

EXPERT EVIDENCE IN THE CASE LAW OF *AD HOC* INTERNATIONAL CRIMINAL TRIBUNALS AND THE INTERNATIONAL CRIMINAL COURT

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Abstract. In criminal proceedings before international tribunals, expert evidence is particularly important for the efficient and effective prosecution of perpetrators of crimes under international law. Expert testimonies, a source of specialized knowledge, represent a significant portion of the evidence collected. The case law of international criminal tribunals confirms that expert testimonies are indispensable for establishing the truth and conducting fair criminal proceedings. Experts are appointed from diverse and broad fields, often specializing in unusual areas of expertise not typically used in criminal proceedings before national courts. This study presents the case law of *ad hoc* International Criminal Tribunals and the International Criminal Court regarding expert evidence, in particular, decisions defining the procedural standing of an expert and the scope of their opinion. Judicature regarding the evidentiary value of findings contained in expert testimonies prepared for international criminal proceedings will also be presented.

Keywords: scientific evidence; admissibility of evidence; international criminal proceedings; forensic science.

INTRODUCTION

Expert evidence, along with witness testimony and the accused's explanations, plays a significant role not only in domestic court proceedings but also in international criminal proceedings [Kremens 2010, 217]. There is no doubt that the effective prosecution and efficient sentencing of perpetrators of crimes under international law is also possible through the use of scientific knowledge. Expert testimonies provide international criminal tribunals with information beyond everyday experience and knowledge, which is essential to achieving their objectives [Klinkner 2009, 104]. An analysis of the case law of international criminal tribunals confirms that expert testimonies are essential for establishing the truth and conducting fair international criminal proceedings.

It should be emphasized that gathering evidence in cases involving war crimes, crimes against humanity, or genocide is a challenging task. The effectiveness

of the actions undertaken is undoubtedly influenced by a number of factors related to the specific nature of crimes under international law, in particular, their mass scale, the lapse of time between the commission of the crime and the conduct of criminal proceedings, ongoing military operations during the proceedings, and the trauma experienced by victims and witnesses [Fournet 2022, 2]. Finally, it is important to mention significant aspects distinguishing the taking of expert evidence before international criminal tribunals from domestic proceedings. First, the proceedings are based on a model combining solutions from various criminal procedure systems, drawing on legal traditions existing in continental law and solutions adopted under common law [Kuczyńska 2019, 1689; Sobański and Kremens 2024, 699]. Secondly, gathering evidence is usually difficult due to ongoing warfare and requires the co-operation of many countries to prevent a significant portion of the evidence from being distorted or destroyed [Klinkner 2013, 4683].

Experts have been frequently called upon in proceedings before the so-called *ad hoc* tribunals (the International Criminal Tribunal for the former Yugoslavia (ICTY)¹ and the International Criminal Tribunal for Rwanda (ICTR),² as well as in proceedings before the International Criminal Court (ICC).³ Giving an opinion for the aforementioned tribunals covered a wide range of topics. The experts conducted research both in areas known and used in domestic criminal proceedings, as well as in areas of specialization resulting from the specific nature of international justice. Consequently, the judicial output of criminal tribunals in relation to the issues analyzed encompassed a number of important rules and specifics, the discussion of which seems justified for a more comprehensive understanding of the status and practical functioning of expert evidence.

Considering the above, this study attempts to present the position of *ad hoc* International Criminal Tribunals and the International Criminal Court on selected issues relating to the procedural position of experts in international criminal proceedings. It was deemed necessary to take into account the judicatures defining the concept of an expert and specifying the qualifications needed to be an expert in a specific field of opinion-giving and relating to the status of the so-called investigator. The purpose of further discussion is to address

¹ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, UN Doc. S.C. Res 808, 22.2.1993 (ICTY).

² International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, UN Doc. S.C. Res. 955, 8.11.1994 (ICTR).

³ International Criminal Court (ICC), <https://www.icc-cpi.int/about/the-court> [accessed: 01.09.2025].

the issue of expert testimonies, particularly their scope. Rulings concerning the evidentiary value of findings contained in expert testimonies prepared for the purposes of international criminal proceedings will also be presented.

1. THE CONCEPT OF AN EXPERT AND THEIR QUALIFICATIONS

In international criminal proceedings, the concept of an expert is not defined by the Statutes⁴ or the Rules of Procedure and Evidence⁵ of *ad hoc* tribunals. The ICC Statute⁶ and the Rules of Procedure and Evidence⁷ also do not provide a more precise definition of the meaning of this source of evidence. Therefore, it is the judiciary, and in particular the rulings of *ad hoc* tribunals, that have defined the requirements for individuals who are expected to provide opinions on significant issues raised before the tribunal.

Both the ICTY and the ICTR recognize that an expert is a person “particularly equipped with knowledge in a given field, which makes them qualified to give expert testimony.”⁸ Furthermore, the assessment of whether a person is an expert, meaning that they possess scientific knowledge or technical understanding beyond the experience and expertise of the person describing the facts, is left to the Adjudicating Chamber in a given case.⁹ In the Bagosora case, the tribunal stated that “expert evidence is admissible when the expert’s specialized knowledge, based on the evidence on which their opinion is based, can contribute to the Chamber’s understanding of the evidence in question.”¹⁰ In the Simba case, it was emphasized that experts are appointed to clarify for judges specific technical issues that require specialized knowledge in a given field.¹¹

The rulings of *ad hoc* international criminal tribunals provide evidence necessary to determine whether a person possesses sufficient qualifications to perform the function of an expert. The following characteristics of an

⁴ Statute of the International Criminal Tribunal for the former Yugoslavia, SC, 3217th meeting, U.N. Doc. S/RES/827 (1993); Statute of the International Criminal Tribunal for Rwanda, SC, 3453rd meeting, U.N. Doc. S/RES/955 (1994).

⁵ Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, IT/32/Rev.38; Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, ITR/3/Rev.15.

⁶ Rome Statute of the International Criminal Court of 17.07.1998, Journal of Laws 2003, No. 8, item 708.

⁷ Rules of Procedure and Evidence of the International Criminal Court, ICC-PIDS-LT-02-002/13.

⁸ Prosecutor v. Delalić (IT-96-21-T), Decision on the Motion by the Prosecution to Allow the Investigators to Follow the Trial During the Testimonies of Witnesses, 20.03.1997, § 10.

⁹ Prosecutor v. Delalić (IT-96-21-T), Decision on the Motion by the Prosecution to Allow the Investigators to Follow the Trial During the Testimonies of Witnesses, 20.03.1997, § 10.

¹⁰ Prosecutor v. Bagosora (ICTR-96-7-T), § 8.

¹¹ Prosecutor v. Simba (ICTR-01-76-T), § 6.

expert should be noted: specialized knowledge, impartiality, and the usefulness of their opinion for resolving the case.

The Rwandan tribunal emphasized the particular importance of specialist knowledge in the Bizimungu¹² case, ruling on the competence of anthropology expert Sebahire Deo Mbonyikebe. The Adjudicating Chamber found that he possessed sufficient qualifications to perform expert duties based on his education (a doctorate in sociological and cultural anthropology) and experience in the field, which he gained as a lecturer at the National University of Butare and the University of Kinshasa. The tribunal also considered his academic achievements, particularly his publications and research for the World Bank and USAID, which concerned the situation in Rwanda [Kremens 2010, 223].

The need to maintain another characteristic – impartiality – was highlighted in the Akayesu case, in which the ICTR ruled that a person seeking to become an expert must maintain impartiality with respect to the case in which they are providing an opinion.¹³ According to the Adjudication Chamber, the person appointed to serve as an expert by the accused's defense attorneys – Ferdinand Nahimana – cannot be considered impartial to the case, as he is a defendant in another case before the ICTR. The *ad hoc* tribunal's position on this matter is significant given the adoption of the Anglo-Saxon expert-witness model in international criminal proceedings, in which experts typically testify in favor of the party appointing the expert. In turn, in the Katanga and Ngudjolo Chui case, the tribunal recalled that the role of an expert is to assist the Adjudicating Chamber in establishing the facts in a neutral and impartial manner, and their task in the ongoing proceedings is not to support any party.¹⁴ This position in the case law has also been confirmed by the doctrine. It was emphasized that the criterion of impartiality should be applied to the context of the given case and to the specific individual [Kaluzhna and Shunevych 2022, 57-58; Bělohlávek and Hótová 2011, 129].

The third of the above-mentioned characteristics is the significance of the expert testimony for the resolution of the case, emphasizing the importance of the circumstances of whether the expert testimony will be helpful to the Adjudicating Chamber in its decision [Kuczyńska 2019, 1699]. An interpretation of this concept can be noted in the Kordić¹⁵ case and the Bizimungu¹⁶

¹² Prosecutor v. Bizimungu (ICTR-99-50-T) Oral Decision on Qualification of Prosecution Expert Sebahire Deo Mbonyikebe, 02.05.2005.

¹³ Prosecutor v. Akayesu (ICTR-96-4-T), Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, 9.03.1998.

¹⁴ Prosecutor v. Katanga and Ngudjolo Chui (ICC-01/04-01/07-1515), 31.03.2009.

¹⁵ Prosecutor v. Kordić (ICTY-95-14/2-T), Transcripts, 28.01.2000, § 13274.

¹⁶ Prosecutor v. Bizimungu (ICTR-99-50-T) Oral Decision on Qualification of Prosecution Expert Sebahire Deo Mbonyikebe 02.05.2005.

case. Both the ICTY and the ICTR ruled that the expert's role is to assist the tribunal in understanding the context in which the events occurred.

In the context of the observations made, it is also worth noting the ICTY's position regarding the granting of expert status to so-called investigators. This issue was noted by the tribunal in the Delalić case. The prosecution, in relation to investigators, i.e. employees employed in the Office of the Prosecutor who perform activities related to the proper collection of evidence or conducting forensic interviews of witnesses and suspects at the stage of preparatory proceedings, sought to give them the status of *quasi* experts. The Adjudicating Chamber clearly held that a witness whose testimony is limited to analyzing documents or confirming their authenticity cannot be recognized as an expert. This would only be possible if the investigator possessed the skills or knowledge that could be used when testifying.¹⁷

The International Criminal Court also commented on the concept of an expert and their qualifications. It should be noted that, as a rule, an expert providing expert testimonies before the ICC is not summoned by the parties to the proceedings, but is an expert appointed from a list (the Adjudicating Chamber may also authorize the appointment of an expert from outside the list). The Court maintains a list of experts available at all times to all bodies of the Court and to all participants in the proceedings. Inclusion on the list requires meeting numerous requirements, in particular: an expert must possess specialized knowledge in a specific scientific discipline, possess relevant experience, be fluent in English or French, possess appropriate education in a given area of specialization, demonstrate high ethical qualifications and maintain high standards of professional and personal integrity, and strictly adhere to confidentiality [Girdwoyń 2011, 83]. Furthermore, they must demonstrate the usefulness of their expertise in ICC proceedings.

With this in mind, the Court in the Lubanga case determined that the list of experts should include a broad range of experts with verified competences who are committed to upholding the interests of justice. The list should also be equitable geographically and gender-wise – the ICC supports applications for inclusion on the list by women.¹⁸ The need to include experts with knowledge and experience in trauma, particularly trauma related to crimes involving sexual violence against children, the elderly, and persons with disabilities, was also emphasized.¹⁹ In the aforementioned case, the Tribunal concluded that when evaluating an expert's opinion, the following

¹⁷ Prosecutor v. Delalić (IT-96-21-T), Decision on the Motion by the Prosecution to Allow the Investigators to Follow the Trial During the Testimonies of Witnesses, 20.03.1997, § 2.

¹⁸ Prosecutor v. Lubanga (ICC-01/04-01/06-1069) Decision on the procedures to be adopted for instructing expert witnesses, 10.12.2007, § 24.

¹⁹ Prosecutor v. Lubanga (ICC-01/04-01/06-1069) Decision on the procedures to be adopted for instructing expert witnesses, 10.12.2007, § 24.

factors require consideration: the expert's competence in the given field, the methodology used, the consistency of the opinion's conclusions with other evidence, and the expert's overall credibility.²⁰

The same case also addressed the procedure for appointing experts and presenting their opinions. The Tribunal stated that, to save time and costs, a single impartial and qualified expert should be appointed, who will have access to the versions of events presented by both parties to the proceedings. It is important that both parties appoint an expert to avoid later disputes regarding their qualifications and impartiality. In such a situation, the expert presents a single opinion, considering the issues raised by the parties and the Tribunal judges, and subjecting them to analysis and evaluation. A party must obtain the Chamber's permission to appoint an expert, and the Adjudicating Chamber may appoint an expert *proprio motu*.²¹

It should be noted that the case law of international criminal tribunals has quite effectively filled the gap in defining the concept of an expert, remaining consistent with both continental and Anglo-Saxon law. The case law also emphasizes the fundamental characteristics that allow a person to act as an expert, namely: possessing specialized knowledge in a specific area of expertise, demonstrating impartiality, as well as demonstrating that the content of the expert testimony is significant to the resolution of the case.

2. SCOPE OF AN EXPERT TESTIMONY

When discussing the issue of expert evidence in international criminal proceedings, it is worth noting the direction set by tribunals regarding the scope of an expert testimony, i.e., defining the issues that an opinion may address and specifying those that should not be included in the opinion. According to the case law of both the ICTR and the ICTY, experts are subject to limitations on matters that are reserved exclusively for the court and which the court is obligated to resolve independently, i.e. the ultimate issue. In this regard, the Adjudicating Chamber's position in the Kordić case²² should be cited, where it was emphasized that it is inadmissible for an expert to adjudicate the phenomenal form of the act committed by the accused. The expert testimony submitted by the prosecution, which analyzed the political and military aspects of the conflict in Bosnia and Herzegovina, referred to the accused's position within the Central Bosnian government, and the conclusions of the expert's opinion included a statement regarding

²⁰ Prosecutor v. Lubanga (ICC-01/04-01/06-2842), 14.03.2012, § 112.

²¹ Prosecutor v. Lubanga (ICC-01/04-01/06-1069) Decision on the procedures to be adopted for instructing expert witnesses, 10.12.2007, § 14-23.

²² Prosecutor v. Kordić (ICTY-95-14/2-T), Transcripts, 28.01.2000.

his having committed the acts charged in the form of directing the commission of a prohibited act. The Court ultimately disallowed this opinion, ruling that the expert had gone too far in his interpretations, raising issues for the Adjudicating Chamber to decide [Kremens 2010, 236].

Another example relating to the definition of the scope of expert testimony is the tribunal's decision in the Kunarac case,²³ in which the Court stated that an expert should not address the issue of witness credibility. The Adjudicating Chamber admitted evidence from experts specializing in forensic medicine, neuropsychiatry, and psychology to examine the written statements submitted by the witnesses. In the cited case, it was also emphasized that only the Chamber has the authority to assess the credibility of a witness, and that assessing the statements of a person who provided four conflicting statements is not the responsibility of psychoanalytic experts. Consequently, the ICTY found that an opinion on the discussed issues was inadmissible [Kremens 2010, 237].

It is also worth mentioning the tribunal's statement in the Bizimungu case, which indicated that it is inadmissible for an expert in sexual crimes to raise the issue of the perpetrator's guilt, as this is a final issue, and therefore a matter for the Adjudicating Chamber to decide.²⁴

3. EVIDENTIARY VALUE OF FINDINGS CONTAINED IN EXPERT TESTIMONIES

The literature emphasizes that the use of expert testimonies is primarily dictated by the specific nature of adjudication before international tribunals and the complexity of the issues under consideration [Knoop. 2019, 33]. The need to use evidence based on scientific knowledge arises primarily in determining the type of crimes under international law committed, the *modus operandi* of the perpetrators, to corroborate witness statements, or to clarify the cultural, social, and historical context of the crimes committed [Fournet 2022, 3-4; Klinkner 2008, 447-66].

Expert testimonies in such cases are based on research from a wide variety of fields. Expert testimonies typical of criminal proceedings are issued, such as medical-forensic, psychological, psychiatric, DNA, and firearms testing. Expert testimonies are also issued in areas specific to cases handled by the international justice system. These include opinions on ethnic profiling of the population living in a given area, history, linguistics, sociology, and cultural issues in a given country.

²³ Prosecutor v. Kunarac (ICTY-9623&23/1-T) Order on Defense Experts, 20.03.2000.

²⁴ Prosecutor v. Bizimungu (ICTR-99-50-T) Decision on the Admissibility of the Expert Testimony of dr Binaifer Nowrojee, 02.05.2005.

An example of a procedure in which expert evidence was used in the majority of cases is the ICTY trial, where expert testimonies were required, primarily in the fields of forensic medicine, forensic archaeology, forensic anthropology, and forensic pathology. Thanks to scientific research in these fields, it was possible to determine the perpetrators' criminal *modus operandi*, determine the causes of death of the victims, examine traces of torture, and utilize the pattern of burial of victims in mass graves, combined with their relocation to conceal the crime of genocide [Siekiera 2024, 131]. The expert testimonies allowed the location of mass graves and the connection between various burial sites. In particular, they confirmed the pattern of exhumations planned by the perpetrators to conceal the victims' bodies and thus complicate the criminal proceedings [Klinkner 2008, 447-66].

It is worth citing the cases of Krstić²⁵ [Klinkner 2013, 4688], Mladić²⁶ [Fournet 2022, 4]; Fournet 2017, 4; Szpak 2012, 79-91], and Karadžić²⁷ [Klinkner 2016, 498-504], in which the Yugoslav tribunal, thanks to expert testimonies, was able to rule that the crime of genocide had occurred regarding the mass executions of Bosnian Muslims. It was determined that the victims did not die in combat, but in planned and carried out mass executions. The expert examinations allowed the Adjudicating Chamber to determine that the purpose of the action was the intention to physically destroy Bosnian Muslims as an ethnic group. The evidentiary value of the expert testimonies contributed to refuting the defense's claims that the victims died in combat. After examining the mass graves and performing autopsies, the experts indicated that many people had been killed by shots to the back of the head, and emphasized the civilian clothing of the victims and the lack of military uniforms and equipment. Moreover, the identified victims were of varying ages, some were disabled, and blindfolds and handcuffs were found on the bodies.²⁸ The rulings of the Yugoslavian tribunal clearly emphasized that the expert evidence used should be considered credible and convincing in proving the crime of genocide.

Among the proceedings conducted, the Akayesu²⁹ case is worth mentioning, in which understanding the context of the events against which the crime of genocide occurred proved essential. During the trial, the Rwandan tribunal reviewed expert testimonies that addressed the social situation in Rwanda in 1994 and the historical background of the conflict between the Hutu and Tutsi tribes. Expert testimonies on the cultural context

²⁵ Prosecutor v. Krstić (IT-98-33-T).

²⁶ Prosecutor v. Mladić (IT-09-92-T).

²⁷ Prosecutor v. Karadžić (IT-95-5/18).

²⁸ Prosecutor v. Popović (IT-05-88-T).

²⁹ Prosecutor v. Akayesu (ICTR-96-4-T), 2.09.1998.

and studies demonstrating changes in the demographic makeup of the population in a given area were also considered in trials before the ICTY.³⁰

In the Lubanga³¹ case, in turn, to prove the war crimes of recruiting child soldiers under 15 years of age and their use in military operations, the ICC relied on expert testimonies, which included radiological and pediatric examinations to assess their age. In the same case, the tribunal appointed expert psychologists to assess the credibility of the testimony of witnesses who were children at the time of the accused's acts and the impact of trauma on their statements.

The International Criminal Court in the Ntaganda³² case accepted evidence obtained through exhumation in the Democratic Republic of the Congo. Expert testimonies from forensic medicine, forensic archaeology, forensic anthropology, DNA testing, and forensic pathology were considered to provide additional corroboration of the evidence gathered, emphasizing the importance of conducting reliable testing. The assessment of the probative value of DNA testing in the Ongwen³³ case is also noteworthy. The Adjudicating Chamber found DNA testing admissible and reliable in this case, confirming, among other things, crimes against bodily integrity and sexual freedom. The Court clearly found that DNA testing conducted by Professor Kloosterman, analyzing the relationship between Dominic Ongwen and the twelve children, showed that in eleven cases, the probability that Ongwen was the biological father was 99.99%. Therefore, the Chamber concluded that the scientific expertise provided the evidence necessary to establish cases of forced pregnancies and demonstrated their connection to sexual violence used as a weapon of war [Fournet 2022, 8-10].

CONCLUSIONS

Conducting fair criminal proceedings before international tribunals, as in domestic criminal trials, requires the collection of credible evidence, which is not an easy task given the specific nature of this type of adjudication. The international justice system must address the many challenges inherent to the nature of acts such as war crimes, crimes against humanity, and genocide. The case law of *ad hoc* criminal tribunals and the ICC confirms that the use of expert evidence represents a significant part of the evidence gathered in a given case. These tribunals' pronouncements not only clarified the procedural position of experts and the competencies necessary

³⁰ Prosecutor v. Milošević (IT-02-54-T) 16.06.2004; Prosecutor v. Kupreškić (IT-95-16-T), 14.01.2000.

³¹ Prosecutor v. Lubanga (ICC-01/04-01/06-2842), 14.03.2012.

³² Prosecutor v. Ntaganda (ICC-01/04-02/06-2359), 8.07.2019.

³³ Prosecutor v. Ongwen (ICC-02/04-01/15-1762-RED), 04.02.2021.

to provide a meaningful opinion, but also analyzed the application of scientific research to a wide range of issues encountered in trials. Opinions prepared in trials before the Rwandan Tribunal, the Yugoslav Tribunal, and the International Criminal Court helped to prove the nature and manner of acts committed, as well as their cultural, historical, and social context. It is crucial that in every case before international criminal tribunals, the reliability of the scientific methodology employed, the credibility of the experts, and their objectivity and impartiality be considered.

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