Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-98-44-AR91.2
16th February 2010
{3299/H – 3278/H}

IN THE APPEALS CHAMBER

Before:	**Judge Patrick Robinson, Presiding** **Judge Fausto Pocar** **Judge Liu Daqun** **Judge Theodor Meron** **Judge Carmel Agius**
Registrar:	**Mr. Adama Dieng**
Decision of:	**16 February 2010**

ICTR Appeals Chamber
Date: 16th February 2010
Action: R Juma
Copied To: Concerned Judges, Parties, Judicial Archives, LO, LSS

ÉDOUARD KAREMERA
MATTHIEU NGIRUMPATSE
JOSEPH NZIRORERA
v.
THE PROSECUTOR

Case No. ICTR-98-44-AR91.2

CONFIDENTIAL

DECISION ON JOSEPH NZIRORERA'S AND THE PROSECUTOR'S APPEALS OF DECISION NOT TO PROSECUTE WITNESS BTH FOR FALSE TESTIMONY

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
CERTIFIED TRUE COPY OF THE ORIGINAL SEEN BY ME
COPIE CERTIFIEE CONFORME A L'ORIGINAL PAR NOUS
NAME / NOM: ROSETTE MUZIGO-MORRISON
SIGNATURE: ... DATE: 16/02/10

Office of the Prosecutor:
Mr. Hassan Bubacar Jallow
Mr. Don Webster
Mr. Saidou N'Dow
Mr. Arif Virani
Mr. Eric Husketh
Ms. Sunkarie Ballah-Conteh
Mr. Takeh Sendze

Counsel for Mr. Joseph Nzirorera:
Mr. Peter Robinson and Mr. Patrick Nimy Mayidika Ngimbi

Counsel for the Co-Accused:
Ms. Dior Diagne Mbaye and Mr. Félix Sow for Mr. Édouard Karemera
Ms. Chantal Hounkpatin and Mr. Frédéric Weyl for Mr. Matthieu Ngirumpatse

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively), is seized of appeals filed by the Prosecution[1] and Joseph Nzirorera[2] on 23 and 24 September 2009, respectively, (collectively "Appeals") against the "Decision on Motion to Prosecute BTH for Providing False Testimony", filed on 10 September 2009.[3] The Prosecution filed its response on 5 October 2009.[4] It filed its appeal brief on 6 October 2009.[5] Following an extension of time granted by the Appeals Chamber,[6] Nzirorera filed his response on 26 October 2009.[7] The Prosecution replied on 30 October 2009.[8]

A. Background

2. Witness BTH, a prisoner at Ruhengeri prison, testified under oath as a Prosecution witness in *The Prosecutor v. Édouard Karemera et al.* case in June 2006.[9] He was recalled in April 2008 at which point he testified under oath that he knowingly lied during his testimony in June 2006 and in other proceedings before the Tribunal.[10] Consequently, on 14 May 2008, the Trial Chamber directed the Registrar to appoint an independent *amicus curiae* ("*Amicus Curiae*") to investigate the alleged false testimony of Witness BTH and to advise on the possible initiation of proceedings for false testimony pursuant to Rule 91(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules").[11]

---

[1] Prosecutor's Notice of Appeal (Rule [*sic*] 77 and 91), filed confidentially on 23 September 2009 ("Prosecution's Notice of Appeal").

[2] Joseph Nzirorera's Appeal from Decision Not to Prosecute Witness BTH for False Testimony, filed confidentially on 24 September 2009 ("Nzirorera's Appeal").

[3] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Motion to Prosecute BTH for Providing False Testimony (Rule 91(C) of the Rules of Procedure and Evidence), filed confidentially on 10 September 2009 ("Impugned Decision").

[4] Prosecutor's Submissions: Joseph Nzirorera's Appeal from Decision Not to Prosecute Witness BTH for False Testimony, filed confidentially on 5 October 2009 ("Prosecution's Response").

[5] Prosecutor's Appeal from the 10 September 2009 "Decision on Motion to Prosecute BTH for Providing False Testimony" (Rule [*sic*] 77 and 91), filed confidentially on 6 October 2009 ("Prosecution's Appeal Brief").

[6] Decision on Joseph Nzirorera's Motion for Extension of Time to File Response Brief, 16 October 2009.

[7] Joseph Nzirorera's Response Brief, filed confidentially 26 October 2009 ("Nzirorera's Response").

[8] Prosecutor's Reply to Joseph Nzirorera's Response Brief on Appeal from the 10 September 2009 "Decision on Motion to Prosecute BTH for Providing False Testimony" (Rule [*sic*] 77 and 91), filed confidentially 30 October 2009 ("Prosecution's Reply").

[9] Impugned Decision, para. 1.

[10] Impugned Decision, para. 1.

[11] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Prosecutor's Confidential Motion to Investigate BTH for False Testimony (Rules 54 and 91(B) of the Rules of Procedure and Evidence), 14 May 2008.

3. On 17 April 2009 the *Amicus Curiae* filed a final report on its investigations.[12] The Amicus Report found that it was beyond reasonable doubt that Witness BTH had given false testimony;[13] however, it did not establish on which particular occasion he did so.[14] It further found that "there is inference of some evidence pointing towards the complicity of relatives of persons being tried at the Tribunal"[15] in procuring the false testimony and also that there were "indications that the Rwandan Office of the Procureur de la Répu[b]lique may have overstepped its professional mandate in sensitizing educating [*sic*] prisoners as to the [*sic*] whether to confess, and this may have affected the process of collecting evidence, as well as the eventual process of testifying before the Trial Chambers."[16] The *Amicus Curiae* was not able to identify anyone who may have procured or induced the false testimony of Witness BTH.[17] The Amicus Report concluded by requesting the Trial Chamber to undertake such action as it deemed appropriate pursuant to Rule 91 of the Rules.[18]

4. On 16 June 2009, the Prosecution filed a motion seeking an order from the Trial Chamber: (i) directing the *Amicus Curiae* to prosecute Witness BTH for willfully providing false testimony, pursuant to Rule 91(C) of the Rules; (ii) seeking clarification from the *Amicus Curiae* in relation to the credibility of certain witnesses interviewed by him; and (iii) directing the *Amicus Curiae* to conduct a further inquiry into witness interference by family members of accused persons before the Tribunal, pursuant to Rule 77(C) of the Rules.[19] Nzirorera supported the Prosecution's Motion and requested that the mandate of the investigation be expanded to include the false testimony, or the procurement of thereof, of all witnesses who testified in the *Karemera et al.* case who were incarcerated at Ruhengeri prison.[20]

5. On 10 September 2009, the Trial Chamber dismissed the Prosecution's Motion in its entirety.[21] It found that ordering the prosecution of Witness BTH was premature,[22] as was expanding the mandate of the *Amicus Curiae* to include all witnesses in the proceedings who were

[12] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Final Report of *Amicus Curiae* of the Investigations into the False Testimony of Prosecution Witness BTH/GFA in *The Prosecutor v. Édouard Karemera et al.* and *The Prosecutor v. Casimir Bizimungu et al.*, filed confidentially on 17 April 2009 ("Amicus Report").
[13] Amicus Report, paras. 118, 126 (p. 38). The Appeals Chamber notes that the paragraphs on page 38 of the Amicus Report are incorrectly numbered and what should be paragraphs 137-141 are in fact numbered paragraphs 126-130.
[14] Amicus Report, para. 119, fn. 14.
[15] Amicus Report, para. 120.
[16] Amicus Report, para. 121.
[17] Amicus Report, para. 122.
[18] Amicus Report, para. 128 (p. 38).
[19] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Prosecutor's Motion Seeking Prosecution of BTH for Providing False Testimony, and Other Relief Related to the Final Report of the *Amicus Curiae*, filed confidentially on 16 June 2009 ("Prosecution's Motion"). *See* Supplementary Submissions to Prosecutor's Motion Seeking Prosecution of BTH for Providing False Testimony, and Other Relief Related to the Final Report of the *Amicus Curiae*, filed confidentially on 24 July 2009.
[20] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Joseph Nzirorera's Response to Motion Relating to Amicus Curiae Report, 21 August 2009, para. 21. *See also ibid*, paras. 7-23.
[21] Impugned Decision, p. 6.

incarcerated in Ruhengeri prison.[23] It further declined to order an investigation into whether relatives of accused persons were in contempt of the Tribunal,[24] and denied the Prosecution's request for clarification regarding the credibility of certain witnesses.[25]

6. In its appeal, the Prosecution requests the Appeals Chamber to reverse in part the Impugned Decision and direct the *Amicus Curiae* to proceed with the prosecution of Witness BTH, pursuant to Rule 91(C)(ii) of the Rules, and to conduct an investigation in relation to third parties, pursuant to Rule 77(C) of the Rules.[26] Nzirorera requests the Appeals Chamber to reverse the Trial Chamber's decision not to initiate the prosecution of Witness BTH for false testimony.[27]

B. Submissions

1. Nzirorera's Appeal

7. Nzirorera submits that the Trial Chamber abused its discretion in finding that it would be premature to order the prosecution of Witness BTH.[28] He argues that the Trial Chamber's reasoning that the determination of issues that fall to be decided by the Trial Chamber in the *Karemera et al.* case would "create a strong possibility of serious prejudice to the *Karemera et al.* trial" is unreasonable.[29] In this respect, he argues that the postponement of the proceedings regarding false testimony "impedes the deterrent value of Rule 91 and allows perjury to go unchecked during the proceedings."[30] He asserts that the Rules envisage that prosecutions take place while the relevant trial is ongoing and not after the judgement in that trial has been rendered.[31] Furthermore, he points to the fact that there have been a number of contempt proceedings before the International Criminal Tribunal for the former Yugoslavia ("ICTY"), pursuant to Rule 77 of the Rules of Procedure and Evidence of the ICTY ("ICTY Rules"), which took place concurrently with ongoing trials.[32]

8. Additionally, Nzirorera submits that the Trial Chamber's reasoning that it was required to determine whether Witness BTH lied when he testified in June 2006 or April 2008 is erroneous.[33] He asserts that the Trial Chamber was only required to determine whether there were "sufficient

[22] Impugned Decision, para. 8.
[23] Impugned Decision, para. 11.
[24] Impugned Decision, paras. 9, 10.
[25] Impugned Decision, para. 12.
[26] Prosecution's Appeal Brief, para. 70.
[27] Nzirorera's Appeal, para. 37.
[28] Nzirorera's Appeal, paras. 13, 14.
[29] Nzirorera's Appeal, paras. 13, 14.
[30] Nzirorera's Appeal, para. 15.
[31] Nzirorera's Appeal, para. 16.
[32] Nzirorera's Appeal, paras. 16-26 (internal citations omitted).
[33] Nzirorera's Appeal, para. 27.

grounds" to proceed against Witness BTH.[34] In any event, he asserts that Trial Chambers regularly make determinations on the merits of cases throughout the proceedings.[35] Finally, Nzirorera submits that the Trial Chamber erred in law in considering that it had to adjudicate the prosecution of Witness BTH without taking into account the possibility of referring the matter to another trial chamber.[36]

9. The Prosecution disputes Nzirorera's claims in relation to the problem of perjury in Nzirorera's case and the Tribunal as a whole.[37] However, the Prosecution takes no position on the relief sought by Nzirorera.[38]

2. Prosecution's Appeal

10. The Prosecution submits that the Trial Chamber erred in finding that the Amicus Report was insufficiently precise to prosecute Witness BTH.[39] It argues that this finding is contradicted by the Trial Chamber's emphasis on the quality of the Amicus Report and its finding that the *Amicus Curiae* fully satisfied his mandate.[40] The Prosecution also argues that the Trial Chamber gave weight to extraneous considerations and failed to take into account relevant material in finding that the Amicus Report was insufficiently precise.[41] It refers to the decision of Trial Chamber II in the *Bizimungu et al.* case which also did not order the prosecution of Witness BTH (Witness GFA in that case) on the basis of the same Amicus Report but suggested that the *Karemera et al.* trial record was a more suitable basis for a prosecution for perjury.[42] The Prosecution argues that the Trial Chamber misdirected itself with regard to the legal question for determination under Rule 91(C) of the Rules, as it is not the sufficiency of a future indictment or the likelihood of success of a future prosecution, but whether there are sufficient grounds to proceed against a person for false testimony.[43]

[34] Nzirorera's Appeal, paras. 27, 28.
[35] Nzirorera's Appeal, para. 29, citing as examples decisions rendered under Rule 98 *bis* of the Rules and decisions on the relevance and necessity of rebuttal evidence.
[36] Nzirorera's Appeal, paras. 31-35.
[37] Prosecution's Response, para. 1.
[38] Prosecution's Response, para. 1.
[39] Prosecution's Notice of Appeal, paras. 2-4; Prosecution's Appeal Brief, paras. 13-17.
[40] Prosecution's Appeal Brief, para. 15.
[41] Prosecution's Appeal Brief, para. 17.
[42] Prosecution's Appeal Brief, paras. 18-20, *citing The Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Confidential Decision Following the Report of *Amicus Curiae* on Whether There are Sufficient Grounds to Proceed Against Witness GFA for Giving False Testimony, 10 August 2009, para. 18, in which the Trial Chamber in *Bizimungu et al.* noted that Witness BTH (GFA) only testified under oath once in the *Bizimungu et al.* case whereas in the *Karemera et al.* case he had testified twice under oath, giving contradictory testimonies, with the result that one of those occasions must have been false testimony.
[43] Prosecution's Notice of Appeal, para. 6; Prosecution's Appeal Brief, paras. 21-23.

11. The Prosecution also argues that the Trial Chamber erred in finding that Witness BTH's culpability is one of the matters to be determined by it in the *Karemera et al.* proceedings.[44] It posits that while Witness BTH's credibility does fall to the Trial Chamber to assess, whether Witness BTH knowingly and willfully gave false testimony is subject to an independent determination.[45] The Prosecution argues that the Trial Chamber's failure to appreciate and consider this distinction constituted a discernible error undermining the exercise of its discretion.[46] It further argues that the Trial Chamber failed to provide adequate reasons as to why separate proceedings would seriously prejudice the *Karemera et al.* proceedings, which amounted to an error of law.[47] The Prosecution submits that the Trial Chamber erred in declining to order the prosecution of Witness BTH because it was a "secondary contingency" to its duty of ensuring that the exercise of its jurisdiction is not frustrated and its basic judicial functions are safeguarded.[48] It argues that this duty in fact supports the immediate prosecution of Witness BTH for perjury rather than the deferral of prosecution, and that by not promptly employing the mechanism for prosecuting perjury, the Trial Chamber has jeopardized the fair progress of the trial.[49] It also claims that the Trial Chamber's reasoning that the prosecution of Witness BTH was premature failed to give sufficient weight to logistical and temporal limitations of the Tribunal.[50]

12. The Prosecution further submits that the Trial Chamber committed a discernible error in the exercise of its discretion in failing to direct the Registrar to order the *Amicus Curiae* to investigate witness interference, pursuant to Rule 77(C) of the Rules.[51] It submits that the Trial Chamber erred in finding that "separating this issue from the *Karemera et al.* proceedings before hearing all of the evidence creates the risk of serious prejudice."[52] It argues that the Trial Chamber erred in the exercise of its discretion by not ordering the investigation because the test of "reason to believe" is relatively low and had been met.[53] It further argues that the Trial Chamber failed to provide adequate reasons as to why separate proceedings would seriously prejudice the *Karemera et al.* proceedings.[54] It submits that in any event, ensuring the integrity and fairness of the proceedings is

[44] Prosecution's Notice of Appeal, paras. 9-11; Prosecution's Appeal Brief, paras. 24, 25, 30-34.
[45] Prosecution's Notice of Appeal, paras. 9-11; Prosecution's Appeal Brief, paras. 24, 25, 30-34.
[46] Prosecution's Appeal Brief, para. 32.
[47] Prosecution's Appeal Brief, paras. 35-38.
[48] Prosecution's Notice of Appeal, paras. 13, 14; Prosecution's Appeal Brief, paras. 41-54.
[49] Prosecution's Appeal Brief, paras. 42, 43. The Prosecution also argues that the Trial Chamber has a heightened duty to ensure the administration of justice with significant responsibility to the international community and failure to direct the immediate prosecution of Witness BTH limits the Trial Chamber's ability to fulfil this public interest mandate. Prosecution's Appeal Brief, para. 44.
[50] Prosecution's Appeal Brief, paras. 53, 54.
[51] Prosecution's Appeal Brief, paras. 55-69.
[52] Prosecution's Notice of Appeal, para. 18, *citing* Impugned Decision, para. 10. *See also* Prosecution's Appeal Brief, paras. 55-58.
[53] Prosecution's Appeal Brief, paras. 59, 60.
[54] Prosecution's Appeal Brief, para. 61.

not only a matter of ensuring the expeditiousness of the trial but also one of ensuring that witness subornation does not continue.[55]

13. Nzirorera responds that he supports the Prosecution's position that the Trial Chamber erred in deferring a decision on whether to prosecute Witness BTH until after the final judgement has been rendered in the *Karemera et al.* case.[56] He further agrees with the Prosecution that the Trial Chamber erred in declining to order further investigation.[57] However, he differs with the Prosecution in respect of the relief sought.[58] He contends that the investigation should not be limited to allegations against people related to the accused in Arusha but should also focus on whether Rwandan authorities connected with the Ruhengeri prison procured or induced false testimony.[59] Finally, he notes the unusual nature of this appeal in which neither party supports the Impugned Decision and therefore he suggests appointing an *amicus curiae* to defend the Impugned Decision or inviting the Trial Chamber itself to file submissions on the matter.[60]

14. The Prosecution replies that it would be inappropriate to ask the Trial Chamber to file submissions on the Impugned Decision as the Impugned Decision speaks for itself.[61] The Prosecution takes no position on the appointment of *amicus curiae* to provide submissions in favour of the Impugned Decision.[62] The Prosecution opposes Nzirorera's submission that the requested investigation should also focus on Rwandan authorities connected to Ruhengeri prison as it does not arise from the findings of the Amicus Report.[63]

C. Standard of Review

15. The decision to order the investigation or prosecution of alleged false testimony or contempt pursuant to Rules 77 and 91 of the Rules is a discretionary one.[64] Where an appeal is filed against a discretionary decision of a Trial Chamber, the issue on appeal is not whether the decision was correct, in the sense that the Appeals Chamber agrees with it, but rather whether the Trial Chamber has correctly exercised its discretion in rendering the decision.[65] Consequently, the Trial Chamber's

[55] Prosecution's Appeal Brief, paras. 66-69.
[56] Nzirorera's Response, para. 5.
[57] Nzirorera's Response, para. 6.
[58] Nzirorera's Response, para. 7.
[59] Nzirorera's Response, paras. 7, 8.
[60] Nzirorera's Response, paras. 22, 23.
[61] Prosecution's Reply, para. 3.
[62] Prosecution's Reply, para. 4.
[63] Prosecution's Reply, paras. 5-8.
[64] *See The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR.91, Decision on "Joseph Nzirorera's Appeal from Refusal to Investigate [a] Prosecution Witness for False Testimony" and on Motion for Oral Arguments, 22 January 2009, para. 13 ("*Karemera et al.* Decision on Refusal to Investigate a Witness for False Testimony"); *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgement, 27 November 2007, para. 31.
[65] *Karemera et al.* Decision on Refusal to Investigate a Witness for False Testimony, para. 13.

exercise of discretion will only be reversed where it is demonstrated that the Trial Chamber committed a discernible error in rendering the Impugned Decision, based on an incorrect interpretation of the governing law, a patently incorrect conclusion of fact, or where the Impugned Decision was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[66]

D. Discussion

1. Preliminary Matter

16. The Appeals Chamber does not consider it appropriate or necessary to request submissions in support of the Impugned Decision from either the Trial Chamber or an *amicus curiae*, as suggested by Nzirorera.[67] It considers that the Impugned Decision speaks for itself and notes that there is no requirement that there be submissions in support of a decision being challenged.[68]

2. Prosecution of Witness BTH

17. Rule 91(C) of the Rules provides that "[i]f the Chamber considers that there are sufficient grounds to proceed against a person for giving false testimony, the Chamber may [where it had appointed an *amicus curiae* to investigate the matter pursuant to Rule 91(B)(ii) of the Rules], issue an order in lieu of an indictment and direct *amicus curiae* to prosecute the matter." Accordingly, the Trial Chamber's discretion to order prosecution for false testimony is premised on its determination that "sufficient grounds" exist to warrant such prosecution.[69]

18. In the present case, when considering whether to order the prosecution of Witness BTH for false testimony, the Trial Chamber noted that the Amicus Report concluded that "the evidence given by BTH before the Tribunal on different occasions was contradictory in virtually all material respects" and that it was "beyond doubt that he had given false testimony".[70] However, as the Amicus Report did not determine on which occasion Witness BTH gave false testimony or which portions of his evidence were false, the Trial Chamber determined not to initiate proceedings against him. In so deciding, the Trial Chamber considered that, as "any indictment issued against Witness BTH would necessarily have to identify what statements allegedly amounted to perjury",[71]

[66] *Karemera et al.* Decision on Refusal to Investigate a Witness for False Testimony, para. 13.
[67] Nzirorera's Response, paras. 22, 23.
[68] *See, e.g., Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1-A, Judgement on Allegations of Contempt, 25 June 2009, in which Jokić challenged the Judgement but there was no opposing party supporting the Trial Judgement.
[69] *See* Rule 91(C) of the Rules.
[70] Impugned Decision, para. 6, *citing* Amicus Report, para. 118.
[71] Impugned Decision, para. 7.

these were matters which fell to be determined by the Trial Chamber in deliberating upon all the evidence in the case and that ordering separate proceedings would create "a strong possibility of serious prejudice to the *Karemera et al.* proceedings."[72]

19. With respect to the fact that the Amicus Report did not establish when Witness BTH gave false testimony or which portions of his evidence were false, and the Trial Chamber's finding that as a result any indictment would necessarily be insufficiently precise, the Appeals Chamber finds that the Trial Chamber applied the incorrect legal test. The legal test is whether there are "sufficient grounds to proceed against a person for giving false testimony".[73] The ICTY Appeals Chamber in the *Šešelj* case held that "the 'sufficient grounds' standard under Rule 77(D) of the ICTY Rules only requires the Trial Chamber to establish whether the evidence before it gives rise to a *prima facie* case of contempt of the Tribunal and not to make a final finding on whether contempt has been committed".[74] While the *Šešelj* Decision concerned the initiation of contempt proceedings under Rule 77 of the ICTY Rules rather than proceedings for false testimony under Rule 91 of the Rules, the Appeals Chamber observes that the language in the two rules is identical with respect to the initiation of proceedings.[75] It therefore considers that since the "sufficient grounds" requirement, as prescribed in Rule 77 of the ICTY Rules, is satisfied where the evidence establishes a *prima facie* case, the "sufficient grounds" requirement of Rule 91(C) of the Rules is also satisfied by the existence of evidence which establishes a *prima facie* case. Accordingly, the Appeals Chamber finds that the Trial Chamber erred in basing its decision upon the fact that the Amicus Report did not determine when Witness BTH gave false testimony or which portions of his evidence were false because this does not necessarily preclude the existence of a *prima facie* case of false testimony.

20. The Appeals Chamber further finds that the Trial Chamber erred in concluding that ordering the prosecution of Witness BTH was premature because an assessment of his credibility will be undertaken when deliberating on the *Karemera et al.* case and that such prosecution would risk causing serious prejudice to the *Karemera et al.* proceedings. An assessment of a witness's

[72] Impugned Decision, para. 8.
[73] Rule 91(C) of the Rules.
[74] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR77.2, Decision on the Prosecution's Appeal Against the Trial Chamber's Decision of 10 June 2008, 25 July 2008 ("*Šešelj* Decision"), para. 16. *See also Karemera et al.* Decision on Refusal to Investigate a Witness for False Testimony, para. 17; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Order Concerning Allegations Against Milka Maglov, 15 April 2003, p. 3.
[75] Rule 77(D) of the ICTY and Tribunal Rules states: "If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may: (i) in circumstances described in paragraph (C)(i), direct the Prosecutor to prosecute the matter; or (ii) in circumstances described in paragraph (C)(ii) or (iii), issue an order in lieu of an indictment and either direct *amicus curiae* to prosecute the matter or prosecute the matter itself."

credibility is a separate inquiry from that of the prosecution of a witness for false testimony.[76] The Trial Chamber hearing the case in which the witness testified will assess the witness's credibility in its consideration of the evidence adduced in that case.[77] Prosecution for false testimony is a separate trial conducted by a separate chamber of judges, who will consider evidence relating to the allegation of false testimony.[78] Therefore, proceedings for false testimony need not be deferred until the completion of the trial in which the false testimony was allegedly given but can proceed contemporaneously. In this respect, the Appeals Chamber recalls the finding in *Rutaganda* that:

> A credibility determination may be based, but does not necessarily depend, on a judicial finding that a witness has given false testimony. The testimony of a witness may lack credibility even if it does not amount to false testimony within the meaning of Rule 91. Thus, an investigation for false testimony is ancillary to the proceeding and does not impact on the accused's right to a fair trial.[79]

Accordingly, the Appeals Chamber finds that the Trial Chamber erred in holding that ordering the prosecution of Witness BTH prior to the completion of the *Karemera et al.* trial would create a strong possibility of serious prejudice to that trial.

21. The Appeals Chamber finds that, by applying an incorrect legal test in determining whether to initiate proceedings for false testimony and considering that prosecution for false testimony was premature, the Trial Chamber based the Impugned Decision on an incorrect interpretation of the governing law and thus committed a discernible error. Consequently, the Appeals Chamber reverses this part of the Impugned Decision.

3. Investigation of the Relatives of Certain Accused and Rwandan Authorities Connected with the Ruhengeri Prison

22. In relation to alleged contempt of the Tribunal by certain relatives of an accused, the Trial Chamber stated that it was "satisfied that the Amicus Report provides a reason to believe that relatives of accused persons at the Tribunal may be in contempt of the Tribunal."[80] In this respect, it

---

[76] *The Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3-A, Decision on Appeals of the Decisions by Trial Chamber I Rejecting the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witnesses "E" and "CC", 8 June 1998, ("*Rutaganda* Decision"), para. 28.

[77] *See, e.g., Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005, para. 659 ("The Appeals Chamber considers that the Trial Chamber was entitled to exercise discretion in its assessment of evidence presented by all parties to the case, in accordance with the relevant Rules of Procedure and Evidence. Whether all of the Defence or Prosecution witnesses were credible was a matter for the Trial Chamber to decide.")

[78] Rule 91(F) of the Rules stipulates that "[n]o Judge who sat as a member of the Trial Chamber before which the witness appeared shall sit for the trial of the witness for false testimony."

[79] *Rutaganda* Decision, para. 28. The Appeals Chamber further recalls that contempt proceedings have, on a number of occasions, been instituted contemporaneously with the trial in which such contempt was alleged to have arisen. *See, e.g., Prosecutor v. Slobodan Milošević, Contempt Proceedings Against Kosta Bulatović*, Case No. IT-02-54-R77.4, Decision on Contempt of the Tribunal, 13 May 2005; *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1-A, Judgement on Allegations of Contempt, 25 June 2009 (arising from *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, proceedings which are ongoing).

[80] Impugned Decision, para. 9.

noted that the Amicus Report indicated that some of the alleged witness tampering appeared to be unrelated to the *Karemera et al.* case while some of it related to the relatives of an accused in the proceedings.[81] However, it also noted that Rule 77(C) of the Rules grants the Trial Chamber discretion as to whether to order an investigation.[82] In light of the possibility that some of the evidence is relevant to the *Karemera et al.* proceedings, the Trial Chamber concluded that "separating this issue from the *Karemera et al.* proceedings before hearing all of the evidence creates the risk of serious prejudice."[83] Accordingly, the Trial Chamber declined to order an investigation "at this time".[84]

23. The Appeals Chamber considers that the Trial Chamber set out[85] the correct standard for ordering an investigation pursuant to Rule 77 of the Rules, which is "reason to believe that a person may be in contempt of the Tribunal."[86] However, it exercised its discretion not to order an investigation at the present stage of the proceedings on the basis that it creates a risk of "serious prejudice".[87]

24. Likewise, with respect to further investigations into possible contempt by Rwandan authorities connected with the Ruhengeri prison, the Trial Chamber found "the matter to be premature" and that "this issue is an element of Nzirorera's defence case and one which will have to be adjudicated by the Chamber."[88]

25. The Appeals Chamber considers that, similarly to proceedings for false testimony pursuant to Rule 91 of the Rules, discussed above, investigations and proceedings pursuant to Rule 77 of the Rules are independent of the proceedings out of which they arise and can be undertaken contemporaneously with those proceedings.[89] As separate proceedings, they give rise neither to concerns regarding inconsistent findings, nor to concerns regarding the expeditiousness of the trial. Accordingly, the Appeals Chamber finds that in concluding that such an investigation would create a risk of prejudice to the *Karemera et al.* proceedings, the Trial Chamber abused its discretion. As a consequence of this discernible error, the Appeals Chamber reverses this part of the Impugned Decision.

[81] Impugned Decision, para. 10.
[82] Impugned Decision, para. 9.
[83] Impugned Decision, para. 10.
[84] Impugned Decision, para. 9.
[85] Impugned Decision, para. 9.
[86] Rule 77(C) of the Rules.
[87] Impugned Decision, para. 10.
[88] Impugned Decision, para. 11.
[89] *See, e.g., Prosecutor v. Slobodan Milošević, Contempt Proceedings Against Kosta Bulatović*, Case No. IT-02-54-R77.4, Decision on Contempt of the Tribunal, 13 May 2005; *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1-A, Judgement on Allegations of Contempt, 25 June 2009 (arising from *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, proceedings which are ongoing).

E. Disposition

26. For the aforementioned reasons, the Appeals Chamber, Judge Robinson dissenting:

GRANTS Nzirorera's Appeal in its entirety and the Prosecution's Appeal in part; and

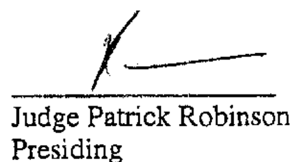
REMANDS the issues of the prosecution of Witness BTH and further investigations of relatives of certain accused and Rwandan authorities connected with Ruhengeri prison to the Trial Chamber so that it can apply the correct legal standards and exercise its discretion accordingly, noting that its scope of action could include initiating proceedings itself, or directing the Prosecution or an *amicus curiae* to investigate further.

Judge Patrick Robinson appends a dissenting opinion.

Done in English and French, the English text being authoritative.

Done this 16th day of February 2010,
at The Hague,
The Netherlands.

[Seal of the Tribunal]



Judge Patrick Robinson
Presiding

DISSENTING OPINION OF JUDGE PATRICK ROBINSON

1. In this appeal, the central question is whether the Trial Chamber properly exercised its discretion under Rule 91(C) and Rule 77(C) of the Rules of Procedure and Evidence of the Tribunal ("Rules"). In this Opinion, I respectfully explain why I differ from the view of the Majority that the Trial Chamber abused its discretion.

2. At the heart of the matter is a difference in approach by common law jurisdictions and civil law jurisdictions to the treatment of contempt, and the related issue of the credibility of a witness in an ongoing trial, and how these positions have been reconciled in what might be called a characteristically unique Tribunal style.

3. It has been said that the Tribunal's legal system is neither common law adversarial nor civil law inquisitorial; it is *sui generis*; [1] and that the driving force in applying the Tribunal's law is the interpretative function.[2] This is especially true in the application of the Rules which, like the Statute, are to be interpreted like a treaty.[3] The application of Article 31 of the Vienna Convention on the Law of Treaties requires that the Statute and the Rules are interpreted in a manner that gives due weight to the principles of good faith, textuality, contextuality and teleology. These instruments must therefore be interpreted having regard to the context in which the Tribunal is placed in the prosecution of persons for serious violations of international humanitarian law, and in light of the fundamental object and purpose of the Tribunal to ensure that trials are fair and expeditious. This is not a novel proposition but it warrants emphasis in the particular circumstances of this case.

4. It might be added that the duty to ensure that trials are fair and expeditious has absolutely nothing to do with the Completion Strategy set by the Security Council in 2003[4]; rather, it has

---

[1] *See* P. Robinson, "Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia", EJIL (2000), Vol. II, No. 3, 579-580 and 588.

[2] *See* P. Robinson, "Fair but Expeditious Trials", in H. Abtahi and G. Boas (eds.), *The Dynamics of International Criminal Justice*, pp. 169-192 (2006), Koninklijke Brill NV EJIL (2000), Vol. II, No. 3, 174-175.

[3] *See* P. Robinson, "Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia", EJIL (2000), Vol. II, No. 3, 570-573 and 589 (citing several authorities from the case law of both Tribunals).

[4] In 2003 the Security Council adopted Resolution 1503, in which it required the Tribunals to complete all investigations by the end of 2004, trials by the end of 2008, and all work by the end of 2010. *See* Resolution 1503 (2003) S/RES/1503 (2003), adopted by the Security Council at the 4817th meeting on 28 August 2003. The point that the duty to ensure a fair and expeditious trial has nothing to do with the Completion Strategy is made because several motions by aggrieved persons allege that particular measures adopted by a Trial Chamber have been adopted because of the Completion Strategy and in fact breach the principle of fairness to the accused. *See Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, *Urgent* Appeal of Trial Chamber's Decision on Length of Defence Case, 6 July 2005, paras 6-7; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-PT, Decision on Motion for Joinder, 21 September 2005, Separate Opinion of Judge Patrick Robinson; *Prosecutor v. Jardranko Prlić et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case, 6 February 2007, para. 13; *Augustin Ngirabatware v. The Prosecutor*, Case No. ICTR-99-54-A, Decision on Augustin

everything to do with the discharge of the statutory mandate in Article 19(1) of the Statute to ensure that a trial is fair and expeditious. Moreover, while a trial may be expeditious without being fair, it cannot be fair without being expeditious, since expeditiousness is an element of fairness. The requirement to ensure a fair and expeditious trial predates the Completion Strategy, not only because it is a requirement of the Statute of the Tribunal adopted in 1993 but more importantly because it is a requirement of customary international law.

5. The general practice in the vast majority of common law jurisdictions is to deal in a trial itself with an issue of contempt such as the one that has arisen in this case, calling into question the credibility of a witness. On the other hand, the general practice in most civil law jurisdictions is to have such an issue dealt with by another court. But we must see how the Tribunal has sought to deal with contempt and its relative, the offence of false testimony.

6. I set out below the relevant provisions in the Rules. Rule 91(C) provides that:

> If the Chamber considers that there are sufficient grounds to proceed against a person for false testimony, the Chamber may:
>
> (i) in circumstances described in paragraph (B)(i), direct the Prosecutor to prosecute the matter; or
>
> (ii) in circumstances described in paragraph (B)(ii), issue an order in lieu of an indictment and direct *amicus curiae* to prosecute the matter.

Rule 77(C) provides that:

> When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may:
>
> (i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt;
>
> (ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or
>
> (iii) initiate proceedings itself.

Rule 77(D) provides that:

> If the Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may:

Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009, para. 13; *Callixte Nzabonimana v. The Prosecutor*, Case No. ICTR-98-44-D, Nzabonimana's Reply to Prosecutor's Response to the Motion for Leave to Appeal an *Ultra Vires* Referral to the President in the Form of an Interoffice Memo from a Legal Officer, Trial Chamber III, Dated 18 November 2009 *(Article 20, 28 of the Statute and Rule 7 bis of the Rules of Procedure and Evidence)*, 14 December 2009, para. 8.

(i) in circumstances described in paragraph (C)(i), direct the Prosecutor to prosecute the matter; or

(ii) in circumstances described in paragraph (C)(ii) or (iii), issue an order in lieu of an indictment and either direct *amicus curiae* to prosecute the matter or prosecute the matter itself.

It is significant that both Rules are completely silent as to when the prosecution, i.e., the trial for false testimony under Rule 91(C) and contempt under Rule 77(D), is to take place; in particular, the Rules give no direction as to whether these trials are to take place during or after the trial for core crimes to which the allegations of false testimony and contempt relate. The absence of any such direction in these Rules means that the Trial Chamber is left with a complete discretion not only to order a prosecution or direct an investigation but also as to when a trial for false testimony or contempt should take place.

7. Allegations of false testimony and contempt may arise either before, during or after a trial. The factors that a Trial Chamber may properly take into account in the exercise of its discretion under these Rules will differ depending on when the allegations arise. In particular, what constitutes an appropriate factor must be very carefully considered when the allegations occur during ongoing proceedings. It is well known that in both Tribunals the investigation and prosecution of contempt proceedings during a trial for one or more core crimes have delayed and thereby disrupted those trials. This is so well known that it could be characterized as a notorious fact. Thus, during ongoing proceedings, the Trial Chamber will have to weigh and balance its statutory obligation to ensure a fair and expeditious trial against any impact that the investigation into the allegations of contempt and any consequential trial for contempt or false testimony may have on its discharge of that duty. Naturally, when the allegations take place before or after a trial, this concern will be absent.

8. Moreover, if in a trial an allegation is made that a witness, who has already testified or is to testify in the future, has been bribed, that allegation presents a live issue for the Trial Chamber, because whether the allegation is true or not can affect the ultimate issue of guilt or innocence of the accused. What is the Trial Chamber to do in those circumstances? Is it to take an action that would immediately remove the issue from its court or should it not itself have the witness examined and cross-examined in its court so that it can make its own assessment of the witness's credibility, which may be critical to the issue of the accused's guilt or innocence?

9. In determining what course to adopt the Trial Chamber is, in my opinion, perfectly entitled and in fact obliged to take into account its fundamental mandate under Article 1 of the Statute to try persons for serious violations of international humanitarian law, and that contempt, and for that matter, false testimony proceedings, only exist to subserve the broader and more important purpose

of ensuring the integrity of trials for core crimes; in that sense, they are truly ancillary or adjunctive to the core crime proceedings. If, so far from fulfilling that ancillary or adjunctive role, contempt and false testimony proceedings have the potential to disrupt a trial for core crimes, a Trial Chamber is obliged to take this into consideration in the exercise of its discretion under Rules 91(C) and 77(C). For example, the initiation of proceedings for false testimony and contempt during a trial of a core crime may delay that trial for an unduly long time. It is appropriate for a Trial Chamber to interpret these Rules as requiring it to give priority to the trial for core crimes because the Rules are to be interpreted having regard to the context in which the Tribunal is placed by Article 1 of the Statute in the prosecution of serious breaches of international humanitarian law and in light of its duty under Article 19(1) to ensure a fair and expeditious trial. After all, the relative primacy of trials for core crimes in relation to trials for contempt and false testimony is clearly evidenced by the difference in sentence; for the former, the maximum sentence is life imprisonment, while for the latter, the maximum sentence is five years' imprisonment, a fine of USD 10,000, or both.[5]

10. In my view, a Trial Chamber, in deciding whether to initiate proceedings for contempt or false testimony on the one hand, or on the other, to itself test the credibility of the witness through examination and cross-examination, is perfectly entitled to take into account the clear possibility that the initiation of proceedings may delay and consequently disrupt the trial for core crimes, and therefore decide that the better course is to postpone the decision on the initiation of proceedings for contempt or false testimony until after the trial. One additional advantage of that approach is that the allegation of misconduct may be so thoroughly addressed in examination and cross-examination that there is nothing left of it, and there may consequently be no need to initiate proceedings for false testimony or contempt. At the same time, this approach in no way prejudices the initiation of those proceedings subsequently, should it be determined that they are warranted. The approach is one that is win-win. Furthermore, be it noted that this approach, which is similar to that adopted by the Trial Chamber, is not antithetical to an investigation and trial for contempt or false testimony in itself; rather, what it questions is the timing of that investigation or trial. What it says is that a decision on the timing that results in contemporaneous proceedings in relation to the core crime and contempt or false testimony must be carefully weighed since it could adversely impact the fair and expeditious conduct of the trial for core crimes, which is the fundamental task of the Tribunal.

11. With respect, the interpretation given by the Majority to Rules 91(C) and 77(C) is unduly textual in its concentration on the terms "sufficient grounds to proceed against a person for false

[5] *See* Rules 77(G) and 91(G) of the Rules. Note that pursuant to Rules 77(G) and 91(G) of the ICTY Rules, the maximum sentence that may be imposed on a person convicted of false testimony or contempt is seven years of imprisonment, 100,000 Euros, or both.

testimony" and "has reasonable cause to believe" and does not give sufficient weight to the other important facets of the interpretative function that are so essential for their correct understanding and application, i.e., contextuality in terms of the mandate of the Tribunal and teleology in terms of the Tribunal's purpose to ensure a fair and expeditious trial. The weakness in the Majority decision is the over reliance that it places on the bald evidential basis that is set out in the Rule. The various elements in Article 31 of the Vienna Convention on the Law of Treaties constitute a unit, i.e., they should be applied as a whole.[6]

12. With regard to Rule 91(C), the Majority hold that: (a) the Trial Chamber applied an incorrect legal test in determining whether to initiate proceedings against Witness BTH for false testimony, as it based its decision upon the fact that the Amicus Report did not determine when Witness BTH gave false testimony or which portions of his evidence were false; [7] and (b) the Trial Chamber erred in concluding that ordering the prosecution of Witness BTH was premature because an assessment of his credibility will be undertaken when deliberating on the *Karemera et al.* case and that such prosecution could cause prejudice to the *Karemera et al.* proceedings.[8] With regard to (a), this is factually incorrect, since there is nothing in the Impugned Decision that indicates that that aspect of the Amicus Report was part of the Trial Chamber's reasoning in determining whether there were sufficient grounds to initiate proceedings against Witness BTH. Moreover, in determining how the discretionary power is to be exercised, the Trial Chamber is obliged to look not merely at the evidence supporting the allegation but also to take into account its statutory duty to ensure a fair and expeditious trial. The approach of the Majority, which ignores that broader duty, is unduly narrow and constricted. If that approach is followed, it is tantamount to fettering the discretion of the Trial Chamber.

13. It is paragraph 8 of the Impugned Decision that provides the Trial Chamber's reasoning for deciding not to order the prosecution of Witness BTH. I agree with every single word of that paragraph. It reflects an approach that is not only pragmatic but also one that is reasonable and promotes judicial economy. In the first two sentences, the Trial Chamber holds that the issues to be determined in a false testimony trial are also issues that it would have to decide itself. This is perfectly correct, because the Trial Chamber would in any event have to pass on the credibility of Witness BTH – a determination that may be vital to the ultimate question of guilt or innocence. It

[6] *See* Yearbook of the International Law Commission 1966, vol. II, pp 219-220 (stating in relation to draft Article 27 on the Law of Treaties, entitled "General rule of interpretation", that the International Law Commission "intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation [...] the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule.").
[7] *See supra*, paras 19 and 21.
[8] *See supra*, paras 20 and 21.

may be that the Trial Chamber could have been more explicit in its reference to the "serious prejudice" to the *Karemera et al.* proceedings that would result from a trial for false testimony. However, the term "serious prejudice" is nothing but a compendious way of adverting to the notorious fact that false testimony and contempt proceedings running contemporaneously with trials for core crimes have impacted adversely on the latter by delaying them and could have the same consequence in the *Karemera et al.* case. The Trial Chamber then, commendably, observes that false testimony is unacceptable, but further notes that it must be mindful of its fundamental objective under Article 19(1) of the Statute and for that reason must give priority to the trial. It was for these reasons that the Trial Chamber found that the request to order the prosecution of Witness BTH was premature. But it must be observed that this finding was without prejudice to those proceedings being initiated subsequently. Therefore, the purpose of Rule 91, which is to prevent and punish false testimony, would in no way be frustrated by the approach taken by the Trial Chamber.

14. The Majority's strictures in relation to the Trial Chamber's approach to Rule 77(C) are unwarranted. Here, the Trial Chamber declined to exercise its discretion to order an investigation into the alleged contempt even though it said that on the evidence it had reason to believe that persons may be in contempt of the Tribunal. The majority hold that the Trial Chamber abused its discretion in concluding that ordering an investigation into possible contempt committed by certain relatives of an accused or by Rwandan authorities connected with Ruhengeri prison would create a risk of prejudice to the *Karemera et al.* proceedings.[9] The effect of the Appeals Chamber's reasoning is that once a finding is made by a Trial Chamber that there is reason to believe that a person may be in contempt, the discretion to direct the appointment of an *amicus curiae* to investigate can only be exercised one way. In other words in the view of the Majority, "may" means "must".

15. There are, of course, discretionary powers that must be exercised in a particular way; in those cases, the word "may" is properly construed as meaning "must". In some common law jurisdictions, this is called "a power coupled with a duty", and this is most usually the case where the purpose of the discretion is to give effect to a legal right. In *Julius v. Bishop of Oxford*,[10] it was held that:

> "where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the

[9] *See supra*, paras 22-25.

[10] (1880) 5 App Cas 214, as cited in *O'Sullivan v. Department of Health & Social Services and Public Safety*, [2001] NIQB 16.

> Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the court will require it to be exercised."[11]

In the same case, Lord Blackburn held that:

> "Enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right: and if the object of the power is to enable the donee to effectuate a legal right, then it is the *duty* of the donee of the power to exercise the power when those who have the right call upon him to do so."[12]

In *Labour Relations Board of Saskatchewan v. R.*,[13] the Canadian Supreme Court considered a provision which provided that a board "shall have the power" to make various orders. The Court held that:

> "While this language is permissive in form, it imposed [...] a duty upon the Board to exercise this power when called upon to do so by a party interested and having the right to make the application ... Enabling words are always compulsory where they are words to effectuate a legal right."[14]

Re Pentonville Prison Governor, ex p. Narang[15] dealt with the English Fugitive Offenders Act. The relevant section provided that a court "may [...] order the person committed to be discharged from custody", if it appeared to the court that certain circumstances (triviality of the offence, a long passage of time since the commission of the offence, and the accusation not being made in good faith in the interests of justice) would make it unjust or oppressive to return the fugitive.[16]

In the House of Lords, Lord Morris of Borth-y-Gest found that:

> "Does that word "may" leave it open to the court to take any other course? Having concluded that to order the return of the fugitive would be unjust or oppressive, can it really be said that the Divisional Court nevertheless have [sic] a discretion to do that very thing? In my judgement, no such discretion exists. Conversely, if no injustice or oppression has been made to appear, the court have [sic] no alternative but to make the order sought by the requesting government. Not for the first time in statutory construction, the word "may" [...] relating as it does to a man's liberty, has to be treated as equivalent to "shall". [...] If the fugitives fail to satisfy the court as required by the section, the court has no jurisdiction to refuse an order for their return, but if they do satisfy the court it has no alternative but to refuse to make the order "[17].

16. The true test, then, as to whether a discretionary power is coupled with a duty depends on the circumstances of each case; of critical importance is the wording of the provision, whether conditions for the exercise of the discretion are set out, whether the discretion relates to a legal right, all of the above being shorthand for the policy, the purpose of the discretion and the context in which it is to be exercised.

---

[11] *Id.*, p. 225.
[12] Cited in John S. James, *Stroud's Judicial Dictionary of Words and Phrases* (5th edition, Volume 3), 1567, 1568. *See also* the authorities cited by James at 1568-1574 for instances where "may" and other enabling words have been held to impose obligatory duties; discretionary or enabling powers; and where the impact is undetermined.
[13] [1956] S.C.R. 82.
[14] *Id.*, pp 86-87.
[15] [1978] A.C. 247
[16] *Id.*, 271.
[17] *Id.*, 283, 285.

17. There is absolutely nothing in the policy and purpose of the discretionary power in Rules 91(C) and 77(C) and the context in which it is to be exercised that supports the proposition that the word "may" is to be construed as meaning "must". On the other hand, there is everything in the purpose of the Rules and the context in which the discretion is to be exercised during an ongoing trial that supports the conclusion that the word "may" is genuinely discretionary and that the provisions are to be interpreted having regard to the relative importance of trials for core crimes in relation to ancillary trials for false testimony and contempt.

18. The basis for the Trial Chamber's decision not to order an investigation under Rule 77(C) is that the evidence relating to the alleged contempt is evidence that would be relevant to the proceeding for the core crimes, especially in relation to the credibility of Witness BTH's testimony; that contempt proceedings could possibly prejudice the proceeding for the core crimes, and finally that the application was premature. The reasoning of the Trial Chamber in paragraphs 10, 11 and 12 of the Impugned Decision is unassailable. The Majority's reasoning in relation to the discretionary power under Rule 77(C) is open to the same criticism that has been made of its approach to Rule 91(C). When the interpretative function is properly applied to Rule 77(C), and in particular, when the elements of textuality, contextuality and teleology are applied together and not separately, it becomes clear that the exercise of the discretion to direct an investigation into contempt may properly be influenced by factors other than the "reason to believe" element in the chapeau. In particular, the Chamber must be entitled to take account of the impact that contempt proceedings would have on the discharge of its fundamental mandate to ensure a fair and expeditious trial - and in that context, to have regard to the potential that those proceedings would have to delay and hence disrupt the trial.

19. In paragraph 25, the Majority hold that Rule 77 proceedings "are independent of the proceedings out of which they arise and can be undertaken contemporaneously with those proceedings". No one disputes that they can be undertaken contemporaneously with those proceedings. But that is not the issue. The issue is whether a Trial Chamber should allow them to be undertaken contemporaneously with those proceedings if it has a proper basis for concluding that they will delay and disrupt them, especially when the matter for determination, namely the credibility of a witness, is a live issue in the trial for core crimes. In paragraph 25, the Majority then go on to say, "As separate proceedings, they give rise neither to concerns regarding inconsistent findings, nor to concerns regarding the expeditiousness of the trial". With respect, this is a startling conclusion for which no explanation is offered; certainly, it finds no support in the experience of the Tribunal. As far as I am aware, there is no case law in either Tribunal on the question whether a judgement on false testimony or contempt would bind a Trial Chamber in the trial of a core crime where the matter is a live issue. Certainly, from the point of view of

principle and doctrine, the answer is not clear. Moreover, as has been stated, it is a notorious fact that contempt proceedings delay and disrupt trials for core crimes.

20. The case is not being made that in no circumstances should a Trial Chamber take action that results in the initiation of false testimony or contempt proceedings contemporaneously with the trial for core crimes. Each case has to be determined on its own merit, and there is at least one situation in which, arguably, a Trial Chamber should initiate contempt proceedings contemporaneously. That is where the allegation is that because witnesses are being intimidated and threatened with physical violence, they will not attend court. If witnesses do not come to court, even with the use of statements in lieu of live testimony, a trial may be seriously compromised. Where, as in this case, the witness has already attended court and there is nothing to indicate that if recalled, the Witness will not attend,[18] there is absolutely no useful purpose in a Trial Chamber taking action that would result in false testimony or contempt proceedings taking place contemporaneously with the trial of a core crime.

21. In my opinion, it is regrettable that contempt proceedings in both Tribunals have been allowed to morph into a special and discrete labour. They have been allowed to take on a life of their own, disrupting and delaying trials for core crimes for unreasonably long periods when their true role is to be supportive in the discharge of the Tribunal's mandate to try persons for serious violations of international humanitarian law. I share entirely the view of the Trial Chamber that the prosecution of Witness BTH for false testimony was a "secondary contingency", and in my view, contempt proceedings warrant the same characterization.[19]

22. In sum, the decision by the Trial Chamber should not be disturbed because it properly exercised its discretion in deciding whether to initiate proceedings under Rule 91(C) or Rule 77(C). The Trial Chamber sitting in an ongoing trial for core crimes was fully entitled to give priority to that trial over ancillary proceedings relating to false testimony and contempt. It was so entitled because a proper interpretation and application of the Rules required it to take account of the context in which the Tribunal operates as the trier of serious breaches of international humanitarian law and also the purpose of the trial proceedings, which is to ensure a fair and expeditious trial. Respectfully, the Majority view warrants criticism for its unduly narrow, constricted and textual approach to the interpretation of Rules 91(C) and 77(C), while failing to give due weight to contextual and teleological requirements.

[18] In any event, the witness could be subpoenaed.
[19] *See* Impugned Decision, para. 8.

Done in English and French, the English text being authoritative.

Done this 16th day of February 2010,
at The Hague,
The Netherlands.

Judge Patrick Robinson

[Seal of the Tribunal]