Forensic Evidence - Toward a Legacy of Truth-Telling and Fair Trial for International Criminal Tribunals

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by Beth S. Lyons*

Introduction

My thesis is that where forensic evidence is relevant, its use can exponentially heighten the “quality of evidence” bar. This may serve (1) to “level the playing field” which is besieged with deficient Prosecution evidence;¹ and (2) to implement the fair trial guarantees, found in the ICTR Statute, Article 20 and various international instruments. Conversely, its absence hampers the “truth-telling” goal of international justice, which is a predicate to breaking the cycle of impunity for international crimes.

However, the role of forensic evidence in international criminal cases is likely to be de minimis where a judgment is more concerned with “writing history” than applying the rule of law. This is illustrated by the Trial Chamber’s handling of forensic evidence in the Ndindilyimana et al (“Military II”) case² in respect to Major Nzuwonemeye, a co-Accused. In this case, scientific evidence was presented by the Defence, and it was partly mis-read, mis-understood and/or simply ignored.

However, to the extent that judges rigorously apply the rule of law, forensic evidence can play a unique and indispensable role in international justice. It can offer a “more objective” evidentiary foundation than the generally deficient-ridden Prosecution witness testimony that fails to meet the legal standard of proof beyond a reasonable doubt.

The Context: Prosecutorial Evidentiary Hazards

It would not surprise me that one of the legacies of the international criminal tribunals- especially the ICTR – will be the deficient quality of the Prosecution evidence. Perhaps, my opinion as a defence counsel could be “written off” or ignored as biased and self-serving: I have litigated at the ICTR over the last decade, including at the pre-trial, trial and appellate levels, in three different cases.

But this conclusion is shared by lawyers who have never set foot in an ICTR courtroom.
Professor Nancy Combs, a former law clerk to U.S. Supreme Court Justice Anthony Kennedy and currently Professor of Law and Director, Human Security Law Center at William and Mary Law School in Virginia, United States, has concluded in her excellent book, *Fact-Finding Without Facts, The Uncertain Evidentiary Foundations of International Criminal Convictions*, that the tribunals “operate in a fact-finding fog of inconsistent, vague and sometimes incoherent testimony that leaves them unable to say with any measure of certainty who did what to whom.” In addition, in the ICTR judgments she reviewed (through 2005), about fifty per cent involved Prosecution witnesses whose statements featured serious discrepancies.

But, what is even more troubling is her finding that “a great deal of false testimony is presented to the ICTR, and to a lesser extent the SCSL.” She concludes: “The bottom line is that international tribunals have considerable difficulty determining even the most basic facts, and that difficulty has broad implications for the incidence of perjury at the tribunals.”

Prosecution witness evidence is simply replete with deficiencies – including not one, but multiple levels of hearsay. The admissibility of multiple levels of hearsay is the “norm” at the ICTR. The issue of the weight of the evidence is not decided until the deliberations stage. At the ICTR, any evidence which is deemed by the Bench to be relevant and probative is admissible. The Chamber may request verification of the authenticity of evidence obtained out-of-court, but this provision is not mandatory. Thus, the evidence tendered and accepted in the courtroom is almost without constraints (at least when it is offered by the Prosecution).

Listening in court, it is almost Kafka-esque; even seasoned counsel who have “heard it all” must question what, if any, standards for truth-telling are being implemented.

Especially given these evidentiary hazards, it is logical to ask why is the Prosecution generally not presenting forensic evidence, so that judges in international criminal cases can make decisions based on “more objective” scientific evidence – rather than on compromised Prosecution witness testimony?
Forensic Testimony: The “Credibility/Reliability” Scale

I am not suggesting that forensic evidence is a panacea, or that its infusion into a Prosecution case cures other evidentiary defects. Nor am I making the claim that scientific evidence, by definition, is perfectly objective or neutral. The issues of credibility, criteria and methodologies of evaluation still remain as the contentious issues of expert challenges and the fodder of cross-examination.

But, particularly scientific evidence presents upfront conclusions which are based on some established criteria and a methodical analysis, and can be challenged by either party. In the context of the evidentiary hazards of the Prosecution evidence, scientific evidence may appear potentially “more objective” and “more reliable” than the Prosecution evidence based on triple and quadruple hearsay from witnesses.

Imagine a “credibility/reliability scale” in this situation: scientific evidence is clearly at one end and multiple hearsay is at the opposite end. Unfortunately, the scale is usually tipped at the hearsay end, so that any scientific or technical evidence may be a way to “level” or “balance” the scale a little.

In tandem with this argument is the reality that the contexts and subject matter of international criminal cases – which include allegations of the most heinous crimes - are highly charged politically and emotionally. Too often, both the Prosecution and its witnesses operate out of emotion and politics. These factors affect the quality of the evidence, and its reliability and accuracy. Given this reality, forensic testimony may help to focus the proceedings on the material elements of the crime charged.9 Scientific experts are professional witnesses who generally do not (or should not) have the same emotional and political interest and investment in cases.

The “Military II” Case

It should be uncontested that there has been a notable dearth of forensic evidence at the International Criminal Tribunal for Rwanda (ICTR), especially in relation to ballistics or similar areas. Generally, the subject matter of the forensic evidence is historical, linguistic or anthropological.10

One of the very few times in the history of the ICTR that any party successfully presented forensic evidence (and the only time for ballistics evidence) was in the
“Military II” case. At trial, the Nzuwonemeye Defence presented testimony on ballistics from forensic expert, Dr. Thomas Kubic.\(^{11}\) He was the opening witness in the Defence case in June 2008.

My client, Major Nzuwonemeye and his subordinate, Captain Sagahutu were indicted, \textit{inter alia}, for the murders of the Belgian UNAMIR peacekeepers\(^{12}\) in Camp Kigali and of Prime Minister Agathe Uwilingiyimana on 7 April 1994 as a crime against humanity, and the predicate for violation of common Article 3 (CA3) to the Geneva Conventions and Additional Protocol II. Both were charged with individual and superior/command responsibility.\(^{13}\) The expert, Dr. Kubic, testified about his findings and conclusions in respect to these two events.

In February 2014, Major Nzuwonemeye was acquitted\(^{14}\) by the Appeals Chamber. The Appeals Chamber reversed the Trial Chamber’s convictions for crime against humanity (murder) for the killings of the Belgian UNAMIR soldiers and the former Prime Minister Agathe Uwilingiyimana, and violation of Article 3 common to the Geneva Conventions and Additional Protocols II. Nzuwonemeye was released to a “safe house” in Arusha, Tanzania.

The Appeals Judgment did not refer to the evidence of the ballistics expert in respect to the reversals of Nzuwonemeye’s convictions, because it had reached its decision to acquit him on other grounds.\(^{15}\) But it is apparent to this counsel that the evidence contributed to a kind of \textit{“res gestae”} for the appellate reversals of the Trial Chamber’s convictions.

The “Military II” Trial Judgment was replete with errors, ranging, for example, from factual misrepresentations of transcripts to legal errors in the indictment to the absence of reasoned opinion in support of legal elements of crimes and forms of liability. The Judgment, covering four co-Accused, consisted of 569 pages. While a certain number of minor errors (typographical) is statistically to be expected, the Judgment’s myriad factual and legal errors was excessive. In fact, Appeals Judge Tuzmukhamedov referred to the “extraordinary magnitude and gravity” of the errors in respect to Nzuwonemeye and Sagahutu [which] “pervade the entire reasoning of the Trial Judgment.”\(^{16}\)
The Trial Chamber’s analysis of the forensic evidence and the resulting inconsistencies in its conclusions were, in my view, among the fundamental errors in the Trial Chamber’s Judgment. Due to the brevity of this paper, I will illustrate this using a few examples in respect to the forensic evidence and the murders of the Belgian UNAMIR soldiers.

**The Prosecution Case**

The Prosecution contended that the Belgian UNAMIR soldiers were killed by Rwandan army soldiers, including members of my client’s unit, the RECCE Battalion, at Camp Kigali on 7 April 1994. Prosecution witnesses claimed that a member of RECCE fired a multiple grenade launcher (MGL) at the UNAMIR building (in Camp Kigali) where the UNAMIR soldiers had taken refuge, killing some of the Belgian soldiers. In addition, a Prosecution witness, ALN, averred that an AML armoured vehicle (from RECCE) was present at the site and fired on the UNAMIR building from 10 metres away. He also claimed that my client was present at the time of the killings. The Prosecution adduced no scientific evidence about the cause of death of the Belgians, or the damage to the UNAMIR building.

**The Defence Case**

The Defence theory was that the Belgian UNAMIR soldiers were attacked by Rwandan soldiers in mutiny, largely handicapped soldiers, who lived close to the UNAMIR building. The attacks took place on 7 April 1994. The soldiers were acting, based on a rumour, that the Belgians had shot down President Habyarimana’s plane the previous night of 6 April 1994, killing him, the President of Burundi, and other officials returning from a meeting in Dar Es Salaam. The handicapped soldiers accosted the Belgian soldiers with their crutches, small arms fire and other implements. This mutinous soldiers theory was corroborated by General Romeo Dallaire, a Prosecution witness, who “acknowledged that it was possible that the attacks against the Belgians were carried out by mutinous soldiers at Camp Kigali.”

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As in any murder case, the cause of death is a material element of the crime and a pivotal point for the defense against the allegation. In this ICTR case, it was no different (although the contextual legal elements of crime against humanity and violations of CA3 also had to be addressed).

When I entered the “Military II case” in February 2007, one of the first tasks which Lead Counsel Chief Charles A. Taku presciently asked me to undertake was to identify a ballistics expert. The forensic expert would address two material elements of the murder charge:

- the *actus reus* (what conduct directly resulted in the murder) and
- who carried out and was responsible for the criminal conduct.

The fact that the Belgians were dead was not contentious: the contentious issue was how they died, i.e. what caused their death and who was responsible. Specifically, the object was to determine whether any armaments from the RECCE unit were responsible for the attacks on and killing of the Belgian UNAMIR soldiers.

Dr. Kubic’s evidence also served another equally important function: it posed an implicit challenge (and a choice) to the judges: to evaluate the credibility of the Prosecution evidence against scientific findings. As the opening witness in the Defence case, Dr. Kubic’s evidence set the stage for the rest of the Defense case because it established a (scientific) standard against which to hold the Prosecution evidence.19

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The Nzuwonemeye Defence presented two key pieces of evidence re the Belgians:

- the evidence of expert witness, Dr. Thomas Kubic, who, with the assistance of Professor Peter Diaczuk, examined the crime site at Camp Kigali; and
- the autopsy report on the dead Belgian soldiers, performed by a Belgian military doctor in Nairobi in April, 1994 a few days after the Belgians died.

The Prosecution did not challenge Dr. Kubic’s qualification by the Trial Chamber as an expert, nor did it oppose the admissibility of the Expert Report, autopsy report and related evidence tendered with his testimony. It also never contested the findings of the autopsy report.
Autopsy Report

The autopsy report of the Belgian soldiers was pivotal, because it addressed a material element of the crime charged – the cause of death. But, the Trial Chamber’s fundamental error was that it misrepresented the findings of the autopsy report in its Judgment and reached a conclusion about cause of death which was not based on the scientific evidence.

The autopsy report was requested by the Deputy Military Prosecutor, “Conseil de Guerre en Campagne,” as part of the judicial inquiry into the deaths of the ten Belgian UNAMIR soldiers. The autopsies were conducted by Dr. Roman, a medical lieutenant-colonel, of the Hopital Militaire, Belgium, on 12 and 13 April 1994 in Nairobi (a few days after the deaths on 7 April 1994). Dr. Roman was tasked with determining the cause of death. His report included a detailed description of the bodies, identifying injuries sustained both pre- and post-mortally. He performed an internal and external examination using a metal detector during the autopsy.

The report identified the cause of death for each soldier: traumatic injuries by a firearm projectile (4 soldiers); cranial-cerebral injuries provoked by a heavy cutting object (for example, a machete) (3); total fracture of the spinal column caused by a strong blow in the back (1); multiple traumatic injuries to the chest, caused by multiple strong external blows (1); multiple traumatic injuries at the level of his thorax, provoked by multiple external violent blows (1).

The Trial Judgment concluded, based on this evidence, that “...six of the Belgian soldiers appeared to have succumbed to injuries as a result of beatings while the remaining four soldiers died as a result of probable grenade explosions.”

The problem, however, was that the autopsy report did not conclude that any soldier died from grenade explosions, nor did it suggest this as a probable cause of death.

The bottom line is that the Trial Chamber wanted to conclude that an MGL-launched grenade, connected to the RECCE unit (Nzuwonemeye was the RECCE Battalion Commander and Sagahutu was Commander of RECCE Company A) was the weapon used to kill at least some of the UNAMIR soldiers in the building. Its reasoning
was convoluted and contorted, but - most importantly - the Trial Chamber’s premise was not based on the expert evidence, with which it had claimed to agree.

The Trial Judgment claimed that it concurred with Dr. Kubic that grenades from MGLs did not cause any damage inside the building. The Judgment accurately summarized Dr. Kubic’s conclusion and evidence that

- the grenades launched [which hit] outside the building, as opposed to hand-thrown grenades, were not the cause of the Belgians’ death;
- that grenades detonated in the UNAMIR building where hand-thrown and not launched grenades; and
- that damage to the north-east corner of the room was caused by hand-thrown grenades, based on the damage and the trajectory.

In sum, Dr. Kubic’s conclusion, based on his examination of the site, was that no MGL-launched grenade entered the UNAMIR building and that any evidence of grenade explosions inside was the result of hand-launched grenades.

But, the same Trial Chamber which agreed with the expert evidence also concluded that the MGL-launched grenades were responsible for the deaths of Belgian soldiers inside the building. The Trial Chamber found both Nzuwonemeye and Sagahutu criminally responsible for the deaths of the Belgians, based on its conclusion that an MGL from RECCE’s arsenal was used by RECCE soldiers in the attack on and killing of two Belgian soldiers.

The Appeals Chamber did not reach any conclusion about the impact of the Trial Judgment’s analysis of the autopsy report in respect to Nzuwonemeye because it had reversed his conviction on other grounds. However, it reversed co-Accused Sagahutu’s conviction for ordering under 6(1), holding that “there is no evidence that any Belgian peacekeeper died from wounds inflicted by this weapon [MGL].” In a footnote, the Appeals Chamber observed that the autopsy report reference to “firearm projectile” did not indicate whether this meant that they were killed by shrapnel from grenades. The Nzuwonemeye Defence had made the same point about the term “firearm projectile” in one of its appellate pleadings.
An Error “Waiting in the Wings”

Was the Trial Chamber simply confused by the scientific evidence, or negligent in its review of the final draft of its Judgment? This is likely to remain an unanswered question. But, regardless, I would argue that the Trial Chamber’s error re the autopsy report and cause of death was a mistake “waiting to happen.” In the Judgment, the Chamber stated that it “is less concerned about the minute details of how the Belgian soldiers were killed than about the role and identity of the persons who were responsible for that unlawful act.” This attitude perhaps contributed to the erroneous reading of the autopsy report and the Trial Chamber’s conclusions, which were inopposite to the forensic evidence -- the same forensic evidence the Trial Chamber claimed was consistent with its own conclusions.

The Fair Trial Error

The Trial Chamber’s autopsy report misrepresentation and errors were compounded by another error: the autopsy report upon which the Trial Chamber relied was not summarized in its Judgment. Moreover, the Trial Chamber offered no reasoned opinion, as per ICTR Statute 22(2), to explain how it reached its conclusions re cause of death, a material element of the crime charged.

A Trial Chamber has no obligation to summarize every piece of evidence, but it has an obligation to provide a reasoned opinion so that an Accused can exercise his right to appeal. It would follow, then, that evidence which directly impacts on key issues, material to the conviction, should be explained by the Trial Chamber.

Nevertheless, the Trial Chamber made conclusions of “consistent evidence” (including the autopsy report) without providing any information about the content of the evidence. Its failure to summarize the autopsy report meant that it was not possible for a reviewing court to make any determination as to whether the Trial Chamber’s conclusions were consistent with the autopsy report. This error is similar to the Muvunyi Trial Chamber’s, where the Appeals Chamber found it “impossible to assess the finding of the Trial Chamber that testimonies of Witnesses YAI and CCP were ‘strikingly similar’ or consistent with respect to the material facts relating to this charge.”

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The Trial Chamber’s 180 Degree U-Turn on Heavy Weapons

Prosecution witness ALN was a member of the RECCE battalion and the sole witness who placed Nzuwonemeye and Sagahutu at the scene of the attack on the Belgians. ALN claimed that Nzuwonemeye ordered Sagahutu to bring a RECCE armoured vehicle to kill a Belgian soldier, and the vehicle shot into the UNAMIR building from 10 metres away. Specifically, ALN described that the armoured vehicle had a mounted machine gun.

Dr. Kubic refuted ALN’s claims: he concluded that the building had no signs of impact from projectiles launched from an AML60 or an AML 90 (the armoured tanks of the RECCE unit). He also testified that based on bullet fragments recovered at the site and independent testing, damage to the building was consistent with small arms fire originating from weapons using .30 calibre (7.62 mm) or 9 mm rounds; these rounds were responsible for the holes in the outer walls, some of which were enlarged due to the crumbling of the structure. Dr. Kubic brought empty shells of each of these sizes, and these were tendered as evidence.

The Trial Chamber, in fact, initially aligned itself with the expert evidence: it rejected ALN’s claims about the armoured vehicle and the presence of Nzuwonemeye and Sagahutu at the scene of the attack as incredible. It found that “Kubic’s evidence and its own observations rule out the possibility that either a rocket launcher or armoured vehicle was used to fire at the Belgians holed up in the UNAMIR building, as testified by Witness ALN. The Chamber will therefore not rely on this aspect of Witness ALN’s evidence.”

Moreover, the Trial Chamber found that Dr. Kubic’s conclusion that “the damage to the UNAMIR building was caused by small arms fire, likely from AK-47 type ammunition, .30 calibre or 7.62 millimeter guns and MGLs [referring to exterior of building], is consistent with the its own observations during the on-site visit.”

But then, the Trial Chamber made a 180 degree U-turn. Approximately 152 paragraphs later in the Judgment, the Trial Chamber reached an opposite conclusion. It found that “heavy weapons” were fired by RECCE into the UNAMIR building. This conclusion was not only unfounded in the evidence, but also contradicted the Trial Chamber’s prior conclusion.
The obvious question is: did the Trial Chamber read its own Judgment for consistency? Or, did it simply ignore its previous finding, based on the expert evidence, for convenience? It is my contention that the Trial Chamber’s failure to consistently interpret the scientific evidence was not an oversight; but the result of a deliberate effort to “contort” the evidence to fit into its own theory about a “two stage” attack on the Belgians, where the Trial Chamber concluded that heavy weapons from RECCE were used during a second stage.

Selective Omission of Expert Evidence – The Shooter on the Wall

Prosecution witness DCK’s testimony was the only evidence adduced that specifically described how a RECCE soldier purportedly used an MGL to kill the Belgian soldiers. DCK, a member of the Music Company unit, claimed that he saw a soldier, whom he was told was from RECCE, fire six grenades into the UNAMIR building, using an MGL.49 The soldier fired at the UNAMIR building from the wall between Army Headquarters and Camp Kigali.50

Dr. Kubic specifically refuted the credibility of DCK’s testimony, based on a hypothetical patterned on his evidence.51 Dr. Kubic testified that given the trajectory, and the amount of damage to the floor, it was not a very likely possibility that a MGL launched grenade could have caused the damage in the north-east corner of the building.52

But Dr. Kubic’s evidence refuting DCK’s claim was omitted from the Trial Chamber’s analysis of, and findings on, DCK’s testimony. Moreover, the Trial Chamber relied on the evidence of DCK to corroborate another witness, AWC, on his identification of two RECCE soldiers who AWC connected to the MGL.53

Perhaps Dr. Kubic’s evidence fell into the category of “minute details of how the Belgians were killed” and thus, was of “less concern” to the Trial Chamber.54 His scientific evidence raised reasonable doubt as to DCK’s claims of the MGL shooter on the wall. Dr. Kubic’s evidence concerned the critical issue of the origin of the damage inside the UNAMIR building, and whether it was caused by an MGL launched grenade. This scenario is similar to the Milosevic case, where a key issue was the origin of the
fired shells in the 22 December 1994 shelling of a flea market. But, as distinguished from our case, the ICTY Trial Chamber analyzed the forensic findings as to the source of the fired ammunition (whether it was from BiH or SRK-held territory) in the judgment.\textsuperscript{55} The Appeals Chamber, however, reviewing these findings, held that a reasonable trier of fact, based on the evidence, could be led to a different finding, and overturned the Appellant’s conviction for this incident.\textsuperscript{56}

Thus, the origin of the damage found by the expert inside the UNAMIR building was a pivotal issue, and the Trial Chamber’s selective omission of this evidence from its Judgment raised a serious question about whether the Trial Chamber understood the importance of Dr. Kubic’s analysis.

**Conclusion**

In the examples cited above, the Trial Chamber’s analysis and conclusions were inconsistent and contradictory in respect to the forensic evidence. The Trial Chamber claimed to accept Dr. Kubic’s findings, but then, reached inconsistent and contradictory conclusions. It would be fair to conclude that the Trial Chamber did not fully comprehend the scientific evidence; if this were not the case, then one would assume that there would be no inconsistencies and contradictions.

The Trial Chamber’s apparent mis-understanding of the forensic evidence is important because it affects the fair trial right of an Accused person. The Prosecution’s evidence must meet a legal standard of proof beyond a reasonable doubt in order for the Chamber to convict. Hence, the challenges to the credibility and reliability of Prosecution evidence directly affect whether the evidence meets this high standard. Inconsistent and contradictory understandings of the expert evidence of Dr. Kubic by the Trial Chamber meant that it accepted evidence to convict Major Nzuwonemeye which did not meet the proof beyond the reasonable doubt standard.

Objectively, this raises the question: what is the role of forensic evidence, especially where a Trial Chamber does not, on its face, appear to comprehend the forensic evidence?

If “truth-telling” is one of the objectives of the ICTR and other international courts and tribunals which investigate and prosecute international crimes, then the
example of the “Military II” Trial Chamber’s handling of the forensic evidence in respect to the murders of the Belgian UNAMIR soldiers certainly sullies this goal.

Litigating History: Making Law vs. Writing History

But “truth-telling” may not be the goal. The struggle in the courtroom is as much about the historical narrative as it is about culpability. As a former ICTY Prosecutor has pointed out, “The struggle for the interpretation of historical events through the trial record might be as important in [the] long run as the determination of guilt or innocence of the individuals tried.” At the ICTR, its judgments are most often a historical narrative of the events of 1994. This is the reason that the government of Rwanda has so tenaciously tried to exercise control over the ICTR, especially the Prosecution.

Take a look at any ICTR Judgment: to a greater or lesser degree, the judges are writing (or, in some cases, re-writing) the history of the events of 1994 in Rwanda. It is especially in this context that judgments with less than complete facts, or only partial representations of the truths serve a historical function, which exceeds, in my view, the parameters and prerogatives of legal judgments.

As long as an international court or tribunal judgment is more concerned with “writing history” than “truth-telling,” the role of forensic evidence is de minimis, if it exists at all. And, the converse is true: to the extent that judges rigorously and consistently analyze forensic evidence within their judgment, the greater the possibility that forensic evidence can make a necessary and affirmative contribution to “truth-telling” - a predicate to break the cycle of international crimes, committed by all sides of a struggle.

This paper was prepared for the ICTR Legacy Conference, November 2014. The author reserves the right to amend or make changes.

*Beth S. Lyons has been a Defence counsel at the International Criminal Tribunal for Rwanda (ICTR) since 2004. In February 2014, she and Lead Counsel Chief Charles A. Taku (with their Defence team) won an acquittal for their client, Major F.X. Nzuwonemeye, in the Prosecutor v. Ndindiliyimana (“Military II”) case. She also has
been co-counsel for Dr. David Matsanga in a matter related to the Kenya cases at the International Criminal Court. Previously, she worked as a Legal Aid criminal defence and appeals attorney in New York City. She has published on international criminal law and procedure. She has served as an Alternate Representative to the U.N. for the International Association of Democratic Lawyers (IADL) since 1997.


4 Ibid., p. 120.

5 Ibid., p. 149.

6 Ibid., p. 148.

7 ICTR Rules of Procedure and Evidence, Rule 89.

8 Ibid., Rule 89 (D). In the Simba case, the Defence challenged the authenticity of a document which the Prosecution wanted to tender into evidence. The Presiding Judge rejected the Defence challenge, on the grounds that the document bore a “K” number. The “K” number, for example K12345, is simply an internal organizational numbering system in the Office of the Prosecution, and has nothing to do with the authenticity of the document which bears the “K” number.

9 See Ntagerura et al Trial Judgment, Case No. ICTR-99-46-T, 25 February 2004, Separate Opinion of Judge Dolenc, para. 21 (“In practical terms, the material facts of the crime answer the following seven questions, which guide any criminal investigation, prosecution and judgment: Who (is the alleged perpetrator); Where; When; What (was committed or omitted): Whom to (victim); What means; and Why(motive). Answers to these seven questions are necessary in order to individualize the Accused, the alleged crime, the mode of the Accused’s participation, and the form of his criminal responsibility”)

10 A few examples: The Prosecution has presented its expert historical witness Dr. Alison des Forges in almost every ICTR case, prior to her death. It also presented evidence of expert witness Dr. Haglund, a forensic anthropologist, in the Kayishema and Ruzindana trial in 1997. The Gacumbitsi Defence provided an expert forensic report challenging the credibility and reliability of Prosecution film footage. The Semanza Defence presented Pascal Ndengejeho, former Minister for Information in Rwanda from 1992-1993, as an expert witness, but the Trial Chamber rejected its application to present the evidence of forensic expert Dominque Lecomte because the deadline for submission of his expert report had not been met. The Setako Defence presented expert Bert Ingelaere, who testified on the functioning of the gacaca courts. The Kajelijeli Defence presented expert Dr. Francois-Xavier Bangamwabo, who testified on various general, historical, political and linguistic issues.

In contrast, a cursory review reveals that the ICTY has made greater use of forensic expertise, especially in the Prosecution’s investigation in some cases, which included the exhumation of mass graves. See, Klinker, Melanie, Forensic science expertise for international; criminal proceedings: an old problem, a new context and a pragmatic solution, The International Journal of Evidence & Proof, 13 E&P 102-129 (2009).
The author has not researched the use of forensic evidence in investigations and prosecutions related to international crimes in Latin America, or elsewhere.

11 Dr. Kubic, who holds a J.D. (law), is currently an Associate Professor at John Jay College of Criminal Justice, City University of New York and served for more than two decades as a criminalist and detective with the New York State municipal crime laboratory.

12 The Defence position was that the members of the UNAMIR contingent (which included Belgians and Ghanaians) were soldiers, not civilians. Both the Trial and Appeal Judgments rejected this argument, but each refers to those in the UNAMIR contingent differently: the Trial Judgment refers to them as soldiers and the Appeal Judgment refers to them as peacekeepers.

13 The Trial Chamber found Major F.X. Nzuwonemeye, the former head of the Reconnaissance (RECCE) Battalion of the Rwandan Army in April 1994, guilty for crime against humanity: (a) under the ICTR Statute, Article 6(1) for ordering and aiding and abetting and under Article 6(3) for superior responsibility for the crime of murder of Prime Minister Agathe Uwilingiyimana on 7 April 1994; the Trial Chamber entered a judgment of conviction under 6(1); (b) under 6(3) for the crime of murder of the Belgian UNAMIR soldiers. Based on these murders, he was convicted of violation of Article 3 common to the Geneva Conventions and Additional Protocol II. He was sentenced to twenty years imprisonment.

The Trial Chamber acquitted Nzuwonemeye of conspiracy to commit genocide, crime against humanity (Rape) and violation of Article 3 common to the Geneva Conventions and Additional Protocol II (Rape, humiliating and degrading treatment).


NOTE: the acquittal rate at the ICTR is about 14%, based on both trial and appeal judgments through 2013; 74 persons were tried/10 persons were acquitted. For statistical analysis of other factors in the international courts and tribunals, see, Smeeulers, Hola and van den Berg, “Sixty-Five Years of International Criminal Justice: The Facts and Figures,” International Criminal Law Review 13 (2013) 7-41.

15 The Appeals Chamber reversed the Trial Chamber’s conviction for crime against humanity for the murder of the Prime Minister under 6(1) [for aiding and abetting] based on an uncured pleading defect in the indictment (AJ: 185-190, 254); for 6(1) [for ordering] based on insufficiency of the Chamber’s findings which included its failure to provide a reasoned opinion and make express findings on mens rea and actus reus liability for ordering (AJ: 292-293), and on multiple evidentiary errors (AJ: 292-312).

In respect to 6(3) liability for the Prime Minister’s murder, the Appeals Chamber held that the Trial Chamber erred in finding that RECCE soldiers “participated in the attack on and killing of” the Prime Minister, and reversed the finding of 6(3) liability for both Nzuwonemeye and Sagahutu (AJ: 320-321).

For the Belgians, the Appeals Chamber reversed the Trial Chamber’s conviction under 6(3) based on lack of notice. The Appeals Chamber held that the indictment was defective and uncured, because it failed to plead any specific conduct to support the 2nd element of 6(3), i.e. knowledge (AJ: 237-241, 254) and that since Nzuwonemeye was not adequately informed of the allegations against him, it “was not open to the Trial Chamber to convict him pursuant to 6(3)” (AJ: 240).

The Appeals Chamber reversed the conviction for violation of common Article 3, consistent with the underlying murder conviction reversals.

16 Ndindilyimana et al., Appeal Judgment, Case No. ICTR-00-56-A, 11 February 2014, Partly Dissenting Opinion of Judge Tuzmukhamedov, para. 3.

17 Note, the Defence evidence in “Military II” and in other cases, including “Military I”, was that the RPF shot down the plane.

18 Trial Judgment: 1772 (summary of Dallaire’s testimony).
Dr. Kubic’s testimony was based on his expertise and two day investigation at the crime site in Kigali, with his assistant, Professor Peter Diacyzk as well as independent testing they both carried out for preparation of the Expert Report. At the closing oral arguments at trial, the Nzuwonemeye Defence presented the Trial Chamber with a choice: between the scientific evidence of Dr. Kubic and the unreliable testimony of ALN. T., 25 June 2009, pp. 56-57.

Defence Exhibit 517.

Ibid.

Ibid.

Trial Judgment: 1867.

The Trial Chamber concluded that one of the weapons used in the attack on the Belgians in the UNAMIR building was an MGL and that it came from a RECCE office (TJ:1869, 1872); that RECCE soldiers were among the attackers(TJ:1863, 1866) and that Sagahutu supplied the MGL or gave approval for it to be used in the attack on the Belgians in the UNAMIR building (TJ: 1886).

Trial Judgment: 1867.

Trial Judgment: 1813.

Ibid.

Trial Judgment: 1812.

Trial Judgment: 1885-1889.


Appeal Judgment: 368, fn. 893 (‘. . .[t]he Appeals Chamber observes that the report in question merely states that some victims died from a “firearm projectile”, without indicating whether this meant that they were killed by shrapnel from grenades. See Defence Exhibit 517 (Autopsy Report), p. 51”)

Nzuwonemeye Appellant's Reply Brief to Prosecution's Respondent's Brief, 20 March 2012; public redacted version, 6 March 2014, para. 143: “The Prosecution points to no scientific evidence that the Belgian UNAMIR soldiers died from an MGL-launched grenade. Where the autopsy report refers to a ‘firearm projectile’ it does not identify the source of the projectile.”

Trial Judgment: 1862.

Appellate jurisprudence holds that the Trial Chamber has full discretionary power to assess the weight and credibility of witness testimony. See, Nahimana et al, Appeal Judgment, Case No. ICTR 99-52-A, 26 November 2007, para. 194.


Trial Judgment: 1867.

Ibid.


Trial Judgment: 1875.
The former UNAMIR building at Camp Kigali was well preserved as a memorial to those who died. There was one room where the Belgian soldiers took refuge; and a second, smaller room which housed an exhibition about 1994. Bullet fragments were found in the structure 14 years after the events.