Scope and Limits of Psychiatric Evidence in International Criminal Law[1]

Dragana Spencer

Abstract

This contribution examines the role of the mental health sector evidence in international crimes prosecutions. Specifically, recent trials are examined with a view to assess the scope and limits of psychiatric evidence in relation to war crimes defences. Scrutinizing fully the origins and triggers of individual criminal responsibility, serves the interests of justice and enhances trial rights. This study also tries to illustrate the undesirable but extensive use of hearsay evidence in international criminal courts and the ways in which psychiatric evidence is used frequently to validate inconsistent testimonies and hearsay accounts of presumed victims and witnesses but not to enable defendants to form defences. The chapter concludes that defence trial rights would be better protected if relevant legal lacunae and ambiguities regarding the admissibility of psychiatric evidence are clarified and if the amount of such evidence required to satisfy certain defences, such as duress, is quantified with greater specificity.

Keywords

Psychiatric evidence, war crimes, burden of proof, fairness.

1 Introduction

Psychiatric evidence is frequently examined with ambivalence even though international courts have sporadically shown willingness to hear and examine expert evidence from forensic

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criminal analysts[2] and psychiatrists when this is considered to be in the 'interest of justice'.[3] This evidence serves three main procedural purposes: as a fact-finding tool; as evidence relevant to the establishment of a full defence (e.g. duress); and as evidence mitigating the severity of a sentence. Through medical/scientific methods, psychiatric evidence may be employed to establish true elements of crime (in particular the mental element) and to moderate objective/legal and moral labelling of criminality, which deter restorative penal goals.

It has been long established that mental functions are allocated to different regions of the brain and so duress for example, should be understood as a result of mental functions which include varied emotional affects such as hate, grievance and anger. In fact '[m]ultiple layers of analysis are required to capture and understand the complexity of meanings of the events to the individual, as well as the meanings of symptomatic reactions and events' consequences to the individual.'[4] Importantly, '[b]ecause this work is usually performed by psychiatrists from different cultures than the victims, psychiatrists have to deal with the tension between what is universal in a victim's experience and what is culturally specific.'[5] In the context of defences such as duress, insanity and diminished responsibility, neural scientists can play a key role since the ICC Statute allows special defences,[6] opening up the possibility of psychiatric, neurobiological and genetic defences.[7] Whilst it is true to say that investigative aims and

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[2] *See e.g* ICTY, *Prosecutor* v. *Stakić*, Case No. IT-97-24-A , Appeals Chamber, Judgment, 22 March 2006, para. 182.

[3] *E.g.,* ICTY RPE, Rule 73ter (F).

[4] Mary-Jo Del Vecchio et al., *Postcolonial Disorders* (University of California Press, Berkeley, 2008), p. 389.

[5] *Ibid.*

[6] ICC Statute, Article 31 (3).

[7] Geert-Jan Knoops*, Defences in Contemporary International Law* (Transnational Publishers, Ardsley NY, 2001), p. 286; Donna R. Miles and Gregory Carey, 'Genetic and Environmental Architecture of Human Aggression', 72 *Journal of Personality and Social Psychology* (1997) 207-217.

methods of these different disciplines compete at times with each other,[8] which inevitably raises questions over their evidentiary and probative value, it must also be observed that legal and moral labelling of, for instance, 'abnormality of mind' (a legal and not medical term) is somewhat partial, lacking due consideration of subjective, cognitive and/or volitional abilities. Due to the perception that psychiatric evidence potentially affords undue leniency,[9] only in exceptional and very limited number of instances does criminal law allow for the personal characteristics of the defendants to justify and/or excuse them from their actions.[10] The law also requires that a reasonable man would have done the same: 'Our initial assumption is usually that someone's capacity to choose is normal; this is the position taken by the courts. As we become more aware of their intellectual and emotional characteristics, we may start to wonder whether our initial assumption was correct.'[11] It is therefore fundamental that the law recognizes and distinguishes what is reasonable in peace and in war times as 'war provides an exaggerated, perhaps extreme, version of the entire range of human experience'.[12]

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[8] Royal College of Psychiatry in Law Commission, *Partial Defences to Murder* (2004, Law Commission 290), para. 5.44: Currently, in homicide cases, for example, psychiatrists consider that there is 'profound mismatch' between the thinking of the law and psychiatry. *See also*, Dawn Rothe and Angela Overton, 'The International Criminal Court and the External Non-Witness Expert(s), Problematic Concerns; An Exploratory Endeavour', 10 *International Criminal Law Review* (2010), 345-364, 351.

[9] Michael L. Perlin, 'Unpacking the Myths: The Symbolism Mythology of Insanity Defence Jurisprudence', 40 *Case Western Reserve Law Review* (1990) p. 599.

[10] The ICC Statute does not differentiate between justification and excuse. *See*, Kai Ambos, 'Defences in international criminal law', in Bartram S. Brown B. (ed.), *Research Handbook on International Criminal Law* (Edward Elgar Publishing Company, 2011), p. 301.

[11] Alec Buchanan, *Psychiatric Aspects of Justification, Excuse and Mitigation – The Jurisprudence of Mental Abnormality in Anglo-American Criminal Law* (Jessica Kingsley Publishers, London, 2000), p. 37.

[12] Simon Wessely, 'Risk, psychiatry and the military', 184 *British Journal of Psychiatry* (2005) 459-466, 459. The author concludes that: 'There is no single 'experience of war', for good or ill. For many … especially those who

The primary objective of expert psychologists and psychiatrist is to explain behaviour then, where possible, justify it: 'law and emotions is a vital field whose distinctive insights and plural methodologies are essential, not simply to the full understanding of the role of emotions in many domains of human activity, but to their intelligent and responsible engagement by law."[13] In the interest of trial fairness, in would be particularly unreasonable to deny an accused person the opportunity to rely on all relevant and reliable evidence that may be exculpatory.[14] This also implies legitimate expectations that the court will examine all exculpatory evidence before determining liability.[15] Understanding how wars and violent conflicts affect emotional, mental well-being and ultimately decision making processes of those finding themselves before international criminal courts, from high ranking state officials and generals[16] to low ranking close range combatants[17] and prison guards, is important here as presumption of innocence

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are not part of modern, professional, volunteer militaries, war is not the 'best days of their lives', and when they return appear hale in body, but not in mind.'

[13] Kathryn Abrams and Hila Keren, 'Who's Afraid of Law and the Emotions?', 94 *Minnesota Law Review* (2010) 1998 - 2063, 2000.

[14] *See e.g.*, The Supreme Court of Canada in *R* v. *Finta* (1994) 1 S.C.R. 701. *See also* Sec. 115 (3) of the German Code of Criminal Procedure 1987 requiring that a suspect be given the opportunity at the detention hearing to 'present those facts which are in his favour.'

[15] *See e.g.*, *R* v. *O'Brien* [2000] Crim.L.R.676.

[16] *See e.g.*, David Ronfeldt, *Beware the Hubris-Nemesis Complex – A Concept for Leadership Analysis, 1994, Office of Research and Development*, Central Intelligence Agency, RAND, p. 23 on malignant narcissism in political leaders which consists of pathologies such as a narcisstic personality disorder, form of anti-social personality disorder (as per DSM 1994), hateful aggression against oneself or other and paranoia.

[17] *See e.g.*, Richard A. Gabriel, *The Painful Field – The Psychiatric Dimensions of Modern War* (Greenwood Press, Connecticut, 1988) p. 7: 'To understand modern conventional war is to recognise a single indisputable fact: War is not only becoming more lethal in terms of its ability to kill and maim; it is far more destructive it its ability

requires that the courts convict the accused only when they are convinced of his/her guilt beyond reasonable doubt.[18] Whilst the statutes and rules of procedure and evidence of international courts and tribunals do not define reasonable doubt, it seems logical to conclude that '[g]iven the gravity of the crimes charged and the severity of the penalties imposed … the beyond-a-reasonable-doubt standard in the international context should signify a particularly high level of certainty.'[19]

2 Relevance, Probative Value of Psychiatric Evidence and Equality of Arms

The principle of equality of arms represents one of the most important features of the wider concept of a fair trial whereby each party must be afforded reasonable opportunity to present its case in conditions that do not place one at a disadvantage vis-à-vis one's adversary.[20] An accused has the right to examine any witnesses against him/her and to obtain attendance of any witnesses, including expert witnesses, on his behalf under the same conditions as witnesses against him/ her.[21] However, it is widely accepted that trial judges have discretionary power to assess the evidentiary value of expert testimony and to determine the probative weight of such

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to drive soldiers mad. Indeed, as the warriors…improve the technology of killing arithmetically, the power to drive combatants crazy, to debilitate them through fear and mental collapse, is growing at an even faster rate.'

[18] ECHR Article 6 (2); ICC Statute, Article 66 (1), (2) and (3); ICTY RPE, Rule 87 (A); ICTR RPE, Rule 87 (A); SLSC RPE, Rule 87 (A).

[19] Nancy A. Combs, *Fact – Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, New York, 2010), p. 361.

[20] See e.g. *Foucher* v. *France*, 18 March 1997, Reports 1997-II, at 34; *Bulut* v. *Austria*, 22 February 1996, Reports 1996-II, at 47. Some international instruments on cooperation specifically provide for '*judicial equality*' during proceedings – *see e.g.*, 1962 Nordic States Scheme.

[21] *See* ICC Statute, Article 67 (1) (e).

evidence.[22] Equally, international courts can exclude evidence, at any stage of the proceedings, and after it has been admitted, if its probative value is substantially outweighed by the need to ensure a fair trial.[23] Generally, the assessment of expert evidence is only a preliminary matter but there have been instances in international criminal trials where expert witnesses have played a key role in the determination of guilt as they were allowed to render opinion on the 'ultimate issue' – usually, an expert should not testify on whether a defendant possessed or lacked the relevant mental condition forming part of the crime charged or his/her defence.[24] It is interesting to note here that whilst judges appear to be sceptical about the validity of psychiatric expert evidence and are subsequently reluctant to acquit defendants on the basis of it, they normally defer to the medical experts when questions regarding the fitness to stand trial and to enter a plea are raised.[25]

The ICC Statute provides that when there is a unique investigative opportunity,[26] the Pre-Trial Chamber may appoint an expert witness to ensure the fairness and integrity of proceedings, in

[22] *See* ICTY, *Prosecutor* v. *Milutinović*, *Sainović and Ojdnaić,* Case No. IT-05-87-T, Trial Chamber, Decision on Evidence Tendered through Dr Eric Baccard, 16 March 2007; SCSL, *Prosecutor* v. *Sesay et al.*, Case No. SCSL-04-15-T, Trial Chamber, Written Reasoned Ruling on the Preliminary Characterisation of Expert Witness TF1-296, 14 July 2006, p. 7; ICTY *Prosecutor* v. *Blaskić*, Case No. IT-95-14, Trial Chamber, Judgment, 3 March 2000, para. 34; ICTY, *Prosecutor* v. *Musema*, Case No. ICTR-96-13-A, Trial Chamber, Judgment and Sentence, 27 January 2000, para. 41; *See also* ICC Statute Art. 69.

[23] *See e.g.*, ICTY RPE, Rule 89 (D); ICC Statute, Article 64 (9) (a).

[24] *See e.g.*, US Federal Rules of Evidence, Rule 704 (b).

[25] *See e.g.* ICTY, *Prosecutor* v. *Kovacević*, Case No. IT-01-42/2-1, Trial Chamber, Decision on provisional release (re. Mr. Kovacević), 2 June 2004, para. 97; ICTY, *Prosecutor* v. *Strugar*, Case No. IT-01-42-PT, Prosecution's Submission of Medical Report Prepared by Dr Bennett Blume, MD Vera Folnegovis-Smalc, MD Daryl Mathews, MD, PhD, 11 May 2004.

[26] ICC Statute, Article 56 (1) (a).

particular to protect the rights of the defence[27] and the Court must acquit a defendant unless the prosecution proves the commission of crimes beyond a reasonable doubt.[28] However, when a defendant wishes to rely on specific mental health defences (e.g. insanity and diminished responsibility) or wishes to call an expert to establish the necessary *mens rea* of the offence charged, the burden of proof is reversed. Here, a psychiatric diagnosis is crucial[29] but any departure from the presumption of innocence must be legally justified. Although such reversal is not *per se* in breach of a fair trial under Article 6 (2) of the ECHR,[30] it is unclear what evidentiary test should be satisfied. For instance, UK courts have ruled that a merely evidentiary burden, requiring the accused to do no more than raise reasonable doubt on the issue to which it related, would not breach the presumption of innocence[31] but persuasive or probative burden, requiring the accused to prove a determining fact, on balance of probabilities, might be more difficult to justify.[32] What specific legal test is to be adopted in order to justify the probative burden is unclear but some guidance, rather than a set of rules,[33] can be found in domestic courts; the judges should consider whether the probative burden relates to something that the accused will find difficult to prove and whether this relates to something that is likely

[27] ICC Statute, Article 56 (2) (c). *Also*, ICC Statute, Article 67 (1) (a) provides that an accused should not have imposed on him/her any reversal of burden of proof or any onus of rebuttal.

[28] ICC Statute, Article 66.

[29] Ellen Byers, 'Mentally Ill Criminal Offences and the Strict Liability Effect: Is There Hope for a Just Jurisprudence in an Era of Responsibility/Consequences Talk?', 57 *Ark. L. Rev*. (2004) 447.

[30] *See e.g. R* v. *Lambert* [2001] 1 All ER 1014.

[31] *Ibid. See also R* v. *DPP, ex parte Kebilene* [2000] 2 A.C. 362.

[32] *Supra* note 29. For a full discussion *see* Dragana Radosavljevic, 'Some Observations on the Lack of a Specific Diminished Responsibility Defence under the ICC Statute', 19 *European Journal of Crime, Criminal Law and Criminal Justice* (2011) 37-55.

[33] *McIntosh* v. *H. M. Advocate* [2003] 1 A. C. 1078, p. 48.

to be within his knowledge and ready access.[34] It could be argued here that given the overwhelming pressure to achieve convictions in international courts and tribunals,[35] the probative burden should be avoided as it implies both an unspecified and discretionary presumption of guilt.[36] Highlighting the importance of rights of the accused, the ICTY reaffirmed in *Celebici* that criminality is determined i*n personam* and cannot be of 'universal effect'.[37] Although there are no specific provision in the statutes of international courts and tribunals dealing with probative burden, it was held by the ICTY in the same case that in responding to charges:

> [T]he accused is only required to lead such evidence as would, if believed and un-contradicted, induce a reasonable doubt as to whether his version might not be true, rather than that of the Prosecution. Thus the evidence which he brings should be enough to suggest a reasonable possibility.[38]

Moreover, if the prosecution fails to prove guilt beyond reasonable doubt 'at the conclusion of the case, the accused is entitled to the benefit of the doubt as to whether the offence has been proved'.[39] As mentioned earlier however, expert witnesses cannot rule on 'ultimate issues', expressing their opinions on questions of individual criminal culpability or on any matters that

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[34] *Ibid.*

[35] Darryl Robinson, 'The Identity Crisis of International Criminal Law', 21 (4) *Leiden Journal of International Law* (2008) 925-963, 929.

[36] *Ibid.* Robinson further points out that 'studies indicate that the more severe the crime, the greater pressure to convict and the greater the likelihood of perceiving an accused as responsible for the crimes.'

[37] ICTY, *Prosecutor* v. *Delalić et al*., Case No. IT-96-21, Trial Chamber, Judgment, 16 November 1998, para. 1226.

[38] *Ibid.*, para. 603.

[39] *Ibid.*, para. 601.

are for judges to adjudicate upon.[40] The ICTY for instance held that it was for the Trial Chamber to establish whether the factual basis of an expert opinion is valid in light of all evidence given.[41] Nevertheless, the jurisprudence of the ICTY and ICTR is inconsistent here; contrary to the general rule that an expert cannot testify as to the guilt of an accused, ICTR permitted a historian to determine conclusions on the basis that 'there is no need to disallow an expert witness to provide opinions and inferences on the ultimate issue.'[42] This approach seems to be based on a less restrictive attitude to psychiatric expert evidence found in some jurisdictions.[43] In the United States for example, psychiatrists and psychologists have been allowed, through legislation, to testify about ultimate issue.[44] In the United Kingdom, a similar approach is routinely taken: 'although technically the final question 'Do you think he was suffering from diminished responsibility' is strictly inadmissible, it is allowed time and time again without any objection.'[45]

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[40] *See e.g.* ICTY, *Prosecutor* v. *Aleksovski*, Appeals Chamber, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999.

[41] ICTY, *Prosecutor* v. *Delalić et al*., Case No. IT-96-21-A, Appeals Chamber, Judgment, 20 February 2001, para. 94.

[42] ICTR, *Prosecutor* v. *Bagosora et al.*, , Case No. ICTR-98-41-T, Trial Chamber I, Oral decision on Defence objections and motion to exclude the testimony and report of the Prosecution's proposed expert witness, Dr Alison DesForges, or to postpone her testimony at trial, 4 September 2002, paras 4-5.

[43] For a further discussion *see e.g.* Deirdre Dwyer, *The Judicial Assessment of Expert Evidence* (Cambridge University Press, New York, 2008).

[44] David W. Springer and Albert R. Roberts*, Handbook of Forensic Mental Health with Victims and Offenders*, 2007 (Springer Publishing, New York, 2007), p. 76. *See also* Gary B. Melton et al., *Psychological Evaluations for the Courts – A Handbook for Mental Health Professionals and Lawyers* (The Guildford Press, New York, 2007), p. 603.

[45] *DPP* v. *A&B C Chewing Gum LtD* [1968] 1QB 159, p. 164 (per Lord Parker CJ). *See also R* v. *Hookway* [1999] Crim LR750, CA, para. 268.

Unlike the majority of civil law penal codes, rules of procedure and evidence of ad hoc tribunals and the ICC are silent on specific criteria and minimum standards of evidential weight.[46] This is particularly evident when psychiatric evidence is invoked. Terms 'mental disease' and 'defect' found in ICC Statute Article 31 (1) (a) are not defined within the Statute nor the Rules of Procedure and Evidence. As a result, types of behaviour and specific symptoms required to satisfy the burden of proof are unqualified. This means that the type and quantum of evidence required to satisfy the elements of defences is decided on a case-by-case basis by judges. This is problematic as under Article 30 of the Statute a person can only be criminally liable if 'the material elements are committed with intent and knowledge' and since most on the crimes (e.g. genocide and crimes against humanity)[47] under the jurisdiction of the ICC require 'specific intent', it follows that defences too should be defined with specificity and clear evidentiary standards.

Here, the imprecise legal criteria in international criminal law for the determination of 'abnormality of mind' must be revised; distinction should be made between intellectual and will abilities of a defendant as '[t]he assessment of preserved functions has objectively greater forensic significance, because if it is confirmed that the perpetrator is not able to perceive the meaning of his acts, then further evaluation of his abilities to govern his behaviour is completely irrelevant.'[48] Such assessment relies on causality whereas 'legal excuses are not based on causation, but on interference with practical reasoning.'[49] In this context, the

[46] With the exception of sexual assault offences. *See e.g.* ICTY RPE, Rule 96.

[47] ICC Statute, Articles 6 and 7 respectively.

[48] Miroslav Goreta, *The concept of diminished responsibility in supranational criminal law (psychiatric approach)*, Psihijatrijska Bolnica Vrapce, Pravni Fakultet Sveučilišta in Zagrebu (Medicinska Naklada, Zagreb, 2007) p. 43.

[49] Michael S. Moore, *Placing Blame* (Clarendon Press, Oxford, 1998), p. 538.

international criminal process should further define and expand the scope of psychiatric expert testimony for the purpose of establishing facts material to defences such as duress[50] and diminished responsibility under ICC 'special defences'.[51] Furthermore, an accused person should be entitled to establish a defence by relying on expert evidence because, as the ICTY concluded in *Celebici*:

> [A]n expert witness is one specially skilled in the field of knowledge about which he is required to testify. Expert opinion is only necessary and required where the expert can furnish the Trial Chamber with scientific, technical or such information that is ordinarily outside the experience and knowledge of the judges of facts.[52]

It seems logical that if judges are able to arrive at conclusions on the facts without the assistance of expert evidence, then the expert evidence is unnecessary. However, if the judges use such evidence in order to determine facts, then the law should defer to medical experts. The lack of specific quantum of evidence required to satisfy the evidentiary burden leaves the judges enjoying 'too broad zone of judicial freedom in the possibility of rejecting forensic evaluation on psychiatric experts and making one's psychiatric conclusions (the English model)'.[53] This results in a doctrinally unjustified competence and expertise shift between judges and medical experts whereby 'the judges - even the most educated - simply are not (and will never be)

[50] Knoops, *supra* note 7, p. 287; *See also* Alec Buchanan and Virgo Graham, 'Duress and Mental Abnormality', *Criminal Law Review* (1999) 517-531.

[51] ICC Statute, Article 31.

[52] ICTY, *Prosecutor* v. *Delalic et al.*, Case No. IT-96-21, Trial Chamber, Decision on the Motion by the Prosecution to Allow the Investigators to follow the Trial During Testimonies of the Witnesses, 20 March 1997, para.10.

[53] Goreta, *supra* note 48, p. 7.

professionally qualified.'[54] This is also true of expert witnesses frequently relied upon by prosecution, particularly in relation history, nature and background of conflicts[55] and military structure and subculture.[56] Here, few issues, which relate to procedural fairness, need to be observed briefly; firstly, the process through which the courts and prosecution teams select expert witnesses and secondly, the asymmetrical allocation of resources between the parties. For example, there are concerns that the use of expert witnesses by the ICC lacks transparency.[57] Moreover, the possibility of bias cannot be excluded as information provided by expert witnesses may be perceived as obtained, selected and presented 'to support and/or inform factual case theories designed to meet OTP interests'[58] which are in turn likely to become ''judicial truth' reinforcing the broader 'regime of truth' in which the process is embedded.'[59]

For this reason, experts appointed by the prosecution, as well as the court, should not be the same experts who would have been involved in producing reports,[60] in reliance of which a case

[54] *Ibid.*, p. 45.

[55] Christopher Safferling, *International Criminal Procedure* (Oxford University Press, Oxford, 2012), p. 473.

[56] *See e.g.* ICTR, *Prosecutor* v. *Semanza*, Case No. ICTR-97-20-T, Trial Chamber, Judgment and Sentence, 15 May 2003, paras 295-298.

[57] Rothe and Overton, *supra* note 7, p. 348; *See also* Richard May and Marieke Wierda, *International Criminal Evidence* (Transnational Publishers, Leiden, 2002), p.267.

[58] *Ibid.*, p. 355.

[59] *Ibid.*

[60] For example, where a defendant is thought to be mentally ill, he or should must be examined by a panel of psychiatrists who then prepare a report which includes 'a finding of whether, at the relevant time, the accused's capacity to distinguish right from wrong was affected by mental illness' in *R* v. *Lambert and Ali* [2002] Q.B. 1112, paras. 18-19. For a full discussion *see e.g*. Ronnie D. Mackay, 'The New Diminished Responsibility Plea', 4 *Criminal Law Review* (2010) 290-302.

against the defendant is brought. For example, the German Code of Criminal Procedure provides that any close relationship between one of the parties and the expert witness is sufficient to raise a suspicion of bias, leading to the rejection of that individual as an expert witness.[61] The ICTY takes a different approach. In *Stanišić*, the Trial Chamber held that such close relationship is insufficient to give rise to legitimate doubts as to his or her impartiality.[62] However, in *Vasiljević* the Tribunal accepted psychiatric evidence from a doctor who was related to the defendant and new him from birth, but at the same time questioned and ultimately rejected his expert evidence precisely because of the nexus.[63]

Under Art.15 (2) of the ICC Statute, the Prosecutor may also seek additional information from States, organs of the United Nations, intergovernmental and non-governmental agencies – institutions that are more likely than not to collaborate with the Court but organisations whose assistance the defence may not be able to invoke either because of lack of resources[64] or because no obligation to provide assistance with documents or witnesses exists.[65] The

[61] German Code of Criminal Procedure, *supra* note 14, sections 24 (2) and 74 (1).

[62] ICTY, *Prosecutor* v. *Stanišić and Zupljanin*, Case No. IT-08-91-T, Trial Chamber, Decision Pursuant to Rule 94bis Accepting Ewan Brown and Affirming Ewa Tabeau as Prosecution Expert Witness, and Written Reasons for the Oral Ruling Accepting Andreas Riedlmayer as an Expert Witness, 29 September 2010, para.10.

[63] *Prosecutor* v. *Vasiljević*, Case No. IT-98-32-T, Trial Chamber II, Judgment, 29 November 2002, para. 284.

[64] *See e.g*. SCSL, *Issa Hassan Sesay* v. *The Office of the Principal Defender*, Case No. SCSL-04-15-T*,* Trial Chamber, Application seeking adequate resources pursuant to Rule 45 and/or pursuant to the Defence Office/Registrar's duty to ensure equality of arms, 10 January 2007. Here, Mr Sesay argued that resources allocated to him to prepare and present his case were inadequate, given the size and complexity of the case. In particular he argued that his defence would be inadequate if he was unable to instruct appropriately qualified military experts.

[65] *See e.g.* ICTY, *Prosecutor* v. *Simić, Todorović et al*., Case No. IT-95-9-PT, Trial Chamber, Decision Denying Request for Assistance in Securing Documents and Witnesses from the International Committee of the Red Cross, 7 June 2000.

additional issue here is the fact that such evidence is often given on a confidential basis so when the Prosecution presents it, the rights of the accused to challenge and cross-examine it, are limited.[66] This is significant as the *proprio motu* ICC Prosecutor has discretion to decide which cases to pursue based on the evidence collected.[67] Admissibility of such evidence is questionable and is as a result often excluded in most domestic, accusatorial systems: "[t]he most important element derived from the accusatorial concept of equality of arms is the exclusion of the untested evidence gathered during the investigations from the trial."[68]

In *Tadić* the ICTY held that the issue of inequality of resources has a direct and detrimental impact on equality of arms and hence fundamentally undermines a fair trial[69] and importantly, that the doctrine of equality of arms must be given a 'more liberal'[70] scope than in domestic proceedings.[71] But in *Kayishema*, the ICTR held that right of the accused and equality between the parties could not be confused with equality of means and resources.[72] As far as the ICC is concerned, the Assembly of States has full control over all of the Prosecutor's resources. Notwithstanding the fact that the use of the powers of the Assembly of States Parties may

[66] ICC RPE, Rule 82 (4).

[67] ICC Statute, Article 53.

[68] Michele Caianiello, 'Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models', 36 *N.C.J. Int'l L. & Com. Reg.* (2011) 294. For a full discussion *see also* Ennio Amodio, 'The Accusatorial System Lost and Regained: Reforming Criminal Procedures in Italy', 52 *American Journal of Comparative Law* (2004) 489-500.

[69] ICTY, *Prosecutor* v. *Tadić*, Case No. IT-94-1-A, Appeals Chamber, Judgment, 15 July 1999, para. 52. *See also* ICC Statute, Article 67; ICTY Statute, Article 20.

[70] *Ibid.*

[71] *Ibid.*

[72] ICTR, *Prosecutor* v. *Kayishema and Ruzindana*, Case No. ICTR-95-1, Trial Chamber, Order on the Motion by the Defence Counsel for Application of Article 20 (2) and 4 (b) of the ICTR Statute, 5 May 1997, para. 20.

interfere with the preliminary inquiries, investigations and prosecutions undertaken by the ICC Prosecutor,[73] no remedy against such violation is provided in the Statute.

2.1 The War Context

War entails 'depravation of basic needs and of all human rights and values, it eliminates emotional comfort, it causes irreversible material and kin losses, physical exhaustion, psychological breakdowns, and makes futile all everyday routines.'[74] This is true of the civilians as well as combatants and military in general: '[f]or the military, the trauma may relate to direct combat duties, being in a dangerous war zone, or taking part in peace-keeping missions under difficult and stressful conditions'[75] exposing people to a number of damaging psychological, physical, as well as chemical and biological disorders.[76] These conditions trigger reactions and coping mechanisms that manifest themselves in behavioural changes, hormonal and metabolic imbalances, psychological damage and neurological disorders.[77] In turn, such changes may explain, not necessarily justify, why some of the persons likely to be charged by international criminal courts and tribunals have aggressive or homicidal tendencies. For instance, frontal lobe injuries are clinically associated with 'poor impulse control, explosive aggressive outbursts, inappropriate verbal lewdness, jocularity, and lack of

[73] ICC Statute, Article 42 (2).

[74] Mirna Flogel and Gordan Lauc, *War Stress-Effects of the War in the Area of Former Yugoslavia*, 2001, p.1, www.nato.int/du/docu/d010306c.pdf, 28 June 2019.

[75] Veterans Affairs Canada, *Post-Traumatic Stress Disorder (PTSD) and the Family, The New Veterans Charter*, 2006, p.1, veterans.gc.ca/eng/mental-health/health-promotion/ptsd_warstress, 28 June 2019.

[76] Flogel and Lauc, *supra* note 74.

[77] *Ibid.*

interpersonal sensitivity.'[78] In a study of head injuries of Vietnam veterans (VHIS) it was also found that persons with lesions to the frontal lobes displayed greater aggressive and violent behaviours compared to subjects without frontal head injuries.[79] In fact, frontal dysfunctions also manifest themselves in:

> impulsivity, reduced guilt, reduced concern and other emotional feelings, less inhibited sexual behaviour, indifference, emotional outbursts, uninhibited social behaviour…personality changes which bear close parallels to the clinical concept of psychopathy.[80]

Symptoms vary according to the nature of combat (e.g. front-liners v pilots), its duration and the type of exposure to traumatic events. So for example, the level of combat varied significantly amongst UK troops deployed in Iraq and those sent to Afghanistan. Reports and levels of major depression, anxiety and PTSD were significantly higher amongst subjects on duty in Iraq.[81] Moreover, physical and mental training, readiness, tolerance and resilience differ amongst professional military personnel (e.g. UK and USA) and those combatants that have been forcefully conscripted (e.g. Bosnia and Herzegovina, Croatia and Serbia during the

[78] Brower M. C. and Price B. H., 'Neuropsychiatry of frontal lobe dysfunction in violent and criminal behaviour: a critical review', 71 (6) *Journal of Neurology, Neurosurgery & Psychiatry* (2001) 720-725, 723.

[79] James D. Duffy and John J. Campbell III, 'The regional prefrontal syndromes: a theoretical and clinical overview', 6 (4) *Journal of Neuropsychiatry and Clinical Neuroscience* (1994) 379-387, 381.

[80] Adrian Raine, *The Psychopathology of Crime: Criminal Behaviour as a Clinical Disorder* (Academic Press, San Diego, 1993), p. 112. *See also* Bonnie L. Green et al. (eds.), *Trauma Interventions in War and Peace: Prevention, Practice, and Policy* (Kluwer Academic Press, New York, 2004).

[81] Charles W. Hoge MD et al., 'Combat Duty in Iraq and Afghanistan, Mental Health Problems, and Barriers to Care', 351 (1) *The New England Journal and Medicine* (2004) 13-22, 17.

Balkan wars 1992-1999). A recent study[82] into the effects of war stress amongst soldiers that participated in Balkan wars indicated that a large percentage of soldiers were not professional army personnel but compulsorily mobilised/conscripted.[83] It also emerged, through the use of biographical data, that these subjects came from most diverse backgrounds, often with early physical abuse and exposure to traumatic experiences preceding the war.[84] In particular, front line combatants were more likely to experience intense fear,[85] intensifying their experience of grave traumatic incidents, which significantly affected their emotional structure as well as emotional functioning.[86] In turn, these subjects were more likely to display high levels of impulsive-destructive behaviour and neurotic/psychotic pathological characteristics.[87]

Whilst great attention is paid to the effects of war stress on military personnel in post-war situations (e.g. PTSD), the effects of pre-combat and combat stress syndromes to the aggressive behaviour, impulsiveness and personality changes are often neglected. Most frequent symptoms of pre-combat stress are anxiety which affects motivation and behavioural changes[88] with frequent outbursts of aggressive or homicidal intentions as well as other anti-social tendencies.[89] Similar but more severe signs can be seen in the combat stress syndrome where war stress, fear and anxiety have significant impact on psychological destabilization and

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[82] Elvira Duraković-Belko and Steve Powell (eds), *Psihosocijalne posledice rata – Rezultati empirijskih istraživanja provedenih na području bivse Jugoslavije*, 2000, www.psih.org/2000b.pdf, 28 June 2019, p.55.

[83] *Ibid*.

[84] *Ibid.*

[85] *See e.g.*, Jeremy Horder, *Excusing Crime* (Oxford University Press, Oxford, 2007), pp. 7, 146-168.

[86] Duraković-Belko and Powell, *supra* note 82.

[87] *Ibid.*

[88] Milanko M. Cabarkapa, 'Najčešći stresni sindromi kod vojnika u ratu', 61(6) *Vojnosanitetski Pregled* (2004) 675-682, 676.

[89] *Ibid*, p. 677.

fragmentation of personality.[90] Importantly, in terms of assessing criminal liability, these effects and/or altered psycho-cognitive factors play a fundamental part in risk assessment and decision making processes and often, under unique combat circumstances,[91] result in irrational and inadequate decisions and destructive actions.[92] The restriction or denial of biological as well as psychological needs has in fact been shown to correlate to increasing instability and conflict, particularly in developing countries.[93] Numerous other factors, such as socio-cultural background, may indicate predisposition to aggressiveness, criminality and homicidal intentions.[94] Psychiatrists therefore are required to interpret behaviour where 'habits of thought persist within … personal and cultural 'bounded rationality.'"[95] In determining predisposition to destructive behaviour, social and economic factors, as well as genetics, play a key role.[96] For instance, one of the conditions that create aggressive environments and high levels of

[90] *Ibid*.

[91] Don Carrick et al., *Ethics Education for Irregular Warfare* (Ashgate, Farnham, 2009), p. 143: 'In an environment where 'the other' is blamed and demonized by casual barbarity, how does one keep a sense of what is 'normal'?'; *See also* Hans-Ludwig Krober and Steffen Lau, 'Bad or Mad? Personality Disorders and Legal Responsibility - The German Situation', 18 (5) *Behavioural Sciences and The Law* (2000) 679-690.

[92] Cabarkapa, *supra* note 88, p.677.

[93] *See e.g.* Brian-Vincent Ikejaku, 'The Relationship between Poverty, Conflict and Development', 2 (1) *Journal of Sustainable Development* (2009) 2.

[94] Okulate G.T. and Ougine C., 'Homicidal violence during foreign military missions – prevention and legal issues', 94 (1) *South African Medical Journal* (2004) 57.

[95] Don Carrick, *supra* note 91, p .43.

[96] On genetic 'dogtag' in the military *see also* Jeanne M. Stellman (ed.), *Encyclopaedia of Occupational Health and Safety*, Vol. III (International Labour Organization, Geneva, 1998), pp. 77.34.

criminality is poverty, considered to be one of the factors triggering destructive behaviour.[97] Numerous studies link economic instability to aggression, deviance and psychiatric morbidity.[98] There is wealth of evidence in fact demonstrating that behavioural and mental health difficulties in developing countries in particular are amplified by political instability[99] as well as low levels of education as poor income,[100] unemployment and poor housing.[101] For example, a study examining trauma in Jewish Israeli and Palestinian teenagers, found that low socio-economic status could predict incidence of PTSD.[102] Other recent studies also confirm the link between personality disorders, particularly in males, and unemployment and poor education.[103] Both recent and long-term poverty seem to increase deviance and offending.[104]

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[97] Milan Novakovic, 'Forensic evaluation of persons with destructive behaviour in the postwar Bosnia and Herzegovina', 64 (3) *Vojnosanitetski Pregled* (2007) 185. The study estimated that here a third of the population lived below poverty line.

[98] *See e.g.* World Health Organization (WHO), *Prevention of mental disorders: Effective interventions and policy opinions*, 2004, p. 21.

[99] *See e.g.* Lene Hansen, *Security and Practice: Discourse Analysis and The Bosnian War* (Routledge, Oxon, 2006), observing in relation to the 1912 and 1913 Balkan wars at p. 103 that one should observe "the construction of Balkan warfare not as product of essential Balkan identities but as constituted through a mixture of great power interventions and the poverty and oppression inflicted by the Ottoman empire."

[100] *See e.g.*, World Health Organization (WHO), *Mental health: strengthening mental health promotion* (2007).

[101] Janet Mosher and Joan Brockman (eds.), *Constructing Crime: Contemporary Processes of Criminalization* (UBS Press, Vancouver, 2010), p. 137.

[102] Alean Al Krenavi et al., 'Analysis of trauma exposure, symptomatology and functioning in Jewish Israeli and Palestinian adolescents', 195 *British Journal of Psychiatry* (2009) 427-432.

[103] Yuegin Huang et al., 'DSM-IV personality disorders in the WHO World Mental Health Surveys', 195 *British Journal of Psychiatry* (2009) 46-53.

[104] Joanne Savage, *The Development of Persistent Criminality* (Oxford University Press, New York, 2009), p. 67. *See also* Emil Coccaro (ed.), *Aggression: Psychiatric Assessment and Treatment* (Informa Healthcare, New York,

Interestingly, at a sentencing stage, ICC Rules of Procedure and Evidence allow the Court to give due weight to, *inter alia*, education, social and economic conditions of the convicted persons.[105] From this perspective, pre-combat screening at all military levels is essential for the purpose of identifying and excluding individuals with existing signs of psychopathology.[106] Identifying mental abnormalities during combat becomes more difficult as for instance military personnel tend to fear stigmatisation. In a recent study, involving subjects who served in Iraq and Afghanistan, of those who were diagnosed with a mental disorder, only twenty three to forty percent actually sought mental health help[107] and were twice as likely to express concern over possible stigmatization as a barrier to seeking help.[108] Moreover, given the frequent brevity of psychological and/or psychiatric therapy, military psychotherapists are less likely to identify subjects with 'poorly resolved early developmental issues centering around basic trust, such as severe personality disorder.'[109] Short therapies in the military may be further detrimental to those seeking help as such process 'accelerates the formation and then the loss

2003), p. 50: 'Poverty is related to higher levels of aggression among children, adolescents and adults.' *See also* Valerie Maholmes and Rosalind B. King, *The Oxford Handbook of Poverty and Child Development* (Oxford University Press, New York, 2012), observing that environmental causes are less significant than poverty in predicting mental disorders and criminality (p. 80): 'Child neglect and childhood poverty are important contributors to risk of PTSD, crime and academic achievement and seem to outweigh the influences of the neighbourhood.'

[105] ICC RPE, Rule 145 (1) (c).

[106] Okulade and Ougine, *supra* note 93; *See also* Pontus Hoglund et al., 'Accountability and psychiatric disorders: How do forensic psychiatric professionals think?', 32 (6) *International Journal of Law and Psychiatry* (2009) 355-361.

[107] Hoge, *supra* note 81, p. 13.

[108] *Ibid*.

[109] Carrie H. Kennedy and Eric A. Zillmer (eds.), *Military psychology: clinical and operational applications* (Guilford, New York City, 2006), p. 65.

of an intense relationship.[110] With brief therapy, the more disturbed the patient, the more limited the therapeutic goals.'[111] During the 2000 operation in Kosovo, the U.S. army introduced a screening programme to identify existing morbidity, acute stress disorder symptoms but the screening was not designed to predict predisposition or to prevent future disorders.[112] Since operations in Iraq and Afghanistan, there has been greater awareness in the U.S. of the extreme effects of war due to high, increased rates of PTSD.[113] This has resulted in a series of psychological screening tests.[114] However, as mentioned above, screening and detection become more difficult once subjects are on duty. Particularly difficult to detect and accurately diagnose is the mental damage caused by traumatic brain injuries. It is estimated that so far, in the wars in Iraq and Afghanistan, the number of blast-related traumatic injuries may have reached 320,000.[115] Whilst the majority of these injuries are treated as 'mild', there is little understanding on their effect on the brain.[116] Nevertheless, there has been an increase in the use of neurological evidence in domestic criminal cases. For example, a U.S. court reduced a death sentence to life imprisonment after neuro-imaging established abnormalities in the frontal

[110] Gabriel, *supra* note 17, p. 41.

[111] *Ibid*.

[112] Edgar Jones et al., 'Screening for vulnerability to psychological disorders in the military; an historical survey', 10 (1) *Journal of Medical Screening* (2003) 40-46, 44.

[113] Roberto J. Rona et al., 'Mental health screening in armed forces before the Iraq war and prevention of subsequent psychological morbidity: follow up study', *333 British Medical Journal* (2006) 4.

[114] *Ibid.*

[115] Christine L. Mac Donald et al, 'Detection of Blast-Related Traumatic Brain Injury in U.S. Military Personnel', 364 (22*) New England Journal of Medicine* (2011) 2091-2100, 2092.

[116] *Ibid*, p. 2098.

lobes of the accused which damaged his normal functioning.[117] Psychiatric and neuro-psychiatric evidence, with the use of latest technology can enable courts to adjudicate more correctly and therefore more fairly on defences. In fact:

> [t]he use of cutting-edge technologies, such as fMRIs, and presentable findings such as colourful brain scans accords credibility in a legal system which retains aspirations to scientific objectivity, and helps legal actors to view such research as probative on questions ranging from inquiry to mental states to lie-detection.[118]

This also includes defendant's past mental state.[119] However, the ICTY has frequently denied requests by defence teams to introduce expert psychiatric evidence for the purpose of

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[117] Eyal Aharoni et al, 'Can Neurological Evidence Help Courts Assess Criminal Responsibility? Lessons from Law and Neuroscience', 1124 *Annals of New York Academy of Science* (2008) 145-149.

[118] Abrams and Keren, *supra* note 12, p. 2025. For problems associated with fMRI evidence *see also* Charles Adelsheim, 'Functional magnetic resonance detection of deception; Great as fundamental research – inadequate as substantive evidence', 62 *Mercer Law Review* (2011) 885-908.

[119] For a general discussion on neurological evidence *see e.g.*, Chung Siong Soon et al, 'Unconscious determinants of free decisions in the human brain' 11 *Nature Neuroscience* (2008), p. 543 where the authors conclude that the 'outcome of a decision can be recoded in brain activity of prefrontal and parietal cortex up to 10 s before it enters awareness'; Patrick Haggard, 'Human volition: Towards a neuroscience of will' 9 *Nature Reviews, Neuroscience* (2008) 934: 'Volition consists of a series of decisions regarding whether to act, what action to perform and when to perform it. Neuroscientific accounts of voluntary action may inform debates about the nature of individual responsibility.' *See also* Pavel Ortinski and Kimford J. Meador, 'Neuronal Mechanisms of conscious awareness' 61 (7) *Archives of Neurology* (2004) 1020; Daniel Wegner, *The illusion of conscious will* (MIT Press, 2002); Walter Sinnolt-Armstrong and Lynn Nadel (eds.), *Conscious Will and Responsibility: A Tribute to Benjamin Libet* (Oxford University Press, New York, 2010). For a different view, *see e.g.* Judy A. Trevena and Jeff G. Miller, 'Cortical movement preparation before and after a conscious decision to move' 11 (2) *Consciousness and Cognition* (2002) 162-190.

establishing defences, that of duress in particular, on the basis that such evidence must be available in the early stages of the proceedings. In *Erdemović* for instance, evidence relating to scientific opinion on moral choices of ordinary soldiers in the execution of superior orders and additional psychiatric evaluation of the mental state of the accused at the time of the alleged criminality was excluded.[120] In a dissenting opinion, Cassese dismissed the pragmatic approach in this case whereby defence evidence was excluded in the later stages of the proceedings on the basis that the law 'must serve broader normative purposes in the light of its social, political and economic role.'[121] Cassese maintained that the Trial Chamber should take into account the low rank of the accused as evidence that he was less likely to resist acting impulsively or to be able to control his impulses[122] notwithstanding that the impaired ability to control impulses must be more than trivial but need not be total.[123]

However, relevant provisions of the ICC Statute[124] and ICTY/ICTR Rules on Procedure and Evidence[125] allow judges to take into account any relevant information relevant to the determination of sentences. This implies that evidence deemed inadmissible during the trial

[120] ICTY, *Prosecutor* v. *Erdemović*, Case No. IT-96-22-A*,* Appeals Chamber, *Joint Separate Opinion of Judge McDonald and Judge Vohrah*, 7 October 1997, para. 75.

[121] *Ibid*.

[122] *Ibid.*, *Separate and Dissenting Opinion of Judge Cassese*, para. 51. *See also* Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, (T.M.C. Asser Press, The Hague, 2003), p. 290: 'The pragmatic and utilitarian reasoning of the Judges McDonald and Vohrah sacrificed principles of fairness. The competing values of deterrence and compassion resulted in a hopeless trade-off.'

[123] *R* v. *Lloyd* [1967] 1QB 175 at 180. *See also* Louise Kennefick, 'Introducing a New Diminished Responsibility Defence for England and Wales', 74 (5) *Modern Law Review* (2011) 750-766.

[124] ICC Statute, Article 76 (1).

[125] *E.g*. ICTY RPE, Rule 85 (A) (vi).

may be used at the sentencing stage.[126] In *Landžo*, the ICTY disregarded the findings of five psychiatrists who all attested that the defendant suffered from personality disorder that impaired the ability to control his actions and impulses.[127] The reasoning behind such decision was that a possibility existed that the defendant manipulated the psychiatrists during interviews (the same could be said of eyewitness and hearsay testimony of alleged victims and witnesses) and therefore, reasonable doubt remained that he could have committed the relevant crimes.[128] Such reasoning appears to be arbitrary. For instance, in a recent UK immigration appeal[129] it was said that whilst a judge can reject psychiatric findings, they have to give good reasons; here the immigration judge erred in law in treating the difference between two psychiatric diagnoses as 'material' when both agreed that the appellant did suffer from depression, having established similar symptoms, but disagreed on the severity.[130] Fundamentally, it was held that the mere suspicion on part of the judge that the appellant could be lying could not prove that he was.[131] In *Landžo*, the Tribunal first rejected medical evidence during trial but then went on to accept the results of these psychiatric evaluations and mitigated the sentence accordingly. Domestic rules, such as common law rules on evidence, are more predictable and consistent and suggest that statements of symptoms, if contemporaneous, are exceptions to the general hearsay rule are not only admissible[132] but when the defence bears the burden of proof, as it is

[126] Vladimir Tochilovski, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights – Procedure and Evidence* (Martinus Nijhoff, Leiden, 2008), p. 367; *Prosecutor* v. *Delalić et al.*, *supra* note 37, para. 1215.

[127] *Ibid*., para. 1164. *See* Radosavljevic, *supra* note 32, p.47.

[128] *Prosecutor* v. *Delalić et al.*, *supra* note 37, para. 1181.

[129] *BN (psychiatric evidence - discrepancies) Albania* [2010] UKUT 279 (IAC).

[130] *Ibid.*, para. 40.

[131] *Ibid*.

[132] *See e.g. Gilfoyle [1996]* 3 All ER 883.

the case when diminished responsibility is invoked, should be 'not higher that the burden which rests upon a plaintiff or an accused in civil proceedings'[133] which is that of balance of probabilities.[134] Generally in fact, in both common and civil law systems 'the defendant bears only a preponderance of evidence, i.e., the necessity to introduce a 'beginning of evidence' … whereupon it is up to the prosecution to establish proof that one of those constituents did not apply.'[135] Such approach follows more closely the internationally recognised norm of in *dubio pro reo*,[136] as the essential component of the presumption of innocence.

2.2 Psychiatric Evidence v. Hearsay Evidence and Procedural Fairness

The scope of this section is not to evaluate the use of hearsay evidence and reliability of witnesses overall in international criminal law. Rather, the focus is on the way in which such evidence is admitted and more importantly here, the questionable liberal ways in which judges allocate probative value to it on one hand, and on the other, the restrictive approach to psychiatric evidence when relied on by the defence. From this perspective the aim is to illustrate procedural unfairness and disadvantages an accused might face.

The ICC Statute appears broader in scope than the Statutes of the ICTY and ICTR in that it creates an opportunity for further development of the principles of fair trial and equality of arms.[137] The ICC Trial Chamber may on its own motion or the request of either of the parties hold further hearings to hear any additional evidence relevant to the determination of a

[133] Peter Murphy and Richard Glover, *Evidence* (Oxford University Press, Oxford, 2009), p. 105.

[134] *Ibid.*

[135] Knoops, *supra* note 7, p. 261.

[136] *Prosecutor* v. *Delalić et al*., *supra* note 37, para. 601.

[137] *See generally* Stefania Negri, 'The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure', 5 *International Criminal Law Review* (2005) 513-571.

sentence.[138] However, the jurisprudence of the ICTY and ICTR in particular reveal that great reliance is placed upon evidence that is not readily verifiable, such as hearsay,[139] testimony of anonymous witnesses[140] or out of court statements[141] that cannot be easily cross-examined.[142] Evidence of guilt therefore may be derived from eyewitness testimony, which is particularly problematic as judges enjoy wide discretion in evaluating and admitting such evidence.[143] International criminal courts appear to adopt the common law model on hearsay evidence whereby such evidence is admissible if it is in the interest of justice[144] and where the court decides that admissibility of such evidence does not, overall, prejudice a fair trial,[145] even when admissibility of such evidence is in beach of ECHR Art. 6 (3) (d), which ensures that everyone 'has the minimum right to examine or have examined witnesses against him and to obtain the

[138] ICC Statute, Article 76 (2).

[139] *Prosecutor* v. *Aleksovski*, *supra* note 40, para. 15: 'It is well settled in the practice of the Tribunal that hearsay evidence is admissible.'

[140] *See e.g.*, Monroe Leigh, 'The Yugoslav Tribunal: Use of Unnamed Witnesses against Accused' 90 (2) *The American Journal of International Law* (1996) 235-238; *See generally* Richard May and Marieke Wierda, *International Criminal Evidence* (Transnational Publishers, Leiden, 2002).

[141] Such statements, with no inquiry to verify their reliability have been held admissible where the court found probative value – *see e.g*. ICTY, *Prosecutor* v. *Blaškić*, Case No. IT-95-14, Trial Chamber, Decision on Standing Objection of the Defence to the Admissibility of Hearsay with no Inquiry as to its Reliability, 23 January 1998.

[142] Dominic McGoldrick, Peter J. Rove and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing, Oxford, 2004), p. 311.

[143] *Ibid*., p. 294 where it is observed in relation to the ICC that its "RPE reveals the preference for admitting al evidence followed by the judge's determination on probative value, reliability and relevance." *See also* ICC Statute, Article 69 (4); ICTY RPE, Rule 89 (C).

[144] *See e.g*. Criminal Justice Act 2003, Section 114 (1) (d).

[145] *See e.g.* decision of UK courts in *R* v. *Carter* [2010] 2 W.L.R. 47; *R* v. *Xhabri* [2006] 1 Cr. App. R. 26. A similar approach has been taken in Canada by the Supreme Court in *R* v. *Khelawan* [2006] 2 S.C.R. 787.

attendance and examination of witnesses on his behalf on the same conditions as witnesses against him'. However, the European Court of Human Right held that the provisions of Art. 6 (3) are absolute minimum rights[146] and 'constitute express guarantees and cannot be read as illustrations of matters to be taken into account when considering whether a fair trial has been held.'[147] For example, the ICTY set out a number of general principles on admission and value of evidence; hearsay evidence is admissible (even in murder cases) if it is deemed relevant and has probative value.[148] In applying the best evidence rule, the ICTY exercises a vast amount of discretion by taking into account unspecified 'particular circumstances attached to each document and the complexity of the case in question.'[149] When inconsistencies are revealed through cross-examination, the ICTY tends to rely on other aspects of the testimony, without discrediting the witness maintaining that 'it is not unreasonable for a Trial Chamber to accept certain parts of witness's testimony while rejecting others.'[150] For instance, in *Haradinaj*, the ICTY noted that some witnesses were 'evasive or not entirely truthful'[151] displaying loyalty to their respective warring factions. In fact 'notions of honour and other group values have a particular relevance to the cultural background of witnesses with Albanian roots in Kosovo'[152]

[146] European Court of Human Rights (ECtHR), *Al-Khawaja and Tahery* v. *the United Kingdom*, Application nos. 26766/05 and 22228/06, Grand Chamber, Judgment, 15 December 2011, para. 89.

[147] *Ibid*.

[148] ICTY RPE, Rule 89 (C); *see also* ICTY, *Prosecutor* v. *Brđanin and Talić*, Case No. IT-99-36-T, Trial Chamber II, *Order on the Standards Governing the Admission of Evidence*, 15 February 2002, para. 18.

[149] *Ibid*., p. 22.

[150] *See e.g*. ICTY, *Prosecutor* v. *Haradinaj and others*, Case No. IT-04-84-T, Trial Chamber I, Judgment, 3 April 2008, para. 29.

[151] *Ibid.,* para. 13.

[152] Combs, *supra* note 19, p. 135.

and 'had a bearing upon the willingness of some witnesses to speak the truth in court.'[153] The Tribunal also held in various decisions that admittance of hearsay and circumstantial evidence does not undermine procedure or the rights of the defence[154] nor that it violates the principle whereby the prosecution is under a duty to prove guilt beyond reasonable doubt. The ICTR also concluded that it could rely on the evidence of a single witness, particularly in rape cases, 'provided such evidence is relevant, admissible and credible.'[155]

Similarly, questions of witness reliability and competence in international criminal trials remain problematic and contentious as rules as to when evidence may be excluded, remain undetermined.[156] For example, negative impact of stress on memory[157] and the resulting testimony inconsistencies are not adequately identified nor resolved in the jurisprudence of international courts and tribunals.[158] In *Muhimana*, inconsistencies in the accounts of a key witness were justified by the ICTR on the assumption that the witness had suffered stress and trauma without imposing a duty on the prosecution to prove this *in concreto*.[159] This raises questions of spontaneity, possible fabrication and confusion.[160] Moreover, in *Akayesu*, the same

[153] *Prosecutor* v. *Limaj and others*, Case No. IT-03-66, Trial Chamber II, Judgment, 30 November 2005, para. 13.

[154] *Supra* note 150, para. 19.

[155] ICTR, *Prosecutor* v. *Rutaganda*, Case No. ICTR-96-3, Trial Chamber, Judgment and Sentence, 6 December 1999, para. 18.

[156] *See* Charles Morgan et al., 'Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress', 27 *International Journal of Law and Psychiatry* (2004) 265-279, 268.

[157] *Ibid.*

[158] *See e.g.* Elisabeth M. Dipardo, 'Caught in a Web of Lies: Use of Prior Inconsistent Statements to Impeach Witnesses before the ICTY' 31 *Boston College International and Comparative Law Review* (2005) 277-301.

[159] ICTR, *Prosecutor* v. *Muhimana*, Case No.ICTR-95-1B, Appeals Chamber, Judgment, 21 May 2007, para. 156.

[160] Murphy and Glover, s*upra* note 132, pp. 272-273. On exclusion of ambiguous statements *see e.g.*, *R* v. *J. P.* [1999] Crim. L. R. 401.

Tribunal operated on the basis that all alleged victims and witnesses had suffered trauma but refused to apply the same reasoning to the testimony of defendants.[161] Such ad hoc application of dubious legal principles results in procedural inconsistencies and inequality of arms by critically undermining the ability of the defence to rebut evidence. Similarly, the ICTY tends to disregard inconsistencies during identifications by taking into account the traumatic experience of the witness.[162] Individual circumstances of witnesses, such as presumed trauma and age are taken into account to justify inconsistencies in their account, on the basis of which culpability is established whereas in the case of defendants, those same individual factors may amount to mitigating circumstances only at the sentencing stage.[163]

International courts and tribunals attempt to resolve guarantees against prejudice by attributing probative weight to such evidence by taking into account, *inter alia*, the demeanour of the witness,[164] reliability, trustworthiness, perjury incentives,[165] and the lack of cross-examination.[166] In the *Taylor* case however, the defence was denied a request to cross-examine four prosecution witnesses in relation of post-testimony gains, including 'the hope of relocation' which precluded the SCSL Trial Chamber to effectively assess the credibility of

[161] ICTR, *Prosecutor* v. *Akayesu*, Case No. ICTR-96-4-T, Trial Chamber I, Judgment, 2 September 1998, paras 73-75.

[162] *Supra* note 150.

[163] Knoops, s*upra* note 7, p. 290.

[164] *Supra* note 150.

[165] *See e.g.* SCSL, *Prosecutor* v. *Taylor*, Case No. SCSL-03-1T, Trial Chamber II, Decision on Defence Motion Seeking Leave to Appeal the Decision on Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses, 4 February 2011.

[166] *Ibid. See also* ICTY, *Prosecutor* v. *Blagojević and Jokić*, Case No. IT-02-60, Trial Chamber I, Judgment, 17 January 2005, para. 26.

these witnesses[167] and to appreciate prosecution's methods in recruiting and inducing testimonies.[168] Similarly, the ICTR never instituted investigations, frequently requested,[169] into allegations of witness perjury.[170] As stated, ICTR rejected on numerous occasions, requests made by defence teams, to clarify the rules of evidence reasoning that 'the basic rule is to allow flexibility and efficacy in order to permit the development of law.'[171] Surprisingly, the ICTY held in *Ojdanić* that the Tribunal was not precluded from determining guilt for a crime not specified within the ICTY Statute or Rules of Evidence and Procedure[172] and that such jurisprudence was is not inconsistent with the *nullum crimen sine lege* principle[173] now firmly established in the ICC Statute.[174] The Appeals Chamber held that the principle is a fundamental

[167] *Supra* note 165, para. 2.

[168] SCSL, *Prosecutor* v. *Taylor*, Case No. SCSL-03-1-T, Trial Chamber II, Decision on Public with Annexes A-H and Confidential Annexes I-J Defence Motion to Recall Four Prosecution Witnesses and to Hear Evidence from the Chief of WVS Regarding Relocation of Prosecution Witnesses, 24 January 2011, ; *See also* ICC, *Prosecutor* v. *Lubanga Dyilo*, Case No. ICC-01/04-01/06, Appeals Chamber, Appeals Hearing, 8 October 2010, para. 3.

[169] *See e.g*. ICTR, *Prosecutor* v. *Bagosora*, Case No. ICTR-98-41-T, Trial Chamber II, Decision on Defence Request for an Investigation into Alleged False Testimony of Witness DO, 3 October 2003.

[170] Combs, *supra* note 19, p. 201. *See also Prosecutor* v. *Aleksovski*, *supra* note 39, para. 15.

[171] ICTR, *Prosecutor* v. *Bagosora*, Case No. ICTR-98-41-T, Trial Chamber II, Decision on the Defence Motion for Pre-Determination of Rules of Evidence, 8 July 1998, para. 4.

[172] ICTY, *Prosecutor* v. *Milutinović et al.*, Case No. IT-99-37-AR72, Appeals Chamber, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction: Joint Criminal Enterprise, 21 May 2003, para. 38.

[173] ICTY, *Prosecutor* v. *Milutinović*, *Sainović and Ojdnaić,* Case No. IT-05-87-T, Trial Chamber, Judgment, 26 February 2009, para. 131.

[174] ICC Statute Article 22 provides that:

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court;

'principle of justice'[175] and that 'it does not prevent a court from interpreting and clarifying the elements of a particular crime ... nor does it preclude the progressive development of the law by the court.'[176] In order that multiple international criminal law regimes retain integrity, such inconsistent and unpredictable approach to offences and determination of guilt needs to be matched by a more flexible, more lateral and more uniform approach to the use of psychiatric evidence in the determination of defences.

3 Presumption of Innocence and Complementarity under the ICC Statute

Both national and international criminal law guarantee a pre-trial right of the presumption of innocence or the defence of alibi to an accused intending to challenge his/her arrest and surrender to the ICC.[177] In executing arrest and surrender orders from international courts, common law countries in particular hold that at the extradition hearing in the requested states, the requesting state must submit evidence tantamount to a prescribed domestic standard which requires the proof the allegations beyond reasonable doubt, or on the balance of probability. The ICC Statute specifically provides, in accordance with presumption of innocence, that the accused must not face any reversal of the burden of proof or any onus of rebuttal.[178] Civil law jurisdictions on the other hand are more flexible since surrender may be approved without the

2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted;

3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

[175] *Supra* note 171.

[176] *Ibid*.

[177] *See e.g*., ICC Statute, Article 66 (1); *See also* The Constitution of the Federative Republic of Brazil 1988, Article 5.

[178] ICC Statute, Article 66 (3).

need to conduct extradition proceedings or rules.[179] Some national extradition laws clearly specify that the hearing court be required to examine the exculpatory evidence directly at the hearing, in order to determine his/her innocence. The rationale here is that it would be unjust for an accused person to await trial in the requesting state before this defence can be lodged.[180] At a domestic level however, the right to be presumed innocent may be subordinate to the need to comply with ICC, ICTY and ICTR surrender orders. In *Bikindi*, a Dutch court held that the defence of alibi or innocence was not available to an accused subject to surrender proceedings because of the supremacy of these tribunals, as subsidiary organs of the Security Council.[181] In disregard of the ICTR Rule that the defence of alibi may be presented at a pre-trial stage,[182] the Dutch court had to set aside both domestic law and treaty obligations. In fact, with regard to the ICTY/ICTR substantive defences as to the lack of criminal liability, intent or guilt are to be exclusively dealt with by these tribunals. The jurisdictional supremacy of the ICTY and ICTR over national courts should not however result in the breach of fundamental human rights at a local level. The ICTR recognised in fact that:

> The Statute of the tribunal does not include specific provisions akin to speedy trial Statutes existing in some national jurisdictions. However, the underlying premise of the Statute and Rules are that the accused

[179] *See e.g.*, Spanish Implementing Legislation, Organisation Act 15/1994, Article 6.

[180] *See e.g.*, Dutch Extradition Act 1988, Article 26 (3).

[181] ICTR, *Prosecutor* v. *Bikindi*, Case No. ICTR-2001-72T, Trial Chamber III, Judgment, 02 December 2008, para. 6.

[182] ICTR RPE, Rule 67 (A) (ii) (a). The defence of alibi was based on the fact that the accused was not present in Rwanda at the time the alleged crime was committed.

is entitled to a fair and expeditious trial. The importance of a speedy disposition of the case benefits both the accused and society, and has been recognised by national courts.[183]

Under the ICC complementarity model though, national courts exercise primary jurisdiction[184] and domestic laws can dictate the use of psychiatric evidence in early stages of proceedings for the purposes of establishing pre-trial defences and protecting accused's right to liberty and presumption of innocence, notwithstanding the fact that domestic courts cannot question whether the ICC properly issued the warrant of arrest[185] and the Statute further provides that the competent court cannot consider whether there is evidence to justify the person's trial before the ICC.[186] Nevertheless, under ICC implementing legislations, an accused may benefit from local prosecution as the ICC may request the investigating or prosecuting state to surrender a person only when it can be demonstrated that the state in question is unable or unwilling to prosecute.[187] This may benefit pre-trial and trial rights of accused persons if domestic courts are willing to develop 'special defences' under the ICC Statute and if local courts are likely and able to employ more consistently, and legitimise further, the use of psychiatric evidence for the establishment of existing defences, such as duress and diminished responsibility.

4 Concluding Remarks

[183] ICTR, *Prosecutor* v. *Barayagwiza*, , Case No. ICTR-97-19-AR72, Appeals Chamber, Decision, 3 November 1999, para. 105; *See also* ICC Statute, Article 19 (1).

[184] ICC Statute, Article 17.

[185] ICC Statute, Article 59 (4).

[186] ICC Statute, Article 59 (5).

[187] *See e.g.* William A. Schabas, 'Complementarity in Practice: Some Uncomplementary Thoughts' 19 *Criminal Law Forum* (2008) 5-33.

In the context of the determination of facts and the pursuance of the truth by international criminal courts, admission and evaluation of expert, psychiatric evidence require a closer look. The restrictive attitude of international courts towards mental health sector evidence in the context of defences needs to be balanced against permissive, often ill-defined use of other types of evidence, such as hearsay, extensively employed in the determination of criminality and culpability. The right to presumption of innocence must be elevated to the highest legal standards, particularly in international criminal law frameworks, whilst the pressures to convict must be moderated. International criminal law needs to develop further, alongside scientific advances which put into question the rigidity of 'reasonableness' tests employed to judge the actions of accused persons.[188] Whilst it may be argued that it is for the courts to uphold morality, law on its own cannot be relied upon to define criminality.

As this chapter has attempted to demonstrate, legal characterisation of behaviour is sometimes insufficient to fully expose and understand criminality as well as morality of actions, and its investigative methods are too narrow to identify the truth. Importantly, the ICC is now under an obligation to ensure an efficient and effective defence[189] and the Statute gives authority to the Court to request submission of any evidence it considers necessary for the 'determination of truth'.[190] The ICC has therefore a unique opportunity to remedy the disengagement between the need to determine the truth and guarantee trial rights on one hand, and on the other,

[188] *See* Tyler Fagan, William Hirstein, and Katrina Sifferd, 'Child Soldiers, Executive Functions, and Culpability',in this volume, pp. In the case of child soldiers, the authors' central claim is that 'a standard ought to be guided by the best evidence from neuropsychology about the development, during childhood and adolescence, of executive functions that give rise to morally and legally responsible agents'.

[189] ICC Statute, Article 67.

[190] ICC Statute, Article 69.

harmonise penal doctrines underpinning punishment and sentencing.[191] From this perspective, international criminal law needs to defer to mental health sector expertise when defences mitigating the *mens rea* are raised, whilst defining with greater clarity and specificity, evidentiary and admissibility rules and most importantly, the burden of proof.

[191] Combs, s*upra* note 19, p. 3.