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Expert Witnesses

Kimberly M. Miles

CASE WESTERN RESERVE UNIVERSITY SCHOOL OF LAW
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ISSUE: EXPERT WITNESSES

Prepared by Kimberly M. Miles
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40. Sean P. Downing, The Use of Expert Witnesses in Civil and Common Law Jurisdictions http://www.nesl.edu/center/center/wcmemos/memoindx.htm (visited 10/17/01).

41. ExpertLaw.com- Criminal Litigation Expert Witness Directory http://www.expertlaw.com/experts/criminal.html (visited 10/12/01).

42. Forensic Psychiatry in South Africa http://bama.ua.edu/~jhooper/southaf.html (visited 10/17/01).

43. Foundation Hirondelle, Agency of Information, documentation and formation, Arusha (Tanzania): International Penal court for Rwanda, Anderson George Rutaganda, Witnesses of Defence. http://translate.google.com/translate?hl=en&sl=fr&u=http://www.hirondelle.org/h

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46. New Guidelines for Expert Witnesses http://www.sparke.com.au/ (visited 10/3/01).

47. Opinion Evidence http://www.forensicmed.co.uk/opinion_evidence.htm (visited 10/17/01).

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48. American Board of Forensic Anthropology http://www.csuchico.edu/anth/ABFA/ (visited on 10/27/01).

49. Vocabulary section of: http://school.discovery.com/lessonplans/programs/forensics/

I. Introduction and Summary of Conclusions

A. Issues

This memorandum addresses the role of expert witnesses at the International Criminal Tribunal for Rwanda (the Tribunal)[1]. Aspects considered include both how to qualify your witness as an expert and how to challenge the opposition's expert. This memorandum addresses the allowable scope of expert testimony and gives examples of ways that experts have been used in the past in the United States, various other countries, and before the Tribunal.

While this memorandum focuses primarily on law of the United States and the Tribunal, it additionally addresses the implications of differences between the adversarial and inquisitorial systems on the practice of using expert witnesses before the Tribunal.

B. Summary of Conclusions

1. *The Tribunal's Rules of Evidence do not Address the Role of Expert Witnesses at the ICTR*

The use of expert witnesses in proceedings before the International Criminal Tribunal for Rwanda is an evidentiary issue governed by the Rules of Procedure and Evidence. These rules were first developed for the International Tribunal for the Former Yugoslavia.[2] The rules were developed by judges of the Tribunal and are considered to

[1] Via e-mail, I was advised to discuss the law of expert witnesses in the Unites States, at the ICTY and ICTR, as well as in other countries such as Canada and South Africa.

be neither predominantly common law nor civil law, but rather an integration of both systems of law. The Rules act as guidelines which outline general procedures, but individual judges have the responsibility of formulating more detailed evidentiary rules.[3] On this issue, the Rules are nebulous at best, as the only time "expert witnesses" are specifically mentioned is in Section 3: Rules of Evidence, Rule 90(D), which states: "A witness, other than an expert, who has not yet testified shall not be present when the testimony of another witness is given…" The Rules, therefore, recognize the existence of expert witnesses, yet give us no specific guidelines for when to admit their testimony, the allowable scope of expert testimony, or whether experts should be hired by adversarial parties or appointed by the court.

2. *Guidance for a Standard of Admissibility*

The task for the Tribunal is to balance the proffered evidence using Rules 89(C) and 95.[4] Rule 89(C) states that "a Chamber may admit any relevant evidence which it deems to have probative value." Rule 95 provides that "no evidence shall be admissible if obtained by methods which cast a substantial doubt on its reliability or if its admission is

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[2] Article 14 of the Statute of the International Tribunal for Rwanda states: The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary. [Reproduced in the accompanying notebook at Tab 4.]

[3] VIRGINIA MORRIS AND MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1998). [Reproduced in the accompanying notebook at Tab 26.]

[4] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, entered into force June 29, 1995. [Reproduced in the accompanying notebook at Tab 4.]

antithetical to, and would seriously damage, the integrity of the proceedings." This is not unlike the *Daubert* standard used in the United States, which weighs the probative value of scientific evidence against the reliability of the methods used.[5] In *Kumho,*[6] the Supreme Court of the United States recently expanded this test from including only scientific expert evidence to all proffered expert testimony. Therefore, any party wishing to proffer expert evidence must show that the expert is qualified, that the facts used in forming the opinion were reliable, that the methods used in formulating the opinion were likewise reliable, and that the testimony would be helpful to the trier of fact.

II. Definition of an Expert

BARRON'S LAW DICTIONARY defines an expert witness as a witness having special knowledge that would assist the tribunal.[7] BLACK'S LAW DICTIONARY defines experts in three separate categories: consulting, testifying, and impartial.

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[5] *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). Discussed in detail infra. [Reproduced in the accompanying notebook at Tab 8.]

[6] *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999). Discussed in detail infra. [Reproduced in the accompanying notebook at Tab 11.]

[7] An expert witness is "a witness having 'special knowledge of the subject about which he is to testify;' that knowledge must generally be such as is not normally possessed by the average person. The expert witness is thus 'able to afford the tribunal having the matter under consideration a special assistance.' This experience may derive from either study and education, or from experience and observation. An expert witness must be qualified by the court to testify as such. To qualify, he or she need not have formal training, but the court must be satisfied that the testimony presented is of a kind which in fact requires special knowledge, skill or experience. Such testimony, given by an expert witness, constitutes expert evidence or expert testimony." BARRON'S LAW DICTIONARY (4th ed. 1996).

A consulting expert is "an expert who, though retained by a party, is not expected to be called as a witness at trial."[8] Consulting experts are utilized by attorneys in trial preparation- to aid in the understanding of a subject matter or to help discern the merits of a case. Occasionally, experts in psychology assist attorneys during voir dire (the pre-trial process of jury selection).

An impartial expert is "an expert who is appointed by the court to present an unbiased opinion."[9]

Finally, a testifying expert is "an expert who is identified by a party as a potential witness at trial."[10] Specifically, an expert witness is defined as "a witness qualified by knowledge, skill, experience, training, or education to provide a scientific, technical, or other specialized opinion about the evidence or a fact issue. Also termed a skilled witness."[11] Experts are those who have education or experience beyond that of the general public, so that her testimony may provide assistance to the jury.[12]

Expert evidence or testimony is defined in BLACK'S as "evidence about a scientific, technical, or professional issue given by a person qualified to testify because of familiarity with the subject or special training in the field."

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[8] BLACK'S LAW DICTIONARY [Reproduced in the accompanying notebook at Tab 37.]
[9] BLACK'S LAW DICTIONARY [Reproduced in the accompanying notebook at Tab 37.]

[10] BLACK'S LAW DICTIONARY [Reproduced in the accompanying notebook at Tab 37.]

[11] BLACK'S LAW DICTIONARY [Reproduced in the accompanying notebook at Tab 37.]

[12] General Information about Expert Witnesses and Consultants. http://expertpages.com/news/new1.htm (visited September 21, 2001). [Reproduced in the accompanying notebook at Tab 44.]

III. Legal Discussion

A. Adversarial v. Inquisitorial Systems

The line between adversarial and inquisitorial systems may not be as clear as it seems. For example, the United States is a common law country, whose law is based upon the adversarial system. Yet, even in the United States, courts have the power to appoint neutral (e.g. unbiased) experts of their own choosing. Fed.R.Evid. 706[13] allows for this appointment on the court's motion (sua sponte) or on the motion of any party. The trial judge may appoint any expert mutually agreed upon by the parties or one of her own choosing.[14]

1. Adversarial Countries

a. Expert Witnesses in the United States

Historically, the rationale for the adversarial system has been that the individual parties will strive to bring to light the evidence necessary to resolve their dispute, as they have the greatest stake in its just result.[15] Despite the judge's role as "gatekeeper" in the

[13] FedR.Evid. 706. [Reproduced in the accompanying notebook at Tab 3.]

[14] *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). [Reproduced in the accompanying notebook at Tab 8.] See also *United States v. Shonubi*, 895 F.Supp. 460, 468 (E.D.N.Y. 1995).

admission of evidence, it is still the responsibility of the American lawyer to gather and present proof.[16] "'Gatekeeping' denotes a sieve, not a search."[17]

The disadvantage to expert testimony in an adversarial system is that witnesses may appear to be biased. "Trials…can become expert witness battlegrounds in which each side presents experts with contradictory opinions."[18] Experts look like "hired guns" instead of impartial scientists. At trial, opposing counsel will ask a testifying expert who she is being paid by in order to discount her credibility before the jury.

b. *Expert Witnesses in Great Britain*

The general rule in Great Britain is that the scope of expert testimony is limited to facts actually perceived by them. Opinion testimony is considered irrelevant, as the jurors can formulate their own conclusions based upon the evidence provided.[19] Even when a witness is an unquestioned expert, his opinions will only be admissible if a determination is made that the opinion is needed (e.g. the court cannot interpret the

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[15] Hyongsoon Kim, *Adversarialism Defended: Daubert and the Judge's Role in Evaluating Expert Evidence*, 34 COLUM. J.L. & SOC. PROBS. 223 (2001). [Reproduced in the accompanying notebook at Tab 30.]

[16] *Id.* [Reproduced in the accompanying notebook at Tab 30.]

[17] *Id.* [Reproduced in the accompanying notebook at Tab 30.]

[18] JACK V. MATSON, EFFECTIVE EXPERT WITNESSING (1999). [Reproduced in the accompanying notebook at Tab 25.]

[19] MICHAEL HIRST, ANDREWS & HIRST ON CRIMINAL EVIDENCE (1997). [Reproduced in the accompanying notebook at Tab 23.]

evidence without help).[20] Where the court is asked to determine issues far removed from its experience, expert opinion *on those issues* is admissible.[21]

Like many adversarial countries, Great Britain recognizes that "amateurs" may have gained special knowledge despite lacking the credentials of a scientific expert. An expert must be only "suitably qualified;" however, establishing expertise will be difficult without any formal qualifications.[22]

Disclosure of all expert witnesses and their testimony is required.

c. *Expert Witnesses in Canada*

In order for testimony to be considered expert, "the subject matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge."[23] The expert evidence must be both necessary, relevant, and reliable.[24]

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[20] Id. [Reproduced in the accompanying notebook at Tab 23.]

[21] Opinion Evidence http://www.forensicmed.co.uk/opinion_evidence.htm (visited 10/17/01) [Reproduced in the accompanying notebook at Tab 47.], citing *Folkes v. Chadd* (1782) 3 Doug KB 175.

[22] Opinion Evidence http://www.forensicmed.co.uk/opinion_evidence.htm (visited 10/17/01) [Reproduced in the accompanying notebook at Tab 47.], citing *R. v. Silverlock* (1894) 2 QB 766.

[23] *R. v. Mohan*, ([1994] 2 S.C.R. 9). [Reproduced in the accompanying notebook at Tab 18.]

[24] Christopher J. Bruce, *The Role of Expert Evidence*, ECONOMICA LTD., SUMMER 1999 VOL. 4, NO. 2, http://www.economica.ca/ew42p2.htm (visited 9/4/01). [Reproduced in the accompanying notebook at Tab 39.]

Opinion testimony is allowed, but the *Mohan* criteria are on occasion applied strictly to exclude expert evidence regarding the ultimate issue.[25]

2. Inquisitorial Countries

The inquisitorial system involves a more active judge, who plays the role of fact-finder as well as decision-maker. The judge may appoint experts and question witnesses directly, in open court. In the inquisitorial system, it is the responsibility of the judge to seek out the truth.

A possible drawback to incorporating aspects of this system is that the judge may lose his visage of impartiality. This could have the negative effect of unduly influencing the jurors for the case.[26]

a. *Expert Witnesses in France*

In France, panels of professional judges try criminal cases. These judges determine the probative value of all evidence. A "Judge Delegate" is responsible for

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[25] James R.P. Ogloff, *The Supreme Court Clarifies the Standard for Expert Witness Testimony*, PSYNOPSIS SPRING 1996. http://www.cpa.ca/Psynopsis/expert.htm (visited 10/15/01). [Reproduced in the accompanying notebook at Tab 45.]

[26] Hyongsoon Kim, *Adversarialism Defended: Daubert and the Judge's Role in Evaluating Expert Evidence*, 34 COLUM. J.L. & SOC. PROBS. 223 (2001). [Reproduced in the accompanying notebook at Tab 30.]

gathering all relevant evidence and may request expert assistance on technical matters.[27] The Judge chooses the testifying experts. Each court maintains a list of experts, but judges are free to appoint experts apart from it (including lay persons and corporations). Parties may move to have an expert removed or to have the expert's report invalidated (for conflict of interest, bias, or prejudice), but these determinations are left to the discretion of the court. As fact-finder, the judge is not required to adopt the findings of the expert and may attach as much or as little probative value as they wish.[28]

There are three types of expert assistance in the French system: 1) *constations*- verification of fact or an answer to a single technical question, 2) *consultations*- fact analysis that do not require full explanations (these opinions are generally given orally), and 3) *expertise*- an expert is given a judge-defined goal and files a full report with the court upon completion.[29]

In the French judicial system, only the judge may question the expert. Litigants may request a cross-examination, but the questions are formulated by the judge alone. While this restriction aides a speedy trial, helpful information may never be revealed. In an adversarial system, parties may discover and challenge both the facts upon which an opinion is based and the methods used in forming the opinion. Opponents are more likely to test an expert's opinion, qualifications, possible bias, and methods on cross-examination than is a judge.

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[27] Sean P. Downing, The Use of Expert Witnesses in Civil and Common Law Jurisdictions http://www.nesl.edu/center/center/wcmemos/memoindx.htm (visited 10/17/01). [Reproduced in the accompanying notebook at Tab 40.]

[28] Id. [Reproduced in the accompanying notebook at Tab 40.]

[29] Id. [Reproduced in the accompanying notebook at Tab 40.]

b. *Expert Witnesses in the Netherlands*

Similar to the United States, Dutch law does not require that experts have an academic background, but rather "special knowledge."[30] Determinations of admissibility are lessened enormously, however, due to the fact that in some situations, the laws dictate the appointment of experts as well as the methods those experts shall employ.[31]

The Dutch legal system is unlike the United States in that it is a derivative of the French (Inquisitorial) legal system. The differences in this arena are shocking. In pre-trial investigations (held to determine the merits of a case for trial), both parties have the right to request that the (court appointed) expert be cross-examined, but neither party has the right to cross-examine the expert themselves.[32] Only once trial has begun, do the parties have the right to summon experts themselves.

Once a party has requested that an expert be summoned on their behalf, they must next fulfill the "necessity requirement." This criterion gives the court some latitude in refusing requests. Again, the judge is acting as "gatekeeper," but in an altogether different manner than in countries utilize the adversarial system. As a rule, the defendant has the right to a counter-expert so long as they meet the requirements of (1) timeliness; (2) an explicit statement; and (3) adequate explanation (e.g. motive).[33]

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[30] M. MALSCH AND J.F. NIJBOER, COMPLEX CASES: PERSPECTIVES ON THE NETHERLANDS CRIMINAL JUSTICE SYSTEM (1999). [Reproduced in the accompanying notebook at Tab 24.]

[31] Id. [Reproduced in the accompanying notebook at Tab 24.]

[32] Id. [Reproduced in the accompanying notebook at Tab 24.]

[33] Id. [Reproduced in the accompanying notebook at Tab 24.]

As with the United States and ICTR's governing rules, Dutch defendants are afforded the right to examine expert testimony before it is presented at trial.[34]

On appeal to the Court of Cassation, if it is unclear how an expert contributed to evidence and the expert's testimony was relied upon by the court, or if expert evidence is misrepresented, the verdict may be quashed.[35]

In both Dutch law and the law of the United States, an expert must provide an explanation as to how she arrived at her conclusion. This is called the "explication rule."

3. Countries with aspects of both

South Africa is a combination of Roman Dutch law, common law, judicial precedent, and legislation.[36] Controlling legislation is the Criminal Procedure Act of 1977 (as amended 1996).[37] Opinion testimony from an expert is acceptable, even in an affidavit, so long as the affidavit includes information regarding the declarant's expertise and the grounds upon which the opinion is based. [38]

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[34] Id. [Reproduced in the accompanying notebook at Tab 24.] See also Article 30-34 Dutch Code of Criminal Procedure (CCP).

[35] Id. [Reproduced in the accompanying notebook at Tab 24.]

[36]Forensic Psychiatry in South Africa http://bama.ua.edu/~jhooper/southaf.html (visited 10/17/01). [Reproduced in the accompanying notebook at Tab 42.]

[37] Id. [Reproduced in the accompanying notebook at Tab 42.]

[38] No. 1884.20 November 1996. NO. 86 of 1996: Criminal Procedure Amendment Act, 1996. http://www.polity.org.za/govdocs/legislation/1996/act96-086.html. (visited 10/17/01). [Reproduced in the accompanying notebook at Tab 6.]

Australia, like many other countries, recognizes that expertise may be gleaned from training, study, or experience. What sets Australia apart as a combination of the adversarial and inquisitorial systems, is the fact that experts are hired by opposing parties in litigation, but they have "an overriding duty to assist the Court impartially."[39] The expert should not assume the role of advocate for the party who retains its services.[40]

4. The Collaborative nature of the ICTY and ICTR

The International Criminal Tribunal for Rwanda (ICTR) is a *sui generis* institution, meaning that it has its own rules of procedure that were not adopted from any single national system. The Rules used were those used at the International Criminal Tribunal for the Former Yugoslavia (ICTY),a similarly *sui generis* institution.[41] The rules were developed by judges of the Tribunal and are considered to be neither predominantly common law nor civil law, but rather an integration of both systems of law.

While the Rules of Procedure and prior cases prove that the laws governing the *admission* of expert testimony at the ICTR are very similar to the *Daubert* standard used

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[39] Bill Madden, *Evidence: Changes to the Role of Expert Witnesses*, (2000) 38 (5) LSJ 50. http://www.lawsocnsw.asn.au/resources/lsj/archive/jun2000/50_4.html (visited 10/3/01). [Reproduced in the accompanying notebook at Tab 31.]

[40] New Guidelines for Expert Witnesses http://www.sparke.com.au/ (visited 10/3/01). [Reproduced in the accompanying notebook at Tab 46.]

[41] Sean D. Murphy, *Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 Am.J.Int'l.L 57, 80 (1999) (quoting *Prosecutor v. Blaskic*, Jan. 21, 1998). [Reproduced in the accompanying notebook at Tab 33.]

in the United States, the role of the judge is less clear. Rule 54 reads: "At the request of either party or proprio motu, a Judge or Trial Chamber may issue such orders, summonses, subpoenas, warrants, and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."[42] Likewise, Rule 98 allows the Chamber to order either party to produce additional evidence.[43] The Judge may therefore determine that the testimony of an expert is probative, order a party to produce the expert evidence, and issue any necessary summons to call the expert to testify. Less clear is whether the Judge may then take it upon herself to question the expert, in the role of inquisitor, once she has summoned them to trial.

A Judge has held that pre-determination of the Rules of Evidence is an inappropriate task for the Judges, as it is an articulated function of the Plenary of the Tribunal.[44] While this may be true, much confusion would be avoided were the Plenary of the Tribunal to clearly articulate the role of the Judge regarding expert testimony.

B. How to Qualify an Expert in the United States

The utilization of testifying expert witnesses aids the court by making difficult evidence more easily understood or by proffering educated opinions which the average

[42] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, entered into force June 29, 1995. [Reproduced in the accompanying notebook at Tab 4.]

[43] Id. [Reproduced in the accompanying notebook at Tab 4.] See also, The Prosecutor v. Ignace Bagilishema (Case No. ICTR-95-1A-T) Decision on the Request of the Defence Pursuant to Rule 73 of the Rules of Procedure and Evidence for Summons of Witnesses [Reproduced in the accompanying notebook at Tab 13.]

[44] The Prosecutor v. Théoneste Bagosora (Case No. ICTR-96-7-T) Decision of the Defence Motion for pre-Determination of Rules of Evidence. [Reproduced in the accompanying notebook at Tab 14.]

layman could not create on his own. The rationale for allowing experts to testify (as opposed to only allowing affidavit testimony) is based upon the logical foundation that jurors are then given the opportunity to weigh the mannerisms and sincerity of the expert. However, because the very nature of expert testimony necessitates that it be beyond the common knowledge of the average layman, the judge must act as gatekeeper to ensure that the methods used in formulating the opinion are reliable.

1. *For use as a consulting expert*

Consulting experts are retained by attorneys solely for information gathering, to help the attorney understand a case or to evaluate a case and determine the merits of it. In this role, the expert is merely educating the attorney and there are no guidelines set forth dictating who an attorney may or may not consult. Consulting experts work closely with attorneys throughout all stages of trial preparation and litigation.

2. *For use as a testifying witness (impartial or otherwise)*

Prior to *Daubert*, a majority of U.S. courts required that admissible expert testimony be based on generally recognized principles or discoveries. This "general acceptance" test evolved from the D.C. Circuit's 1923 opinion in *Frye v. United States*.[45]

[45] In *Frye*, the court refused to admit the results from an early form of polygraph testing. *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). It was in this case that the Supreme Court found that for novel scientific evidence to be admissible, the party offering it must establish that the techniques used were generally accepted as reliable in the scientific community. [Reproduced in the accompanying notebook at Tab 9.]

Determination of "general acceptance" required a two-prong test: (1) What is the field in which the underlying principle falls, and (2) Is the proffered evidence generally accepted by a substantial majority in this field?[46]

In 1975, approximately fifty years after *Frye*'s adoption, the Federal Rules of Evidence were enacted by Congress.[47] Fed.R.Evid. 104(a)[48] provides the foundation of a judge's role in evaluating the admissibility of expert testimony. It is essential that the court determine preliminary questions concerning the qualifications of prospective witnesses and the admissibility of evidence. While Federal Rules of Evidence 702-706 outline the court's role in determining whether any expert testimony is admissible, Fed.R.Evid. 702 specifically addresses the issue of admitting scientific expert testimony.[49]

Neither the drafting history of these rules nor the rules themselves mention a "general acceptance" requirement. This absence suggests a clear departure from the *Frye* standard for admitting expert testimony. Nevertheless, the "general acceptance" test

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[46] Leslie Morsek, *Get on Board for the Ride of Your Life! The Ups, the Downs, the Twists, and the Turns of the Applicability of the "Gatekeeper" Function to Scientific and Non-Scientific Expert Evidence: Kumho's Expansion of Daubert,* 34 AKRON L. REV. 689 (2001). [Reproduced in the accompanying notebook at Tab 32.]

[47] Christopher B. Mueller and Laird C. Kirkpatrick, Evidence Under the Rules, Fourth Edition, (2000). [Reproduced in the accompanying notebook at Tab 27.]

[48] Fed.R.Evid. 104(a). [Reproduced in the accompanying notebook at Tab 2.]

[49] In May 2000, the Supreme Court approved the revised text of Rule 702, requiring that expert testimony be based upon "sufficient facts or data," and "reliable principles and methods." Substantially, the expert must apply "the principles and methods reliably to the facts of the case." For example, infallible evidence that a single small bullet wound located in the left ventricle of the heart has no reliable application in a stabbing case. Fed.R.Evid. 702-706. [Reproduced in the accompanying notebook at Tab 3.]

dominated federal and state court analyses of expert witness testimony until 1993, when the United States Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals*.[50]

In *Daubert*, the Supreme Court made it clear that the Federal Rules of Evidence superseded *Frye*. It stated unambiguously that "[although] Frye made 'general acceptance' the exclusive test for admitting expert scientific testimony . . . [t]hat austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials." The *Daubert* court clearly explained that "no common law of evidence remains."[51] Therefore, the Federal Rules of Evidence govern whether expert testimony is or is not admissible. Under the Rules, a trial judge's primary goal is to act as "gatekeeper," admitting only expert testimony or evidence that is both *reliable* and *relevant*.[52]

The Court in *Daubert* formulated a reliability requirement, necessitating that "[t]he subject of an expert's testimony must be 'scientific . . . knowledge." In addition to derivation by the scientific method, other indicia of reliability include whether a theory or

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[50] *Daubert* involved allegations that Bendectin, a prescription antinausea drug marketed by Merrell Dow, caused birth defects when ingested by pregnant women. Each side proffered scientific evidence to bolster its respective position on Bendectin's ability to cause human birth defects. In an initial ruling on the admissibility of this evidence, the Ninth Circuit Court of Appeals affirmed the district court's application of *Frye* as the appropriate standard for assessing the admissibility of expert testimony. The United States Supreme Court granted certiorari specifically to resolve the issue of whether *Frye*'s "general acceptance" test remained the prevailing standard for admitting expert testimony in light of the Federal Rules of Evidence. *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). [Reproduced in the accompanying notebook at Tab 8.]

[51] *Daubert*, 509 U.S. 579, 588 (citing U.S. v. Abel, 469 U.S. 45, 51 (1984)). [Reproduced in the accompanying notebook at Tab 8.]

[52] Fed.R.Evid. 702-706 [Reproduced in the accompanying notebook at Tab 3.]

method had been: (1) tested; (2) peer reviewed and published; (3) generally accepted in the scientific community; (4) deemed to have an acceptable rate of error[53]; and (5) subjected to standards controlling technique operation.

The Supreme Court also found that Fed.R.Evid. 702 embodied a relevancy threshold, in that the evidence or testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." When examining this second prong of the admissibility test, trial courts must consider whether proffered expert testimony is sufficiently tied to the facts of a case such that the evidence will help a jury to resolve factual disputes. It is important to note that the expert testimony need not be utterly essential to the jury's understanding of a case; it need only be of some assistance . Expert testimony should be excluded only if it would add nothing to the jury's decision-making process.[54]

Ever since *Daubert*, the fact-finder is given the responsibility of deciding whether or not the expert is reliable (e.g. sincere), but not whether their methods are likewise reliable. The expert must first convince the judge, in the role of gate-keeper, of her qualifications and methods. The ruling was designed to liberalize the admissibility of scientific expert testimony by allowing the court to decide case by case whether each expert's methods are reliable. As science progresses rapidly, it would be difficult for the law to keep pace were the standards of admissibility anything other than lenient.

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[53] The standard for an acceptable rate of error is "more probable than not" (51%). This is a very relaxed standard when compared with the scientific community. JACK V. MATSON, EFFECTIVE EXPERT WITNESSING (1999). [Reproduced in the accompanying notebook at Tab 25.]

[54] ROBERT CLIFFORD, QUALIFYING AND ATTACKING EXPERT WITNESSES (2001). [Reproduced in the accompanying notebook at Tab 22.]

In 1999 the Supreme Court decided *Kumho Tire Co. v. Carmichael*[55], expanding the admissibility requirements of *Daubert* (and the gatekeeping role of the judge) to include all experts (scientific or otherwise) providing testimony at trial. An expert witness is now defined as "a witness qualified by knowledge, skill, experience, training, or education to provide a scientific, technical, or other specialized opinion about the evidence or a fact issue. Also termed a skilled witness."[56] "…Daubert's list of specific factors neither necessarily nor exclusively applies to all experts in every case."[57] The *Daubert* criteria are meant as helpful guidelines only, and are not definitive.

When a witness is seeking qualification as an expert based upon experience, the court should consider three factors: (1) the number of experiences from which the expert's opinion is drawn, (2) the similarity of those experiences, and (3) the resemblance between those experiences and the facts of the case.[58]

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[55] *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). At issue in this case was the testimony of an expert regarding tire-failure analysis (the case involved a blowout caused by a defect in the tire's manufacture or design, the result of which was one death and several injuries). The expert's opinions were based on his skill and experience, not scientific principles. [Reproduced in the accompanying notebook at Tab 11.]

[56] BLACK'S LAW DICTIONARY [Reproduced in the accompanying notebook at Tab 37.]

[57] The *Daubert* court cautioned: "Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test." *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 593 (1993). [Reproduced in the accompanying notebook at Tab 8.] See also Paul Giannelli and Edward Imwinkelried, *Scientific Evidence: The Fallout from Supreme Court's Decision in Kumho Tires*, 14 CRIM. JUST. 12 (2000). [Reproduced in the accompanying notebook at Tab 29.]

[58] Marc N. Garber, *Opening Daubert's Gate: Testing the Reliability of an Expert's Experiences After Kumho*, 15 CRIM. JUST. 4 (2000). [Reproduced in the accompanying notebook at Tab 28.]

Often, a court will have a *Daubert* hearing to determine an expert's qualifications before the evidence is admitted or heard in front of a jury.[59]

C. Admissibility of Expert Testimony at the ICTR

The International Criminal Tribunal for Rwanda (ICTR) is a *sui generis* institution, meaning that it has its own rules of procedure that were not adopted from any single national system. The Rules used were those used at the International Criminal Tribunal for the Former Yugoslavia (ICTY), a similarly *sui generis* institution.[60]

The Tribunal must balance the proffered testimony using Rules 89(C) and 95.[61] Rule 89(C) states that "a Chamber may admit any relevant evidence which it deems to have probative value." Rule 95 provides that, "no evidence shall be admissible if obtained by methods which cast a substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings." This is not

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[59] It is of note that trial courts are not required to hold a "*Daubert* hearing" every time expert testimony is challenged, though they often do. See Paul Giannelli and Edward Imwinkelried, *Scientific Evidence: The Fallout from Supreme Court's Decision in Kumho Tires,* 14 CRIM. JUST. 12 (2000). [Reproduced in the accompanying notebook at Tab 29.]

[60] Sean D. Murphy, *Developments in International Criminal Law: Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 Am.J.Int'l.L 57, 80 (1999) (quoting *Prosecutor v. Blaskic*, Jan. 21, 1998). [Reproduced in the accompanying notebook at Tab 33.]

[61] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, entered into force June 29, 1995. [Reproduced in the accompanying notebook at Tab 4.]

unlike the *Daubert* standard used in the United States, which weighs the probative value of scientific evidence against the reliability of the methods used.[62]

In 1998, the Tribunal decided a "defence motion for the appearance of an accused as an expert witness."[63] The Defense proffered this testimony to rebut the Prosecution's expert (a historian who specialized in the history of Rwanda). In the written opinion of the Tribunal, the judge made a distinction between the proffered testimony [by an expert who has also been charged with the commission of similar crimes] and testimony "intended to enlighten the Judges on specific issues of a technical nature, requiring special knowledge in a specific field."[64] The Tribunal also articulated the requisite conditions that an expert be "a recognized expert in his field" and impartial in the case.[65]

With the assent of seven judges, Rule 6[66] provides that the Rules of Procedure may be amended.[67] A Rule geared specifically toward expert testimony and the specific standards by which it may be admitted would be advantageous to the Tribunal and the Office of the Prosecutor.

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[62] *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). Discussed in detail earlier. [Reproduced in the accompanying notebook at Tab 8.]

[63] The Prosecutor v. Jean Paul Akayesu (Case No. ICTR-96-4-T) Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness. [Reproduced in the accompanying notebook at Tab 12.]

[64] *Id.* [Reproduced in the accompanying notebook at Tab 12.]

[65] *Id.* [Reproduced in the accompanying notebook at Tab 12.]

[66] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, entered into force June 29, 1995. [Reproduced in the accompanying notebook at Tab 4.]

[67] VIRGINIA MORRIS AND MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1998). [Reproduced in the accompanying notebook at Tab 26.]

D. How to Challenge an Expert

1. In the United States

Under *Frye*, judges gave little thought to the admissibility of scientific evidence. "Judges weren't second-guessing experts," a noted commentator explained. "You had to convince them that it was really flat-Earth science" in order to get a ruling against admission.[68] "In the wake of *Daubert*, 'An educated guess or a significant hunch by a good scientist is not enough. You need good science."[69] Simply cataloging the expert's experiences, education and training will not pass muster under *Kumho*.[70]

Parties may file pretrial motions to exclude or strike the testimony of an expert. (These motions are generally based on the four *Daubert* factors.[71]) Motions to exclude evidence should be short and specific. It is wise to focus on the expert's testimony at deposition, especially admissions involving factors an expert failed to consider.[72] In so

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[68] William C. Smith, *No Escape from Science: As science and technology become integral to more types of cases, expert testimony is increasingly important to the outcomes. Judges and lawyers still struggle with how to apply standards for admitting expert testimony,* 86 A.B.A.J. 60 (2000), (quoting William Shelley of Philadelphia's Cozen & O'Connor.) [Reproduced in the accompanying notebook at Tab 35.]

[69] *Id.* (quoting Michael Hoenig of Herzfeld & Rubin, NYC). [Reproduced in the accompanying notebook at Tab 35.]

[70] Marc N. Garber, *Opening Daubert's Gate: Testing the Reliability of an Expert's Experiences After Kumho,* 15 CRIM. JUST. 4 (2000). [Reproduced in the accompanying notebook at Tab 28.]

[71] Example: "We the Prosecution, file this motion to show that the defense's expert fails to meet the judicial standards of relevancy and scientific reliability." JACK V. MATSON, EFFECTIVE EXPERT WITNESSING (1999). [Reproduced in the accompanying notebook at Tab 25.]

doing, even if the motion itself fails, critical weaknesses in the evidence have been exposed. The judge may rule on the motions (*in limine*) or she may call for a hearing to determine the qualifications of the expert.[73] A judge may even appoint her own experts to make recommendations to her![74]

Expert testimony, to be held admissible in court, must be deemed both reliable and relevant.[75] To determine relevancy, one must decide whether or not the information would aid the finder of fact in its determination. If it is found that the subject of the expert's testimony is one of such common knowledge that persons of ordinary intelligence ("the reasonable man") could reach a decision as easily as the expert, the expert's testimony must be excluded as irrelevant.[76]

Testimony must also be reliable. Judges are naturally suspicious of conclusions which cannot be independently verified by additional testing. Insufficient testing (in quantity or method) will undermine an expert's credibility before either judge or jury.

Amidst enumerated *Daubert* factors, it is easy to forget about other recognized evidentiary guidelines. As with all evidence, the probative value must outweigh the

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[72] William C. Smith, *No Escape from Science: As science and technology become integral to more types of cases, expert testimony is increasingly important to the outcomes. Judges and lawyers still struggle with how to apply standards for admitting expert testimony,* 86 A.B.A.J. 60 (2000). [Reproduced in the accompanying notebook at Tab 35.]

[73] Either side may request a hearing. STANLEY L. BRODSKY, THE EXPERT EXPERT WITNESS (1999). [Reproduced in the accompanying notebook at Tab 21.]

[74] JACK V. MATSON, EFFECTIVE EXPERT WITNESSING (1999). [Reproduced in the accompanying notebook at Tab 25.]

[75] Fed.R.Evid. 702-706 [Reproduced in the accompanying notebook at Tab 3.]

[76] ROBERT CLIFFORD, QUALIFYING AND ATTACKING EXPERT WITNESSES (2001). [Reproduced in the accompanying notebook at Tab 22.]

prejudicial value of the testimony. Confusing, misleading, or unfairly prejudicial testimony is excluded.[77]

If a party disagrees with evidentiary rulings on the trial level, they are afforded the right to an appeal. Prior to the court's decision in *General Electric Co. v. Joiner*,[78] the Circuits were split on which standard of review to use on appeal. The sixth and seventh Circuits used a "manifestly erroneous" standard, while the eighth Circuit required a "clear abuse of discretion."[79] In *Joiner*, the justices ruled that trial court decisions on the admissibility of scientific evidence or testimony may be overturned on appeal for "abuse of discretion."[80] Appellate court review is not limited to the expert's methodologies only. The court may review the expert's conclusions under this same standard.[81]

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[77] STANLEY L. BRODSKY, THE EXPERT EXPERT WITNESS (1999). [Reproduced in the accompanying notebook at Tab 21.]

[78] *General Electric Co. v. Joiner,* 522 U.S. 136 (1997). [Reproduced in the accompanying notebook at Tab 10.]

[79] Richard C. Reuben, *Completing the Admissibility Equation: Justices May Fill the Gap in Daubert Test of Scientific Evidence*, 83 A.B.A.J. 44 (1997). [Reproduced in the accompanying notebook at Tab 34.]

[80] *General Electric Co. v. Joiner*, 522 U.S. 136 (1997) [Reproduced in the accompanying notebook at Tab .] and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). [Reproduced in the accompanying notebook at Tab 10.]

[81] Leslie Morsek, *Get on Board for the Ride of Your Life! The Ups, the Downs, the Twists, and the Turns of the Applicability of the "Gatekeeper" Function to Scientific and Non-Scientific Expert Evidence: Kumho's Expansion of Daubert*, 34 AKRON L. REV. 689 (2001). [Reproduced in the accompanying notebook at Tab 32.]

2. At the ICTR

Expert testimony is "intended to enlighten the Judges on specific issues of a technical nature, requiring special knowledge in a specific field."[82] The Tribunal also articulates the requisite conditions that an expert be "a recognized expert in his field" and impartial in the case.[83] Any one of these requirements may be challenged in a Motion before the Tribunal. A party may question (1) whether the issue is technical in nature; (2) whether the issue requires "special knowledge" in a specific field (contrasted with common knowledge);[84] (3) whether the expert is "recognized in his field;"[85] or (4) whether the expert is impartial.

In The Prosecutor v. Alfred Musema,[86] the prosecution was denied leave to amend his list of witnesses to add an expert, due to the fact that, after examination of the content of the expert's statement, the judge believed he did not "need" to hear the expert witness or to admit into evidence the expert's statement. The Tribunal determined that it

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[82] *Id*. [Reproduced in the accompanying notebook at Tab 32.]

[83] *Id*. [Reproduced in the accompanying notebook at Tab 32.]

[84] This is analogous to the relevance requirement of the *Daubert* standard used in the United States.

[85] Similar to the "general acceptance" test once used as the standard for admitting scientific expert testimony and currently used as a factor for the admission of any proffered expert testimony. *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). (Discussed in detail supra). [Reproduced in the accompanying notebook at Tab 8.]

[86] The Prosecutor v. Alfred Musema (Case No. ICTR-96-13-T) Decision on the Prosecutor's Request for Leave to Call Six New Witnesses. [Reproduced in the accompanying notebook at Tab 15.]

was the burden of the prosecution to demonstrate need and to relate the expert evidence to the crimes charged in the indictment.[87] Therefore, in circumstances where the expert is being offered outside the time limitations set out in the Rules of Procedure and Evidence, the expert may be challenged for a lack of "need."

E. Scope of Expert Testimony

1. In the United States

BARRON'S LAW DICTIONARY (under "expert witness") states, "Hypothetical questions [asking the witness to assume stated facts] may be asked of an expert witness as a way of educating the trier of fact in the area of the expert's knowledge or experience." This constitutes opinion testimony, which is only permissible from a qualified expert.[88] Moreover, the opinion of an expert may go to the ultimate issue to be decided.[89]

2. At the ICTR

The Tribunal allows testimony that may assist the judges in understanding evidence involving a technical or specialized field. There is no Rule of Procedure

[87] The Prosecutor v. Alfred Musema (Case No. ICTR-96-13-T) Decision on the Prosecutor's Request for Leave to Call Six New Witnesses. [Reproduced in the accompanying notebook at Tab 15.]

[88] Fed.R.Evid. 702-706 [Reproduced in the accompanying notebook at Tab 3.]

[89] Fed.R.Evid. 704 [Reproduced in the accompanying notebook at Tab 3.]

specifically governing the allowable scope of this testimony, nor is there prior case law which dictates whether experts may proffer opinion testimony relating to an ultimate issue. The testimony must be evaluated using Rules

Expert testimony at the ICTR is "intended to enlighten the Judges on specific issues of a technical nature, requiring special knowledge in a specific field."[90] This intimates that the expert's testimony should be restricted to his field of expertise, but gives no further guidance regarding opinion testimony.

F. Rules of Discovery Governing Expert Testimony

1. In the United States

Four categories of experts and the discovery applicable to each were discussed in the 1980 case of *Ager v. Jane C. Strormont Hosp*.[91] Four separate categories of experts were reviewed:

1) Experts to be used at trial: The identity and substance of testimony of expert witnesses may be obtained through the discovery process.

2) Consulting experts who may assist at trial: Discovery of the expert's opinion and the information upon which that opinion is based is limited by Fed.R.Evid. 26(b)(4)(B).[92]

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[90] *Id.* [Reproduced in the accompanying notebook at Tab 3.]

[91] *Ager v. Jane C. Strormont Hosp*., 622 F.2d 500 (10th Cir. 1980). [Reproduced in the accompanying notebook at Tab 7.]

[92] Fed.R.Evid. 26(b)(4)(B). [Reproduced in the accompanying notebook at Tab 1.]

3) Informally consulted experts: A consulting expert's opinions, and even her identity, are generally exempt from the scope of discovery.[93]

4) Experts whose information was not acquired in preparation for trial (e.g. actors or viewers of occurrences): Not included within Fed.R.Evid. 26(b)(4)(B) and all facts or opinions they have are freely discoverable.

As a part of initial disclosures in federal court, a party must provide to all other parties a wide range of information about a testifying expert's qualifications and opinion, including all information that the witness considered in forming the opinion. These initial disclosures may include a brief narrative of the expert's qualifications, the general substance of her testimony, a statement of agreement to testify at trial, a statement that she will be sufficiently familiar with the action to submit a meaningful deposition, a list of other recent cases the expert has been a witness in, and a statement of the expert's fees.[94]

The Supreme Court recently held in *Weisgram v. Marley Co.*, that the appellate courts have the power (under Fed.R.Civ.P. 50(a)) to direct a District (trial) court to enter a judgment notwithstanding the verdict (judgment as a matter of law) if the court determines that admitted expert testimony was unreliable and inadmissible under *Daubert v. Merrell Dow Pharmaceuticals Inc.*[95] The court in *Weisgram* recognized the ability to

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[93] BLACK'S LAW DICTIONARY [Reproduced in the accompanying notebook at Tab 37.] and Fed.R.Civ.P. 26(b)(4)(B). [Reproduced in the accompanying notebook at Tab 1.]

[94] BLACK'S LAW DICTIONARY [Reproduced in the accompanying notebook at Tab 37.] and Fed.R.Civ.P. 26 (a)(2)(B) [Reproduced supra at note 97.]

remand for new trial, but held that this was not a requirement. This demonstrates the court's position that expert testimony can be highly persuasive, and that it must therefore be deemed reliable before it is admitted into evidence and heard by the jury.[96]

In pre-trial stages, experts often testify through signed affidavits. Even at this early stage, the opinions of the expert, the expert's qualifications, and the methods used to form the opinions are subject to the laws governing discovery.[97]

2. At the ICTR

Discovery of witnesses and information in proceedings before the Tribunal is mandated by the Rules of Procedure and Evidence.[98] Rule 66 provides that a list of

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[95] *Weisgram v. Marley Co.*, 528 U.S. 440 (2000). [reproduced in the accompanying notebook at Tab 20.], citing *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). [Reproduced in the accompanying notebook at Tab 8.]

[96] It is of note, however, that the appellate court's standard of review is limited to "abuse of discretion," as decided in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). [Reproduced in the accompanying notebook at Tab 10.]

[97] Fed.R.Civ.P. 26 (a)(2),Disclosure of Expert Testimony, states, "(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to ***present evidence*** under Rules 702, 703, or 705 of the Federal Rules of Evidence.
(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert ***testimony*** in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years…" (italics mine)

witnesses who a party intends to call must be provided to opposing counsel no later than 60 days before trial. According to Rule 73, a motion must be made to the Judge if a party intends to deviate from this list once trial had begun.[99] Expert witnesses specifically are governed by Rule 94, which mandates that the full statement of any expert to be called must be disclosed no less than 21 days prior to the date on which the expert is expected to testify.[100] The opposing party must file a notice (within 14 days) indicating whether they accept the expert witness' statement as well as whether they wish to cross-examine the witness.[101]

In addition to the list of witnesses a party intends to call, Rules 66 and 68 require the disclosure of materials (documents) and any exculpatory evidence, respectively.[102]

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[98] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, entered into force June 29, 1995. [Reproduced in the accompanying notebook at Tab 4.]

[99] The Prosecutor v. Ignace Bagilishema (Case No. ICTR-95-1A-T) Decision on the Request of the Defence Pursuant to Rule 73 of the Rules of Procedure and Evidence for Summons on Witnesses. [Reproduced in the accompanying notebook at Tab 13.] See also The Prosecutor v. Ferdinand Nahimana (Case No. ICTR-99-52-I) Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures (discussing definitions of "good cause" and "interests of justice.") [Reproduced in the accompanying notebook at Tab 17.]

[100] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, entered into force June 29, 1995. [Reproduced in the accompanying notebook at Tab 4.]

[101] Rule 94, International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, entered into force June 29, 1995. [Reproduced in the accompanying notebook at Tab 4.] See also, The Prosecutor v. Ferdinand Nahimana (Case No. ICTR-99-52-I) Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses [Reproduced in the accompanying notebook at Tab 16.] and The Prosecutor v. Ferdinand Nahimana (Case No. ICTR-99-52-I) Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures. [Reproduced in the accompanying notebook at Tab 17.]

[102] International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, entered into force June 29, 1995. [Reproduced in the accompanying notebook at Tab 4.]

Rule 66 may be held to include reports (findings) of expert witnesses intended to be called at trial.

G. Previous Uses of Expert Witnesses

1. In Criminal Trials in the United States

Forensics is "the application of the tools of science, as well as specific scientific facts, to help solve legal problems."[103] The term "forensics" encompasses many things. Forensics can be broken down into Forensic Sciences, Forensic Medicine, and Forensic Psychiatry/Psychology. Listed below are some examples of ways in which experts are used in the different fields of forensics:

a. *Forensic Sciences*

- Accident Reconstruction:
  1) Ballistics (bullet entry/exit)
  2) Bloodstain Pattern Analysis
  3) Computer re-enactments
- Chemistry (trace evidence collection)
- Communication and Media:
  1) Image processing (photographs and video)
  2) Linguistics audio/ audio tapes
- Fingerprints
- Fires and Explosions
- Hair Fibers palynology

For a discussion of the Rules governing discovery, see The Prosecutor v. Ferdinand Nahimana (Case No. ICTR-99-52-I) Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses. [Reproduced in the accompanying notebook at Tab 16.]

[103] Vocabulary section of: http://school.discovery.com/lessonplans/programs/forensics/ [Reproduced in the accompanying notebook at Tab 49.]

- Toolmarks/shoeprints
- Toxicology (drug testing, etc.)
- Weapons Experts:
  1) Firearms Identification (Ballistics)
  2) Materials Testing

b. *Forensic Medicine*

Used for identification of victims and suspects:

- Anthropology (craniofacial identification) Discern the age, sex, ancestry, stature, and unique features of a decedent from the skeleton.[104]
- DNA testing
- Odontology

Medical examiners are often used as expert witnesses at trial, testifying to their determinations as to the cause of death of a victim. This testimony encompasses both the technical cause of death (e.g. fracture to the skull) and the expert's opinion as to what may have caused the injury (e.g. a forceful blow by a blunt instrument).

c. *Psychological/Psychiatric*

- Criminal Profiling
- Criminal Responsibility
- Criminology (hate crimes experts)
- Diminished Capacity
- Fitness for Trial (e.g. competency)
- Risk Assessment (evaluation of possible recidivism)
- Sanity determinations (mental state at the time of the offense)
- Sexual Deviance
- Victim affects
  1) Art Interpretation (to show effects of crime in children who may be too young to express their emotions).
  2) Trauma determinations[105]

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[104] American Board of Forensic Anthropology http://www.csuchico.edu/anth/ABFA/ (visited on 10/27/01) [Reproduced in the accompanying notebook at Tab 48.]

[105] ExpertLaw.com- Criminal Litigation Expert Witness Directory http://www.expertlaw.com/experts/criminal.html (visited 10/12/01). [Reproduced in the accompanying notebook at Tab 41.]

2. At the ICTR

a. *Cultural/ Political/ Historical*

Historians who specialize in the study of Rwanda are often called by the Prosecution to discuss the cultural and political climate which led up to the genocide of 1994.[106] For example, in the *Rutaganda* case,[107] a Professor was proffered by the Prosecution to testify that the interhamwe spearheaded the genocide.

b. *Linguistic*

Linguistic experts at the ICTR may be used to make determinations about malice, bias, or innuendos in speech.[108] This can be of the utmost import when prosecuting those who use radio and television to communicate information to and to rally those actually committing genocide and crimes against humanity. These individuals are likewise culpable for the crimes they instigate, yet they can be some of the most difficult to prosecute. Socio-linguistic experts use statistical analysis as well as sociological analyses

[106] One example of this is found in The Prosecutor v. Jean Paul Akayesu (Case No. ICTR-96-4-T) Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness. [Reproduced in the accompanying notebook at Tab 12.]

[107] The Prosecutor v. Georges Anderson Nderubumwe Rutaganda (Case No. ICTR-96-3-T) Decision on the Defence Motion for Disclosure of Evidence. [Reproduced in the accompanying notebook at Tab 19.]

[108] In the United States, linguistics experts are utilized in the same fashion in libel and slander suits.

of linguistics to make determinations regarding the origin and cultural influence of speech or writing. For example, in The Prosecutor v. Ferdinand Nahimana,[109] a witness was called to testify regarding Radio Rwanda, false communications, and Nahimana's attitude toward Tutsis.

c. *Forensic*

Forensic experts may be utilized before the Tribunal in much the same way they are used in the United States: to prove the commission of specific acts by the accused.

For example, In The Prosecutor v. Ferdinand Nahimana, et al., two expert witnesses were called by the Prosecution to testify regarding electronic and print media, in addition to the historical and socio-linguistic experts.[110] These experts can be utilized to prove that the accused is guilty of the crimes alleged in the indictment.

In the Rutaganda case, [111] the director of medical examiners (Dr. Haglund) was called by the prosecution to testify regarding his findings. His team exhumed the bodies

[109]The Prosecutor v. Ferdinand Nahimana (Case No. ICTR-99-52-I) Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures. [Reproduced in the accompanying notebook at Tab 17.]

[110] The Prosecutor v. Ferdinand Nahimana (Case No. ICTR-99-52-I) Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses. [Reproduced in the accompanying notebook at Tab 16.]

[111] The Prosecutor v. Georges Anderson Nderubumwe Rutaganda (Case No. ICTR-96-3-T) Decision of 6 December 1999.
Reported at Foundation Hirondelle, Agency of Information, documentation and formation, Arusha (Tanzania): International Penal court for Rwanda, Anderson George Rutaganda, Witnesses of Defence.
http://translate.google.com/translate?hl=en&sl=fr&u=http://www.hirondelle.org/hirondelle.nsf/c0d4ea7a44b64faec12564e500421ff1/0693445a8faae88ec12568300006d6fc%3FOp

from several sites, including the Amgar garage. The defense responded by calling an expert anthropologist to refute Dr. Haglund's testimony by stating that his report was full of errors. The prosecution called a former Kigali prosecutor to testify to the criminality of the Interhamwe militia between 1992 and 1994. The Defense called an expert to dispute the duration of the genocide's planning stage, though affirming that RTLM was "radio of war."

These examples evidence that the ICTR has adopted an adversarial system regarding expert testimony. Opposing parties each offer the evidence supporting their case, and the judge acts as gatekeeper, not inquisitor. It is for the Tribunal to filter the proffered evidence and allow in only what is relevant and reliable, as is the test in so many countries.

It would be greatly beneficial for the Tribunal to create a rule specifically setting out the requirements for the admission of expert testimony, the allowable scope of the testimony, and the methods for challenging an expert.

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enDocument&prev=/search%3Fq%3DRutaganda%26hl%3Den (visited 11/28/01). [Reproduced in the accompanying notebook at Tab .]