

Research Article

EVIDENCE IN THE INTERNATIONAL CRIMINAL COURT – THE ROLE OF FORENSIC EXPERTS: THE UKRAINIAN CONTEXT

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Summary: 1. Introduction. – 2. Jurisdiction of the ICC Regarding Prosecution of Offenders Who Committed Crimes as a Result of the Full-scale Invasion of Ukraine by the Russian Federation. – 3. ICC Model of Justice. – 4. Admissibility of Evidence at the ICC. – 5. Expert Status at the ICC. – 6. Peculiarities of Expert Involvement at the ICC. – 7. Conclusions.

Keywords: *the International Criminal Court (ICC), the ICC jurisdiction, the ICC model of justice, admissibility of evidence at the ICC, expert status at the ICC, expert involvement at the ICC*

ABSTRACT

Background: *Ukraine faced unprecedented challenges for to the national justice system and the possibility of using international justice to bring the Russian Federation military, officers,*

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and officials to justice after the full-scale invasion of Ukraine by the Russian Federation on 24 February 24, 2022. Since In March 2022, the ICC Prosecutor has started an investigation of into war crimes in Ukraine. In addition, joint investigative groups are carrying out activities. Cooperation between pre-trial investigation bodies of Ukraine through the Prosecutor General of Ukraine with and the International Criminal Court has been established. Therefore, the research of into possible problems in the criminal procedure of prosecution for war crimes is one of the priority areas for Ukrainian law enforcement practice and legal science.

Methods: *The present article is devoted to the peculiarities of the ICC international criminal justice, in particular the ICC jurisdiction in the territory of Ukraine (Ukraine has not ratified the ICC Rome Statute), the ICC model of administration of justice, the rules of admissibility of evidence, the status of experts, and the features of expert involvement during ICC trials.*

Results and Conclusions: *The authors found that several provisions of the joint Order of the Ministry of Internal Affairs of Ukraine, the Ministry of Health of Ukraine, and the Office of the Prosecutor General 'On approval of the Procedure for interaction between bodies and units of the National Police of Ukraine, health care institutions and the bodies of the Prosecutor's Office of Ukraine in establishing the fact of the death of a person during martial law on the territory of Ukraine' dated 9 March 2022 do not correspond to the Code of Criminal Procedure of Ukraine. The authors emphasise that the erroneous provisions of this bylaw could serve as a legal basis for avoiding criminal responsibility for war crimes.*

1 INTRODUCTION

On 24 February 2022, the army of the Russian Federation started a full-scale invasion of Ukraine. The number of victims among the civilian population is increasing every day. As of 29 August 2022, the Office of the United Nations High Commissioner for Human Rights (OHCHR) recorded 5,663 dead and 8,055 wounded civilians in Ukraine (13,718 in total).¹ These data are only approximate because of the lack of access to the territories of Ukraine temporarily occupied by the Russian Federation, the presence of mass burial sites and, accordingly, the difficulty that state authorities face in identifying these bodies, along with daily air attacks by the enemy. These reasons prevent us from stating exact numbers. Experts from the American non-profit organisation Armed Conflict Location and Event Data Project (ACLED), which records violence for political reasons, assume that the total number of registered deaths is greatly underestimated.² Similarly, civilian buildings and structures are destroyed every day because of the criminal actions of the Russian Federation. According to data published in an independent legal analysis by the New Lines Institute Analytical Center of the University of Pennsylvania, Russian forces are frequently using indiscriminate, wide-range weapons or cluster munitions, targeting densely populated areas in at least eight regions of Ukraine,³ resulting in destruction and loss of life.

Criminal prosecution of the military, officers, and officials of the Russian Federation for war crimes committed on the territory of Ukraine as a result of the full-scale invasion of Ukraine by Russia on 24 February 2022, is being carried out by pre-trial investigation bodies

1 'Ukraine: Civilian casualties as of August 28, 2022' <<https://ukraine.un.org/en/196929-ukraine-civilian-casualties-28-august-2022>> accessed 31 August 2022.

2 Sarah Habershon, Rob England, Becky Dale, Olga Ivshyna. 'Is it possible to find out how many people died in Russia's war against Ukraine?' (BBC News, 4 July 2022) <<https://www.bbc.com/ukrainian/features-62028612>> accessed 27 July 2022.

3 'An Independent Legal Analysis of the Russian Federation's Breaches of the Genocide Convention in Ukraine and the Duty to Prevent' <<https://newlinesinstitute.org/an-independent-legal-analysis-of-the-russian-federations-breaches-of-the-genocide-convention-in-ukraine-and-the-duty-to-prevent/>> accessed 27 July 2022.

and prosecutors within the framework of the national judicial system, as well as within the mechanism of the International Criminal Court (ICC).

The ICC has limitations on the number of investigations it can carry out as an institution, given that the ICC has limited human and financial resources compared to the number of armed conflicts in the world and the scope of their possible consequences. Therefore, it is expected that the ICC will consider the most significant and most serious war crimes of the Russian Federation, and the vast majority of them will 'fall on the shoulders' of national courts. Therefore, the initial task of the present research is to outline the peculiarities of the ICC jurisdiction, characterise the ICC model of justice, and examine the peculiarities of proof and admissibility of evidence in the ICC.

In order to bring a person to justice and ensure compensation for damages, it is necessary to conduct a proper independent investigation of the crimes committed. In particular, evidence is required to establish the causes of the death of civilians, the fact of torture, the causes of destruction of civil infrastructure, and the amount of damage caused as a result of the criminal actions of the Russian Federation. Special knowledge in the form of forensic examination and expert opinions attached to the proceedings is necessary for proving these (and other) elements of the subject of proof in cases of this category. A forensic examination must be conducted in each case in the proceedings in the courts of national jurisdiction under Clause 1 Part 2 of Art. 242 of the Criminal Procedure Code. At the same time, ICC can use the expert examination results by Ukrainian forensic experts as evidence during the consideration of cases.

Therefore, the detailed focus of this article is on such practical issues as who might be an expert capable of conducting such an examination, the results of which can be used in the ICC; whether the ICC sets specific requirements for experts; what the procedural status of an expert is, etc. One of the key issues is that of entities authorised to involve an expert in proceedings at the ICC to provide evidence based on the results of expert examination. Attention is also paid to the issue of the admissibility of such evidence. The present article aims to outline answers to these questions.

2 JURISDICTION OF THE ICC REGARDING THE PROSECUTION OF OFFENDERS WHO COMMITTED CRIMES AS A RESULT OF THE FULL-SCALE INVASION OF UKRAINE BY THE RUSSIAN FEDERATION

The ICC will consider a case if the state a) ratifies the ICC Rome Statute, which regulates the administration of justice of the ICC, or b) recognises the ICC jurisdiction under Part 2 of Art. 12 of the ICC Rome Statute. Ukraine signed the Rome Statute on 20 January 2000 but had not ratified it prior to the full-scale Russian invasion of Ukraine. At the same time, Ukraine recognised the jurisdiction of the ICC twice in 2014 and 2015 in connection with war crimes committed by the Russian Federation on the territory of Ukraine.

The ICC jurisdiction does not extend to the crime of aggression committed on the territory of a state or by citizens of a state that is not a party to the Statute. This rule is generally for states that have not ratified the Statute and have only recognised the jurisdiction of the ICC under Part 2 of Art. 12 of the same. It should be noted that from the point of view of proof, it is easier to prosecute the military and political leadership of the aggressor state for the crime of aggression than for war crimes and crimes against peace. Thus, in order to prove the guilt of a person for war crimes or crimes against peace, it is necessary to establish the entire chain of connections from the perpetrators of the crime (soldiers) to the immediate leaders who gave the order, up to the highest military and political leadership.

The jurisdiction of the ICC extends to the entire internationally recognised territory of Ukraine, including the temporarily occupied territories. The fact that the Russian Federation has not ratified the Rome Statute is not significant because the Russian Federation commits international crimes on the territory of Ukraine. The ICC does not have a procedure for considering a case *in absentia* (in the absence of the accused), but it is clear that in many cases, criminals will be beyond the reach of the court.⁴

On 2 March 2022, 39 member states of the ICC filed an appeal with the ICC Prosecutor regarding the situation in Ukraine. As a result, the ICC Chief Prosecutor Karim A. A. Khan QC launched an investigation into Russian war crimes in Ukraine.⁵ Therefore, the ICC will indeed consider the cases of crimes committed by Russian military personnel on the territory of Ukraine as a result of the invasion of Ukraine by the Russian Federation on 24 February 2022.

3 THE ICC MODEL OF JUSTICE

The Rome Statute is 'a combination of elements originating from different legal traditions which were subsequently reflected in the Rules' that was adopted following lengthy negotiations.⁶ Although the Statute reflects the adversarial model ('adversarial', 'accusatorial', 'common', 'Anglo-American' model) of justice (a clear division of the powers of the prosecution and defence, cross-examination, etc.),⁷ the practice of the two *ad hoc* tribunals was more mixed, combining features of adversarial and inquisitorial ('inquisitorial', 'civil', 'continental' model) legal traditions.⁸

The main difference between the so-called inquisitorial and adversarial models of justice is the method of finding the truth: in the adversarial system, this search for (procedural) truth 'lies in the hands of the parties' and therefore conflict is at the centre of the proceedings (the 'two cases approach'), and in the inquisitorial model, the establishment of the truth depends on the state authorities responsible for criminal prosecution (the 'one case approach').⁹

Despite including the characteristic features of the adversarial model, the provisions of the ICC contain many exceptions to the typical features of this theoretical model. In particular, it refers to the active role of the court in the proceedings and to such exceptions to the principle of directness as the admissibility of written testimony and other evidence in court if they were collected *ex parte* during the investigation, thereby forming a separate ICC procedural system for the administration of justice.¹⁰ On the one hand, there is an opportunity for

4 Oksana Kaluzhna, Kateryna Shunevych, 'Liability Mechanisms for War Crimes Committed as a Result of Russia's Invasion of Ukraine in February 2022: Types, Chronicle of the First Steps, and Problems' <<https://ajee-journal.com/ajee-gateways>> accessed 8 August 2022.

5 The requirement to investigate and punish war crimes of the Russian Federation in international courts, posted on 18 April 2022 <<https://www.rada.gov.ua/news/razom/221903.html>> accessed 26 July 2022.

6 S De Gurmendi, H Friman, 'The Rules of Procedure and Evidence of the International Criminal Court' (2000) 3 Yearbook of International Humanitarian Law 296 doi:10.1017/S1389135900000672 <<https://www.cambridge.org/core/journals/yearbook-of-international-humanitarian-law/article/rules-of-procedure-and-evidence-of-the-international-criminal-court1/C421C0B68B573391596D8A133632666B>> accessed 26 July 2022.

7 J Doherty, 'Evidence in International Criminal Tribunals: Contrast between Domestic and International Trials' (2013) 26 (4) Leiden Journal of International Law 943.

8 De Gurmendi, Friman (n 8) 289-336.

9 Kai Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed?' (2011) 3 Third International Criminal Law Review 1-37 <<https://ssrn.com/abstract=1972235>> accessed 26 July 2022.

10 Michele Caianiello, 'Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models' (2011) 36 North Carolina Journal of International Law & Commercial Regulation 288-289 <<https://scholarship.law.unc.edu/cgi/viewcontent.cgi?article=1921&context=ncilj>> accessed 26 July 2022.

the parties to collect and submit evidence in the case at their discretion, thus realising the principle of equality and the adversarial principle.

At the same time, the court acts as a proactive rather than a passive participant in the process. For example, in one of the cases considered at the ICC,

...the court, having established that the prosecutor neglected his duty to provide received exculpatory evidence for the defense, chose to postpone the proceedings, rather than making a decision on the inadmissibility of undisclosed evidence or dropping the charges against the accused, due to the abuse of the process, which confirms the presence of elements of the inquisitorial system.¹¹

4 EVIDENCE AND THE ADMISSIBILITY OF EVIDENCE AT THE ICC

The document that defines the proof process in the ICC is the Rules of Procedure and Evidence.¹² The Rome Statute specifies three types of evidence: 1) testimony of witnesses, 2) documentary evidence, 3) material and other evidence, the question of admissibility and relativity of which is decided by the Trial Chamber (Arts. 64-69). The parties following Art. 69 of the Rome Statute of the ICC have the right to submit evidence to which admissibility requirements apply. There is no uniform official investigation file; the prosecution and the defence must independently determine the evidence they plan to use during the trial. However, there is a requirement for the prosecution. In every case of the discovery of evidence that can prove the innocence of the accused, the prosecution must provide it to the defence. The prosecution and the defence provide evidence to each other and the Pre-Trial Chamber for review before trial. The role of the victim in the proceedings is auxiliary. The victim has the right to participate in all stages of the proceedings, express his/her position, and demand compensation.¹³

The court is empowered to require the parties to submit evidence that the court deems necessary to establish the truth in the case. At the same time, the requirements for the admissibility of evidence are less strict compared to approaches in national legal systems. As Michele Caianiello points out, this is because ‘...parties who are not familiar with the international procedural system can easily present their cases, without limiting themselves to the technical nuances typical of national models.’¹⁴ The ICC is guided by the principle of free evaluation of information when deciding on the admissibility of evidence,¹⁵ taking into account the issue of ‘the probative value of evidence and the damage that such evidence may cause to a fair trial or a fair assessment of the testimony of a witness.’¹⁶

The Rules of Procedure and Evidence allow exceptions to the principle of the directness of examination of evidence. For example, if the witness who gave a previously recorded testimony is not present before the Trial Chamber, the Chamber may allow the introduction of the previously recorded testimony in one of the following situations: both the prosecution and the defence had the opportunity to examine the witness during the recording; the witness who gave the previously recorded testimony is in the trial, and the prosecution, defence, and

11 Ibid, 300.

12 The Rules of Procedure and Evidence <<https://www.icc-cpi.int/sites/default/files/RulesProcedureEvidenceEng.pdf>> accessed 26 July 2022.

13 De Gurmendi, Friman (n 8) 312.

14 Caianiello (n 12) 287.

15 De Gurmendi, Friman (n 8) 312.

16 Michele Caianiello, Giulio Illuminati, ‘From the International Criminal Tribunal for the Former Yugoslavia to the International Criminal Court’ (2000) 26 N.C. J. INT’L L. 407 <<https://scholarship.law.unc.edu/ncilj/vol26/iss2/3/>> accessed 26 July 2022.

representatives of the Trial Chamber have the opportunity to examine the witness during the trial (Rule 68, 'Prior recorded testimony'). Thus, the possibility of using a testimony obtained during the investigation is connected with the condition that the defence was present and had the opportunity to question the witness during the interrogation, during the pre-trial investigation, or directly during the trial.

If the defence was denied the right to cross-examine, the witness testimony in the ICC could not be used as admissible evidence (Rule 68 of the ICC). This includes situations when the defence was not invited to the interrogation at the stage of the pre-trial investigation. As a result, witness interrogation was conducted only by the prosecution, the investigator (including with the participation of the prosecution), or the investigating judge (Art. 225 of the Criminal Procedure Code of Ukraine). In these situations, the defence counsel or the suspect is absent (including in cases where at the time of the witness interrogation, there was no defence, i.e., no one had been informed of the suspicion).

The exception to the principle of directness in the ICC Rules is essential in the context of the traumatic psychological impact on the psyche of minor witnesses of violence by repeated interrogations. As a result of interrogations, the mind of the interrogated person plunges into memories of events and re-experiences the same emotions (re-victimisation). However, the theory and practice of the judiciary today try to take all possible measures to prevent this from happening. For example, they use specific techniques to minimise the negative psycho-emotional impact on children during criminal proceedings.

The evidence may be declared inadmissible by the court in cases where there are substantial doubts about its authenticity or where the admission of the evidence would be incompatible with the fair trial and would cause severe damage to it (Art. 69 of the Rome Statute of the ICC).

Based on the judicial practice of the ICC, the 'two-stage test of verification of evidence for admissibility' was formed: at the first stage, the Pre-Trial Chamber of the ICC determines whether there is the 'investigation or prosecution' at the domestic level; at the second stage, the question to be resolved is whether the state is 'truly unwilling or unable' to investigate crimes under the ICC jurisdiction.¹⁷

5 EXPERT STATUS AT THE ICC

The Rules of Procedure and Evidence do not contain a definition of the term 'expert'. The expert at the ICC acquires the status of a witness and is the person '... who, by virtue of some specialised knowledge, skill or training can assist the Chamber in understanding or determining an issue of a technical nature that is in dispute' (para. 14 of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*).¹⁸ The concept of an 'expert witness' as a person who, thanks to specific knowledge, skills, or training, can help the Trial Chamber understand or determine an issue of a technical nature that is the subject of the dispute is also mentioned in the decision of the ICC in *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud (Decision on Defence's proposed expert witnesses and related applications seeking to introduce their prior recorded testimony under Rule 68(3) of the Rule)* of 28 April 2022 (para. 9).¹⁹

17 Tomas Hamilton, 'Case Admissibility at the International Criminal Court' (2015) 14 *The Law & Practice of International Courts and Tribunals* 305-317 <<https://ssrn.com/abstract=2715037>> accessed 26 July 2022.

18 *The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_05764.PDF> accessed 20 July 2022.

19 *The Prosecutor v Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2022_03280.PDF> accessed 26 July 2022.

The expert's role, given his/her specialised knowledge, is to help the court understand and resolve special issues beyond a layperson's ordinary experience and knowledge.²⁰ Experts must perform their professional duties with 'maximum neutrality and objectivity'.²¹ As noted by Irish researchers R. Derham and N. Derham, the expert's primary duty is to assist the court, but this does not impose any additional duty on him/her to act as a mediator or usurp the role of the court in deciding the facts.²²

An expert authorised to conduct an expert examination is chosen from the List of Experts approved by the Secretariat of the ICC or is proposed by a party. The Pre-Trial Chamber must approve the decision (Part 2 of Art. 113 of the Rules and Procedures of Evidence) – that is, the court is the entity authorised to involve an expert in the proceedings.

The List of Experts is maintained by the ICC Registry. Experts can be included in the List after determining the person's experience in the relevant field (Art. 44 of the ICC Regulations).²³ A person who intends to be included in the List must provide a detailed biography, proof of qualifications indicating experience in the relevant field, and, if possible, proof of inclusion on the list of experts of any national court.²⁴ Such a List should be open to the ICC bodies and all participants in the proceedings.²⁵ The List should provide a wide selection of experts, all of whom will have had their qualifications verified; moreover, they will have undertaken to uphold the interests of justice when admitted to the List (para. 24).²⁶ In addition, when compiling the List, the Secretariat of the ICC should have regard for equitable geographical representation and a fair representation of female and male experts, as well as experts with expertise in trauma, including trauma related to crimes of sexual and gender-based violence, children, the elderly, and persons with disabilities, among others.²⁷ As of 16 June 2021, this List has more than 140 experts²⁸

In determining whether the evidence of an expert witness may be introduced into evidence, the Chamber must decide whether: the witness is an expert as defined above; testimony in a particular area of expertise would assist the Chamber; the expert's expected testimony corresponds to his/her competence; the provided report and/or testimony does not 'usurp' the Chamber's function as the final arbiter of fact and law.²⁹ At the same time, '...concerns about the independence or impartiality of an expert witness do not affect the admissibility of the testimony or opinion provided by him/her, but it does affect the significance of the evidence provided by him/her'.³⁰ During the expert witness interrogation, the court has the right to ask questions of the expert before and after the interrogation by the party. At the

20 'The Use of Experts in International Arbitration' <<https://rlw.juridice.ro/17537/the-use-of-experts-in-international-arbitration.html>> accessed 27 July 2022.

21 Ibid.

22 R Derham, N Derham, 'From ad Hoc to Hybrid—The Rules and Regulations Governing Reception of Expert Evidence at the International Criminal Court' (2010) 14 (1) *The International Journal of Evidence & Proof* 36 doi:10.1350/ijep.2010.14.1.339.

23 Regulations of the Court <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf> accessed 27 July 2022.

24 Derham, Derham (n 24) 36.

25 Ibid.

26 *Prosecutor v Lubanga*, Decision on the procedures to be adopted for instructing expert witnesses, ICC-01/04-01/06-1069 (ICC TC I, Dec. 10, 2007) <http://www.worldcourts.com/icc/eng/decisions/2007.12.10_Prosecutor_v_Lubanga1.htm> accessed 27 July 2022.

27 Ibid.

28 List of the ICC experts <<https://www.icc-cpi.int/sites/default/files/2021-06-16-list-of-experts-eng.pdf>> accessed 27 July 2022.

29 Derham, Derham (n 24) 25-56.

30 Ibid.

same time, the defence has the right to interrogate and cross-examine the expert after all the other participants.³¹

In the decision in *The Prosecutor v. Thomas Lubanga Dyilo* of 14 March 2012, the ICC noted that when assessing the testimony of expert witnesses, the Chamber has considered factors such as the established competence of the particular witness in his/her field of expertise, the methodologies used, and the extent to which the findings were consistent with other evidence in the case and the general reliability of the expert's evidence (para. 112).³²

6 PECULIARITIES OF EXPERT INVOLVEMENT AT THE ICC

During the consideration of a case at the ICC, there are two ways of involving an expert: a) involving an expert via the Pre-Trial Chamber of the ICC; b) the use of expert opinions drawn up following the national legislation of the state and transferred to the ICC through international cooperation.

a) Use of the results of the forensic examination at the ICC conducted by experts engaged by the Pre-Trial Chamber of the ICC

The Pre-Trial Chamber of the ICC decides on the involvement of an expert in the proceedings (Art. 56 of the ICC Rome Statute). At the request of the victims or their legal representatives, at the request of the accused, or on its initiative, the Court may engage appropriate experts to assist in determining the scope of the offence and the extent of any damage, loss, or injury caused to the victims and to offer various options as to the appropriate types and compensation forms (Part 2 of Art. 97 of the Rules of Procedure and Evidence).

The Pre-Trial Chamber, when deciding to carry out a medical, psychological, or psychiatric examination, takes into account the nature and purpose of the examination, as well as the person's consent to participate in such an examination (Part 1 of Art. 113 of the Rules and Procedures of Evidence). According to Part 5 of Art. 44 of the ICC Regulation, the Pre-Trial Chamber may issue orders relating to the subject of an expert report, determine the number of experts, the method of presenting their evidence in court, and determine time limits for the preparation and publication of their report.³³

The parties have the right to provide 'joint instructions' to the expert, i.e., to provide jointly agreed questions, the answers to which the expert should find as a result of conducting the expert examination. If the parties do not agree on the questions, they provide 'separate instructions' to the expert. After the examination, the expert draws up a single opinion, which should include answers to all the questions raised by the parties (para. 16).³⁴

As the British researcher Dragana Radosavljevic points out, the opinions/testimony of experts (in particular, psychiatric expertise) are treated ambiguously, although international courts have shown a willingness to listen to and examine the experts' testimony when it seems

31 Ibid.

32 Situation in the Democratic Republic of the Congo in the case of the Prosecutor v Thomas Lubanga Dyilo <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2012_03942.PDF> accessed 20 July 2022.

33 Regulations of the Court <https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf> accessed 27 July 2022.

34 *Prosecutor v Lubanga*, Decision on the procedures to be adopted for instructing expert witnesses, ICC-01/04-01/06-1069 (ICC TC I, Dec. 10, 2007) <http://www.worldcourts.com/icc/eng/decisions/2007.12.10_Prosecutor_v_Lubanga1.htm> accessed 27 July 2022.

necessary 'in the interests of justice'.³⁵ This is because this evidence fulfils three procedural goals: as a fact-finding tool; as evidence relevant to the establishment of a complete defence (e.g., duress); as evidence that may influence the mitigation of the sentence.³⁶ In some international criminal trials, expert witnesses played a crucial role in convictions, as they were allowed to express an opinion on the 'ultimate question' – whether the defendant had the relevant mental state required for the crime of which he had been accused.³⁷

However, international tribunals take the position that the absence of an expert's opinion/testimony is not decisive in cases where there are convincing testimonies of eyewitnesses.³⁸ For example, in the practice of the ICC, proving the coercive circumstances that made consent impossible is sufficient to prosecute a person for committing sexual violence.³⁹ In this case, it is not necessary to conduct a forensic examination to establish the severity of bodily injuries or to establish the lack of consent of the victim, which is confirmed by Part 3 of Rule 63. According to that Rule, the Trial Chamber does not make a legal requirement regarding the need to confirm the proof of any crime under the jurisdiction of the Court, in particular, crimes related to sexual violence.

In general, the Court may take into account the opinions/testimony of experts during the proceedings at the ICC if they are relevant to the case and are 'important enough' to assist the tribunal in considering the issue of prosecution for 'the most serious crimes'.⁴⁰ These 'most serious crimes' are systematic or largescale conduct that may have 'caused social alarm to the international community', along with a person who was a 'most senior leader suspected of being most responsible for the crimes within the jurisdiction of the Court'.⁴¹

It should be noted that there is another possibility of involving experts who have special knowledge in solving the case by ICC. In order to collect evidence, the ICC Prosecutor's Office at the pre-trial stage may involve 'external non-witness experts' to provide expert opinions.⁴² Such experts indirectly play a role in generating prosecutorial 'facts', 'knowledge', and 'objective truths'.⁴³ This right follows from Part 2 of Art. 15 of the ICC Rome Statute, according to which the ICC Prosecutor can receive information through the sources he/she considers appropriate, in the form of written or oral testimony. There are no special requirements for external non-witness experts in the normative ICC regulation.

b) Use of the results of the forensic examination, conducted by experts involved in the procedure following the national legislation of Ukraine, at the ICC

Since the Court does not have sufficient resources and powers to conduct investigations, the ICC relies on the state's cooperation. If the national authorities provide active and prompt assistance, the ICC can be effective in administering justice.⁴⁴ Thus, Art. 93 of the

35 D Radosavljevic, 'Scope and Limits of Psychiatric Evidence in International Criminal Law' (2013) 13 (5) *International Criminal Law Review* 1013-1035 doi: <https://doi.org/10.1163/15718123-01305011>

36 Ibid.

37 Ibid, 1016.

38 R May, M Wierda, *International Criminal Evidence* (Brill 2021) doi: <https://doi.org/10.1163/9789004479647>

39 International Protocol on Documentation and Investigation of Sexual Violence in Conflict, Article 59 <https://womens.uia.today/UWC-library/unwomen/37-International_Protocol_2017_2nd_Edition_UKR.pdf> accessed 26 July 2022.

40 Derham, Derham (n 24) 25-56.

41 Hamilton (n 19) 305-317.

42 A Overton, D Rothe, 'The International Criminal Court and the External Non-Witness Expert(s), Problematic Concerns: An Exploratory Endeavour' (2010) 10 (3) *International Criminal Law Review* 345-364 doi: <https://doi.org/10.1163/157181210X507868>

43 Ibid.

44 De Gurmendi, Friman (n 8) 289-336.

Rome Statute stipulates that expert opinions drawn up based on the results of examinations under the state national legislation may be submitted to the ICC in the order of cooperation between the state and the ICC.

After the full-scale invasion of the Russian Federation in the territory of Ukraine on 24 February 2022, the Verkhovna Rada of Ukraine adopted the Law of Ukraine No. 7304 on 3 May 2022.⁴⁵ The Law regulates the procedure for Ukraine's cooperation with the ICC by providing for Chapter IX-2 'Peculiarities of cooperation with the ICC' in the Criminal Procedure Code of Ukraine. These changes allow for the transfer of the materials of criminal proceedings that were investigated by national law enforcement agencies to the ICC (Art. 620 of the Criminal Procedure Code of Ukraine). In practice, the opinion of an expert who was involved by national law enforcement agencies during the investigation of criminal proceedings could be transferred to the ICC. Such expert opinions must meet the requirements of national legislation regarding their drafting.

At the same time, it is appropriate to note specific problems that arose at the national level in connection with the invasion of the Russian Federation and, as a result, may affect the prosecution of offenders by the ICC. According to Art. 12-2 of the Law of Ukraine 'On the Legal Regime of Martial Law', shortening or speeding up any forms of judicial proceedings during martial law is prohibited. Accordingly, forensic expert institutions should continue conducting expert examinations and providing expert opinions to promote the administration of justice.

At the same time, as a reaction to the legal regime of martial law and military actions in the territory of the state, the 'Order of interaction between bodies and units of the National Police of Ukraine, health care institutions and the bodies of the Prosecutor's Office of Ukraine in establishing the fact of the death of a person during martial law on the territory of Ukraine' (hereinafter – the Order) dated 9 March 2022 No. 177/450/46 was adopted by the Ministry of Internal Affairs of Ukraine, the Ministry of Health of Ukraine, and the Prosecutor General's Office.⁴⁶ At first glance, the purpose of this document is to eliminate obstacles and improve forensic expert activities. The need for such an act could be read between the lines because of the significant increase in forensic examinations in connection with the number of dead and injured people, damaged buildings and infrastructure, etc.

However, this bylaw contradicts specific provisions of the Criminal Procedural Code of Ukraine, which is the main one in the regulation of criminal procedural relations in Ukraine. Other normative acts must be adopted in accordance with it. If there is a need to change the legal regulation, then such a change should be carried out by amending the Criminal Procedure Code of Ukraine.

The Order (Clause 2 of Section 3.3) provides that the basis for conducting a forensic medical examination is a resolution, referral, report, or other document drawn up by an authorised person of the military administration, the National Police of Ukraine, the Security Service of Ukraine, the Prosecutor's Office or other authorised bodies. The provision of this clause contradicts Art. 242 of the Criminal Procedure Code of Ukraine, according to which the decision adopted by the person conducting the inquiry, the investigator, the prosecutor, or the decision of

45 Draft Law on Amendments to the Criminal Procedure Code of Ukraine on Cooperation with the International Criminal Court No 7304 of 20 April 2022 <<https://itd.rada.gov.ua/billInfo/Bills/Card/39474>> accessed 26 July 2022.

46 'The order of interaction between bodies and units of the National Police of Ukraine, health care institutions and the bodies of the Prosecutor's Office of Ukraine in establishing the fact of the death of a person during martial law on the territory of Ukraine' approved by the Order of the Ministry of Internal Affairs of Ukraine, the Ministry of Health of Ukraine, and the Office of the Prosecutor General 9 March 2022 No 177/450/46 <<https://zakon.rada.gov.ua/laws/show/z1299-17>> accessed 26 July 2022.

the investigating judge, or the agreement between the defence party and the Bureau of Forensic Medical Examination is the legal basis for conducting a forensic medical examination.

Such documents that are provided for by the Order ('napravlenia', 'vidnoshenia' or other documents) cannot be considered a legal basis (as a procedural document provided for by the Code of Criminal Procedure) for conducting an examination. The possibility of drawing up such a document by an authorised person of the military administration and applying to the Forensic Medical Examination Bureau is also not provided for in the Criminal Procedure Code of Ukraine. In addition, an authorised person of the military administration is not an investigator and does not have (and cannot have) the powers of an investigator or inquirer (even during martial law). Therefore, any documents drawn up by representatives of the military (district or regional administrations) do not give rise to criminal-procedural relations, nor are they a legal basis for creating evidence – an expert opinion. Moreover, the issuance of such documents by these officials is an excess of the official powers provided for by law, i.e., a classic example of a violation of Part 2 of Art. 19 of the Constitution of Ukraine, according to which 'state authorities and local self-government bodies, their officials are obliged to act only on the basis, within the limits of authority and in the manner provided for by the Constitution and laws of Ukraine'. Therefore, the powers of military administration employees regarding the involvement of forensic medical experts in Clause 2, Section 3 of the Order contradict the Constitution of Ukraine, the Criminal Procedure Code, and the Law 'On the Legal Regime of Martial Law'.

We assume that this innovation in the Order for conducting forensic medical examinations based on the 'napravlenia', 'vidnoshenia' or other documents of an authorised person of the military administration was proposed in a (hasty and uncoordinated) response to the challenge of the reality of the war – the mass death of people as a result of military actions in the territory of Ukraine and the need for their identification, the establishment of the causes of death, and other important features of the subject of proof of war crimes (for example, suffering from hunger or thirst, the torture of prisoners of war and/or civilians, etc.). However, to this day, the effect of these provisions of the Order has not been corrected, so either this error has not yet been noticed by numerous specialists-employees of the specified ministries and the Prosecutor General's Office (which is quite strange) or this 'error' is targeted (which is even more strange) in order to encourage the incorrect practice of conducting forensic medical examinations based on instructions, referrals, or other documents of employees of military administrations. Such forensic expert opinions may be excluded from the evidence base as inadmissible in future legal proceedings within the national judiciary and the ICC.

In addition, after analysing the Order mentioned above, it is possible to single out certain features of conducting forensic medical examinations during martial law:

- prior to the forensic medical examination, an information notification regarding the corpse is duplicated at the telephone number specified by the territorial police body;
- at the same time, even under the current conditions, if the police officers do not have prior information about the corpse in the forensic medical institution, but the corpse is there, the forensic medical expert conducts an examination (this provision also does not comply with the Code of Criminal Procedure);
- the expert who conducted the forensic medical examination is obliged to provide information about the cause of death to the person who made the decision about the examination within three days after the beginning of the examination. In this case, we are talking about cases in which the resolution (para. 7, para. 2, para. 4 of the Order), a reference to the 'napravlenia', 'vidnoshenia' or other document (para. 1, para. 2, para. 4 of the Order) or the decision of the investigating judge, or the agreement between the defence party and forensic medical examination

bureau (242, 243 of the Criminal Procedure Code of Ukraine) is absent in the specified provision of the Order. In this case, based on the literal interpretation of this provision, if the basis for the forensic medical examination was a document other than the investigator's decision, the forensic expert is not obliged to provide information about the death of a person.

- employees of the forensic medical examination bureau provide the expert's opinion to the person who sent the corpse for examination within three days after its preparation. In this context, the question arises whether 'the person who sent the corpse for examination' is the same as 'the person who made the decision to conduct the examination and sent the relevant document to the forensic medical examination bureau'. If not, then based on the interpretation of the Order, the person who made the decision to conduct an examination receives only information about the causes of death (and does not receive an expert's opinion as evidence).
- forensic experts carry out measures for further identification of the corpse (fixation and mandatory photography of special signs, dental formulas, removal and storage of objects for molecular genetic examination);
- when there are clear signs of damage from a gunshot, explosive, burn, chemical, radiation, or other injuries resulting from hostilities, regardless of whether the victim is military or civilian, a medical certificate of death is issued by a forensic medical expert based on an external examination. At the same time, the forensic expert takes mandatory photographs of the corpse with sufficient digital documentation, selection of material for forensic immunological and molecular genetic research (if necessary), and, if possible, preservation of the elements that caused the injury. The Order allows for a situation wherein, if the cause of a person's death is apparent and includes various types of damage resulting from hostilities, a forensic medical examination may not be conducted. The Order thus contradicts Part 2 of Art. 242 of the Criminal Procedure Code⁴⁷

We would like to note that the specifics of conducting forensic medical examinations provided for in the Order are not temporary. Therefore, it will not cease to operate with the end of martial law in the territory of Ukraine, and there is thus a need to bring the specified bylaw into compliance with the provisions of the Criminal Procedure Code of Ukraine. The errors of the bylaw threaten to create risks for the recognition of expert opinions as inadmissible because the procedure for the expert involvement and conducting an examination, provided for by the Code of Criminal Procedure of Ukraine, will not be followed. In such a case, the question arises of whether such a situation will be a chance for the defence to request that evidence be considered inadmissible both within the national judiciary of Ukraine and in the ICC in an attempt to avoid criminal liability. The bylaw contributes to the possibility of such a result in the future, mixing the concept of 'forensic examination' as a means of proof in criminal proceedings and the administrative procedure of examining a corpse for the purpose of issuing a death certificate.

47 KA Shunevych, 'Peculiarities of forensic expert activity during the full-scale armed aggression of the Russian Federation against Ukraine. Actual problems of human rights, the state, and the legal system' in *Materials of the XXI International Student and Postgraduate Scientific Conference* (April 22-23, 2022), Faculty of Law of Ivan Franko National University of Lviv, 222-226.

7 CONCLUSIONS

The ICC jurisdiction extends to states that have ratified the ICC Rome Statute or have recognised the jurisdiction of the ICC following Part 2 of Art. 12 of the ICC Rome Statute. At the time of the invasion of the Russian Federation on 24 February 2022, Ukraine had not ratified the Rome Statute. The Chief Prosecutor of the ICC, Karim Ahmad Khan, launched an investigation into war crimes of the Russian Federation in Ukraine at the request of 39 ICC members on 2 March 2022. As a result, war crimes committed by Russian military personnel in the territory of Ukraine will be a subject of consideration at the ICC. The jurisdiction of the ICC extends to the entire internationally recognised territory of Ukraine, including the temporarily occupied territories.

The Rome Statute generally established an adversarial model for the administration of justice, but the ICC Statute contains many exceptions to the typical features of this theoretical model (the active role of the court in the proceedings; the admissibility of written statements and other evidence in court, if they were collected *ex parte* during the investigation). Therefore, justice in the ICC is carried out according to the ICC electric separate procedural system of the ISS.

The document that defines the specifics of proof in the ICC is the Rules of Procedure and Evidence. Each party has the right to present evidence to which the exact requirements of admissibility apply. The requirements for the admissibility of evidence are less stringent than approaches in national legal systems so that parties unfamiliar with the international procedural system can easily present their cases without being limited by the technical nuances typical of national models. The ICC applies the principle of free assessment of evidence, and exceptions to the principle of the directness of evidence are allowed.

An expert at the ICC has the status of a witness ('expert witness') and, thanks to his/her special knowledge, skills, or training, helps the Trial Chamber understand or determine issues of a technical nature that are the subject of the dispute. The expert must be neutral and objective. The Trial Chamber chooses an expert from the List of Experts either approved and administered by the ICC Registry or involves them at the proposal of the parties to the process. As of 16 June 2021, the List includes more than 140 experts.

The ICC has two ways of involving an expert to provide an opinion/testimony: a) the involvement of a specific expert by the ICC Pre-Trial Chamber by selection from the List of ICC Experts approved by the Secretariat of the ICC; b) the involvement of an expert who carries out his/her activities under national legislation, via international cooperation between the state and the ICC.

The second method raises concerns regarding the admissibility of a forensic expert's opinion if it is provided without compliance with the requirements of the Criminal Procedure Code of Ukraine. Therefore, Ukrainian bylaws in the field of regulation of forensic examination must be brought into line as soon as possible with the main regulatory act in the field of regulation of criminal procedural relations – the Criminal Procedural Code of Ukraine – and, in the case of a real, justified need and intention to change the legal regulation of these relations, must reflect such changes in the Criminal Procedure Code of Ukraine.

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