999 conflict in Kosovo when the ICTY was already in full operation. We used forensic evidence in these cases to convince the Trial Chamber that two young girls who died after being thrown into a well had been sexually assaulted. Despite our limited use of forensic evidence, if available, we believe that it can be a useful way of proving or corroborating sexual violence charges. However, forensic evidence should not be considered crucial to the proof of conflict-related sexual violence charges and it has been the exception, rather than the rule, in our cases'. Brammertz and Jarvis, *supra* note 5, p. 158. Footnote added.

43 *Ibid.*, p. 152. Footnotes omitted. See also *ibid.*: 'We used expert evidence to bolster victim credibility in the *Furundžija* case. Both the OTP and the defence called medical experts to testify about whether the rape victim in the case, Witness A, was suffering from PTSD and, if so, whether this affected her memory.' Emphasis added.

victim testimony, and the personal and social consequences of the crime.⁴⁴

3.3 *Post-Conflict Anamneses: Sexual Violence as a Weapon of War*

As pointed out earlier, conflict or post-conflict situations seriously hamper, or make impossible, immediate access to adequate medical care. This inaccessibility renders the prompt collection of medical evidence an extremely arduous, if not unsustainable, task. In these contexts, the anamneses of victims may thus come as particularly useful evidentiary tools since they allow for the later intervention of medical doctors and physicians, who are still able – once the conflict has ended – to diagnose sexual violence and identify patterns of occurrence, which are in turn key to establish when sexual violence has been used as a weapon of war.⁴⁵ In the ICC proceedings against Jean-Pierre Bemba Gombo, a forensic psychiatrist with ‘theoretical training in gynaecology and obstetrics [who] performed internships in the obstetrics surgery department’⁴⁶ presented to the Trial Chamber his expert report on recourse to sexual violence used as a weapon of war.⁴⁷ After having defined sexual violence as ‘a coercive manner of obtaining a sexual act, ... of obtaining sex with a partner who is not willing using force’,⁴⁸ the expert explained that ‘[s]exual violence used as a weapon of war is violence - sexual violence - perpetrated during armed conflicts. Often, and in most cases, the perpetrators of sexual violence, using such as a weapon of war, actually use weapons as such to require from their partners to engage in the sexual act.’⁴⁹ Based on the medical examinations of 371 victims,⁵⁰ a number sufficient to establish the widespread character of the sexual violence and thus to support its qualification as an international crime, the expert report ‘provides three main pieces of information’:⁵¹

44 The Office of the Prosecutor, International Criminal Court, *Policy Paper on Sexual and Gender-Based Crimes* (June 2014), <https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>, accessed 1 July 2020, pp. 36–37, para. 97. Emphasis added.

45 For an analysis of sexual violence as a weapon of war, see Janine Natalya Clark, ‘Making Sense of Wartime Rape: A Multi-causal and Multi-level Analysis’, 13 *Ethnopolitics* (2014) 461–482.

46 ICC, *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, Trial Chamber, Transcripts, ICC-01/05-01/08-T-101-ENG CT WT 14-04-2011 2/51 NB T, 14 April 2011, p. 11, lines 23–25.

47 ICC, *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, Trial Chamber, Transcripts, ICC-01/05-01/08-T-99-ENG CT3 WT 12-04-2011 20/56 PVT, 12 April 2011, p. 51, lines 23–25.

48 ICC, *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, Trial Chamber, Transcripts, ICC-01/05-01/08-T-100-ENG CT2 WT 13-04-2011 3/53 NB T, 13 April 2011, p. 3, lines 7–24.

49 *Ibid.*, p. 3, lines 7–24.

50 *Ibid.*, p. 16, lines 1–10.

51 *Ibid.*, p. 17, lines 1–7.

First of all, the age. Women who were raped were -- the largest number were aged below 30⁵² ... The second piece of information ... concerns the number of births of children. There again, the women who were raped ... had had three to six births. The third piece of information arising from the table is the high number of married women who were subjected to sexual violence.⁵³

The report assessed 'four types of impact'⁵⁴ of the physical violence:

The medical impact, first of all, i.e., what was ascertained following the sexual assault in terms of organs, in terms of the body, visible on the person's body; and the second impact, which is psychological impact, i.e., what the person felt at the time and in the wake of the rape; thirdly, the psychiatric impact, in other words, disorders - psychiatric disorders - that were generated by the rape in the victim; and finally, the social consequences.⁵⁵

Whether perpetrated in times of armed conflict or not, sexual violence will have similar medical consequences and, here also, the anamneses of the victims may prove key in establishing the violence. Indeed, regarding the medical impact of the violence, the expert reported that, in ten cases, the medical examinations established a link between the rapes and the victims' seroconversion⁵⁶ while in four cases they established a 'connection, between the rape and ... unwanted pregnancies'.⁵⁷ In terms of long lasting psychological, physical and social impact, the expert testified of the specific situation of teenage victims:

The younger victims, that is to say between six and 15 years of age ... did suffer psychological consequences that were much more serious than the adults because, you see, these are children, people who are in the process of becoming who they are. The person has not yet found his or

52 See *ibid.*, p. 17, lines 11–19; the expert also testified that three minors under the age of ten were raped while 27 per cent of the victims examined were over the age of 40 and some victims were aged over 60.

53 *Ibid.*, p. 17, lines 1–7.

54 *Ibid.*, p. 23, lines 16–25.

55 *Ibid.*

56 *Ibid.*, p. 25, lines 1–3.

57 *Ibid.*, p. 15, lines 17–21.

her identity, so when a person is subject to such an event this affects the person's growth. So these particular victims suffered much more serious psychological repercussions than the adults did. From a physical point of view, ... all these teenage girls lost their virginity and this too had an impact on their personal life and their future life within society. And, furthermore, finally from a physical point of view there were injuries seen amongst these teenage girls. The first multi-disciplinary team, in particular the gynaecologist, was able to observe the physical injuries.⁵⁸

This testimony was relied upon by the Trial Chamber whose judgment explicitly refers to this medical evidence. As per the trial judgment, 'rape victims experienced significant medical, psychiatric, psychological, and social consequences, including PTSD, HIV, social rejection, stigmatisation, and feelings of humiliation, anxiety, and guilt.'⁵⁹ This finding is accompanied by a footnote which expressly recalls the expert

testifying that victims of rape suffer from four types of consequences: medical (lesions to organs, HIV seroconversion, syphilis serology, loss of virginity, lesions to vagina, and unwanted pregnancies), psychological (fear, anxiety, anger, aggression, guilt, isolation, embarrassment and shame, loss of confidence, and washing rituals), psychiatric (PTSD, reactive depression, melancholia, neuroses, addictive behaviour, and psychosomatic disorders), and social (stigmatisation and repudiation).⁶⁰

If the expert's testimony was expressly referred to in the judgment – an indicator that this medical evidence contributed to assist the Trial Chamber in delivering its guilty verdict – it was not sufficient to convince the Appeals Chamber, which ultimately acquitted the defendant for lack of convincing linkage evidence.⁶¹ Of course this expert's testimony was not the sole evidence presented in court and other evidence could have persuaded the Appeals Chamber. Yet, the *Bemba Gombo* acquittal can still serve as a strong reminder that scientific, including medical, evidence will only be useful as an evidentiary tool if it is collected and presented in a methodologically sound and rigorous manner.

58 *Ibid.*, p. 48, lines 11–22.

59 ICC, *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, Trial Chamber III, Judgment, 21 March 2016, para. 567.

60 *Ibid.*, footnote 1761.

61 See ICC, *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08 A, Appeals Chamber, Judgment, 8 June 2018.

4 Medical Evidence: More Harm than Good?

In the ICC trial of Dominic Ongwen, the Trial Chamber heard more medical evidence to demonstrate ‘unwanted pregnancies’ or – to employ the terminology of the Rome Statute of the ICC – forced pregnancies.⁶² 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.’⁶³ An expert in biological tracing and forensic science testified before the Court that the DNA 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.’⁶⁴ If this scientific finding may be seen as ‘support[ing] the charge of rape against Dominic Ongwen’,⁶⁵ it will probably not be deemed sufficient to prove, by and of itself, the sexual violence and the forced pregnancies that resulted from it. While ‘DNA evidence can demonstrate a pattern of systematic rape as part of a war strategy’,⁶⁶ the Prosecution must still take into account the fact that DNA, just like any scientific and/or medical evidence, is not an infallible evidentiary tool before a court of law. In that sense, due regard is probably to be given to the warning issued by the Trial Chamber in its *Lubanga Dyilo* judgment when it stressed that evidence based on paediatric radiology had to be ‘treated with care.’⁶⁷ In this case, a paediatric radiologist⁶⁸ and a paediatrician and forensic doctor⁶⁹ were called to testify by the Prosecution to establish the age of certain soldiers and prove the criminal recruitment of children as soldiers. In the words of Prosecutor Moreno Ocampo,

[t]he Prosecution will present documents, testimony, and forensic analysis based on an X-ray of their bones and teeth. They will consistently,

62 Rome Statute of the ICC, *supra* note 25, Art. 7(1)(g).

63 ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Trial Chamber, Transcripts, Prosecution's Opening Statement, ICC-02/04-01/15-T-27-ENG ET WT 07-12-2016 28/76 SZ T, 7 December 2016, p. 27, lines 17–25.

64 ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Trial Chamber, Transcripts, ICC-02/04-01/15-T-137-Red-ENG WT 27-11-2017 2/27 EC T, 27 November 2017, p. 12, lines 16–19.

65 ICC, *Prosecutor v. Ongwen*, Transcripts, 7 December 2016, *supra* note 63, p. 27, lines 17–25.

66 Koenig *et al.*, *supra* note 7.

67 ICC, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Trial Chamber I, Judgment, 14 March 2012, para. 176. Emphasis added. *See also* para. 170.

68 ICC, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Transcripts ICC-01/04-01/06-T-172-Red3-ENG CT WT (rev.dec.1974) 12-05-2009 34/98 PVT, 12 May 2009 and Transcripts ICC-01/04-01/06-T-173-ENG CT WT (rev.dec.1974) 13-05-2009 6/60 EA T, 13 May 2009, pp. 6–7 for bone age assessment and proving child soldiering.

69 *Ibid.*, p. 17.

with the inevitable difference of a variety of authentic sources prove that the children were between 11 and 15 years old at the time of their recruitment.⁷⁰

In his testimony, however, the pediatric radiologist himself pointed to the limits of paediatric imagery:

The problem of radiologic assessment of bone age is a genuine issue ... you must understand that this is not a precise science. We do have a number of atlases. We have our experience which is more or less important. We use the atlases, and we know that the bone age is a semi-quantitative method. ... In other words, if you give to two different medical experts who have been qualified and experienced the same images, they can come up with a different assessment with one age interval.⁷¹

... And there is a third element that needs to be taken into account regardless of the reliability of the method, is that the atlas is based on the population of Northern America, about 50 years ago, and since then this atlas was not updated as such. ... to this date we still do not have any study or cohort [for Southern Africa or other geographical areas], because the difficulty is that we need to have a great number of subjects with a reliable age, genuine age. So these limits exist. We need to be aware of them. However, we have no other method ... and this is the method that is routinely used by medical experts.⁷²

Ultimately, the Trial Chamber ruled that 'these forensic assessments of age lack precision, and they provide an inadequate basis, taken alone, for determining an individual's age'.⁷³ The judicial exclusion of the medical evidence aimed at establishing child soldiering was here final and irrevocable. Whether the judges proved overly strict or not may be a matter of appreciation; what seems clear however is that the Prosecution needs to take into account the inherent limits of medical evidence which sometimes, due to methodological weaknesses, may simply be inaccurate and deficient.

⁷⁰ *Ibid.*, p. 17, lines 1–10.

⁷¹ ICC, *Prosecutor v. Lubanga Dyilo*, Transcripts, 12 May 2009, *supra* note 68, p. 34, lines 21–25.

⁷² *Ibid.*, p. 35, lines 1–25 and p. 36, line 1.

⁷³ ICC, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Trial Chamber I, Judgment, 14 March 2012, para. 423. This was confirmed on appeal. See ICC, *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06 A 5, Appeals Chamber, Judgment, 1 December 2014, para. 236.

In certain cases, the adverse effects of these flaws in the methodology could arguably be mitigated by the Prosecution itself when it selects and calls experts to testify. In the *Ongwen* case, a forensic psychiatrist was called to present her psychiatric assessment of the defendant. She first explained that,

[a] psychiatrist will conduct a similar examination of a person's mental faculties by asking standard questions which include a number of set headings, such as, how does a person look; how do they behave; how do they interact with you; do they make eye contact; do they appear straightforward or evasive. It will also include standard questions to elicit psychopathology. ... Now, in addition to the mental state examination conducted with the individual, forensic psychiatrists tend to also rely on other material, particularly documentation about the offence; what witnesses say; what other medical or psychiatric reports might say; what witnesses say. They use these different sources of information to triangulate all the information in order to try and understand whether there are consistencies or discrepancies, which they may need to challenge and to try and essentially tease out what is the most probable or likely diagnosis⁷⁴

Yet, she then specified that she was 'not able to personally conduct a mental state examination of Mr Ongwen' because he 'did not wish to meet with' her⁷⁵ and conceded that,

[i]t would have been desirable to assess Mr Ongwen because there are a number of matters that I would have wanted to put to him, and obviously the direct mental state examination could not be carried out. However, I had an advantage in being provided with an enormous bundle of documentation which gave different perspectives and provided different sources of information on ... his mental state over a period of time; including the medical records, including witness statements, including video material. I therefore felt that having all this information gave me a very accurate picture and a very good picture of Mr Ongwen's mental state and his level of functioning over a period of time, including the period that I was particularly being asked to comment on.⁷⁶

74 ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Trial Chamber, Transcripts, CC-02/04-01/15-T-162-Red-ENG WT 19-03-2018 6/67 SZ T, 19 March 2018, p. 16, lines 1–25.

75 *Ibid.*, p. 17, lines 1–22.

76 *Ibid.*

Based on her assessment, she concluded that the defendant was not suffering from severe depression,⁷⁷ that he had the capacity to both issue⁷⁸ and resist⁷⁹ orders, that he had control and agency and was not acting under duress or coercion, and that he had the ability to differentiate right from wrong.⁸⁰ While these conclusions might reflect the truth, the fact that she did not personally interview the defendant might fail to convince judges of their reliability. Further, upon questioning by the Defence, she also admitted to having never worked with child soldiers before⁸¹ and to not speaking Acholi, the language of the defendant.⁸² Problematically, these flaws might shed stronger doubt as to the accuracy of her testimony. Equally problematically, these flaws could arguably have been avoided by calling an expert who, even if unable to meet with the defendant, had – at a very minimum – expertise in medically examining (former) child soldiers and who – preferably – spoke the defendant's language and was familiar with his culture. As noted earlier, medical evidence is not infallible and has its limits; it is thus crucial that, to minimize the risks of dismissal of evidence, experts be extremely carefully and rigorously selected to convince judges beyond reasonable doubt.

5 Conclusion: Understanding the Limits of Medical Evidence

As this analysis has shown, the presentation of medical evidence can contribute to establish the violence perpetrated and assist judges in determining the individual criminal responsibility of the accused. Yet, such evidence is not without limit and, in certain instances where methodology and accuracy may be put into question, its use in court could be counter-productive and do more harm than good. Put differently, where fallible, such evidence should simply not be used by the Prosecution: precedents have shown that judges will not hesitate to dismiss it. This prosecutorial strategy would in fact be supported by the ICC system where, according to the Rules of Procedure and Evidence (RPE), there is no 'legal requirement that corroboration is required in order to

77 *Ibid.*, p. 39, lines 1–25.

78 *Ibid.*, p. 58.

79 *Ibid.*, pp. 59–61.

80 *Ibid.*, p. 57.

81 ICC, *Prosecutor v. Ongwen*, Case No. ICC-02/04-01/15, Trial Chamber, Transcripts, ICC-02/04-01/15-T-163-Red-ENG WT 20-03-2018 14/100 SZ T, 20 March 2018, p. 14, lines 2–10.

82 *Ibid.*, p. 20.

prove any crime within the jurisdiction of the Court'.⁸³ This non-corroboration rule also applies to crimes of sexual violence.⁸⁴ Thus, in contrast to 'systems which require corroboration of testimonial evidence of sexual violence (e.g. in some national jurisdictions), collection of physical evidence may be a higher priority than in those systems which do not require it (e.g. before the ICC)'.⁸⁵ Fundamentally therefore, '[f]orensic evidence can be useful in proving sexual violence charges, but it must not be assumed that forensic evidence is a precondition for bringing a sexual violence charge'.⁸⁶ Any other evidence, including witness testimony, would thus suffice. In the words of the Inter-American Court of Human Rights, 'the lack of medical evidence does not take away from the truth of the presumed victim's allegations'.⁸⁷

In their research on 'The uses and impacts of medico-legal evidence in sexual assault cases', Du Mont and White reached the following conclusion:

To date, it has not been determined what the minimum amount of available medico-legal evidence is for aiding the courts, nor which components of the medical forensic examination (e.g., documentation of injury or collection of specimens) are most effective in specific circumstances (e.g., rapes by acquaintances). Moreover, it is unknown whether there are differences among subgroups of victims (e.g., children, adolescents and men) with respect to the impact of medico-legal evidence on legal outcomes. The many ways in which sociocultural factors may influence the use of medico-legal evidence have not been accounted for systematically and, although there is a general belief that improved training for sexual assault examiners, law enforcement officers and legal professionals can increase its efficacy, the results of existing initiatives have not been

83 ICC, Rule of Procedure and Evidence, *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002* (ICC-ASP/1/3 and Corr.1), part II.A, Rule 63(4): 'a Chamber shall not impose a legal requirement that corroboration is required in order to prove any crime within the jurisdiction of the Court, *in particular, crimes of sexual violence*.' Emphasis added.

84 See ICTY, Rules of Procedure and Evidence, IT/32/Rev.50, 8 July 2015 and ICTR, Rules of Procedure and Evidence, U.N. Doc. ITR/3/REV.50, 13 May 2015, Rule 96(i): '[i]n cases of sexual assault: no corroboration of the victim's testimony shall be required'. See also ICC, RPE, Rule 63(4), *supra* note 83.

85 International Protocol, *supra* note 24.

86 Brammertz and Jarvis, *supra* note 5, pp. 157–158. Footnotes omitted.

87 Inter-American Court of Human Rights, *J. v. Peru*, Series C No 275, Preliminary Objection, Merits, Reparations and Costs, 27 November 2013, para. 333, here referring specifically to 'cases in which sexual abuse is alleged'. Cited in Brammertz and Jarvis, *supra* note 5, p. 158, note 297.

rigorously evaluated. Finally, *from the perspectives of victims, the importance and relevance of the collection and processing of medico-legal evidence is neither clear nor self-evident.*⁸⁸

Although their research focused on domestic criminal systems, their conclusion can soundly be transposed to international criminal justice in general and to the ICC in particular. Regardless of whether they were grounded in law, the recent acquittals of Bemba Gombo,⁸⁹ Gbagbo and Blé Goudé⁹⁰ generated a sentiment of injustice among victims and perhaps a miscomprehension as to how to prove atrocities before the ICC. In that sense, it can safely be asserted that, in The Hague, ‘from the perspective of victims, the importance and relevance of the collection and processing of medico-legal evidence is [no more] clear [or] self-evident’⁹¹ than at the domestic level. Bitterly disappointed with the incapacity of the evidence, including medical evidence, to convince the judges of the guilt of the accused, it is likely that the victims will fail to understand the necessity of collecting and presenting medical evidence in future cases. It is also likely that victims are not the only ones caught in this non-understanding and the question whether the import of such evidence is ‘clear’ and ‘self-evident’ *from the perspective of judges* is one worth raising.

As this research has attempted to show, the Prosecution needs to meticulously select the medical evidence to be presented in court and to disregard any evidence that is methodologically fragile. While presenting robust evidence is crucial in any case, this need is particularly acute when it comes to scientific, including medical, evidence due to the fact that the experts called to testify are precisely this: experts. Put differently, they are professionals who do not speak the legal language judges are familiar with. In court, they must be examined and questioned in a way that allows them to present their data in a manner that is clear, understandable and relevant to the case at hand. Judges

88 Janice Du Mont and Deborah White, ‘Research Summary – The uses and impacts of medico-legal evidence in sexual assault cases: A global review’ (World Health Organization, 2007), p. 4. For the full review, see Janice Du Mont and Deborah White, *The uses and impacts of medico-legal evidence in sexual assault cases: A global review* (Sexual Violence Research Initiative, World Health Organization, 2007), <https://www.svri.org/sites/default/files/attachments/2016-01-19/medico.pdf>, accessed 1 July 2020. Emphasis added.

89 See ICC, *Prosecutor v. Bemba Gombo*, *supra* note 61.

90 See ICC, *Prosecutor v. Gbagbo and Blé Goudé*, Case No. ICC-02/11-01/15, Trial Chamber I, Judgment, 15 January 2019.

91 Du Mont and White, *supra* note 88.

must be able to understand the experts' findings for the import of medical evidence to become 'clear' and 'self-evident' to them.

Via scientific – including medical – expert testimonies, inter-disciplinarity enters the courtroom. It is only through the clear and sound examinations of the medical experts called to present rigorous and methodologically strong conclusions that judges will fully be able to rely on medical evidence, to perceive its import and to realize its inherent limitations. Once the interdisciplinary dialogue between judges and scientific experts gets going, international criminal biolaw might continue its path out of the courtroom, into judgments and into legal instruments.