

Evidential Collusion

Introduction

This paper will address the problem of evidential collusion in international criminal justice, most notably at the International Criminal Tribunal for Rwanda (ICTR). For the purpose of this paper, collusion is defined as corruption of witness testimony in a concerted manner. It refers to groups or individuals looking to persuade witnesses to give false evidence or dissuade witnesses from giving evidence to a court or tribunal.¹

Witness collusion is one of the greatest threats to any criminal justice system, as it can be the cause of miscarriages of justice, preventing an accused from being convicted even if in fact he is guilty, or convicting an accused on the basis of concocted evidence. These dangers are all the more pronounced in international justice for a variety of reasons.

First, the environment in conflict areas where investigations into international crimes are being conducted is often politicised, with different political and military groups still adverse to each other, even after the end of the overt conflict, wielding power and influence. The individuals subject to these investigations themselves tend to be publicly known figures with supporters at large in the society where the witnesses live. In such a context, it should not come as a surprise that these groups and individuals have a stake in the outcome of international criminal proceedings and thus an interest in incriminating or exculpating accused persons for reasons unrelated to their actual guilt or innocence. Such reasons may include political advantage, and ethnic loyalty or hatred. Therefore the likelihood is that attempts to corrupt the evidence will be more frequent in situations dealt with by an international court than in domestic proceedings in relatively stable democratic jurisdictions.²

Second, in an area affected by conflict it is not difficult to find individuals who have little money and a keen interest in improving their living conditions, if necessary in exchange for false testimony.³ In particular, individuals held in custody in conflict areas without a realistic

¹ Wikipedia defines collusion as “an agreement between two or more parties, sometimes illegal and therefore secretive, to limit open competition by deceiving, misleading, or defrauding others of their legal rights, or to obtain an objective forbidden by law typically by defrauding or gaining an unfair market advantage. See <http://en.wikipedia.org/wiki/Collusion>. The free legal dictionary defines collusion as “[a]n agreement between two or more people to defraud a person of his or her rights or to obtain something that is prohibited by law. A secret arrangement wherein two or more people whose legal interests seemingly conflict conspire to commit Fraud upon another person; a pact between two people to deceive a court with the purpose of obtaining something that they would not be able to get through legitimate judicial channels. See <http://legal-dictionary.thefreedictionary.com/collusion>.”

² See also R. Cryer ‘Witness Tampering and International Criminal Tribunals’ (2014) 27 LJIL 1, 291, at 200.

³ The author cites ample examples of witnesses who have shown to have had financial incentives for providing false testimony in C. Buisman, ‘Delegating Investigations: Lessons to be Learned from the Lubanga Judgment’ (2013) 11 Nw.J.Int’l Hum. Rts. 3, 30, at 37-45, 60-61.

perspective of being released any time soon may be easily persuaded to give false evidence in favour of, or against an accused if such testimony would increase their chances of being released earlier.⁴

Third, given the geographical and cultural gaps between the situation under investigation and the tribunal or court judging it, judges may find it difficult to assess the veracity of claims of witness collusion and to be able to assert any real control over its occurrence.⁵

This paper will provide an overview of the most striking examples of allegations made of witness collusion. It will then review the tools available to ICTR trial chambers to tackle this problem and how efficiently they have made use of these tools. It will look into the question of whether more witnesses should have been prosecuted for false testimony, and more of those who induced them to do so prosecuted for contempt, and the potential disadvantages of such a course of action. It will also suggest methods by which witness collusion can be discovered before they are brought before the ICTR. It concludes by identifying the lessons to be learned from the ICTR experience in dealing with claims of witness collusion.

Most frequent allegations of witness collusion

There have been many claims of witness collusion before the ICTR. A significant number of witnesses recanted their original evidence, alleging concoction not only of that evidence, but also of the evidence of other witnesses. It has often been alleged that this was done directly or indirectly at the instigation of public authorities.⁶ Such claims were made in almost every trial, mostly by prosecution witnesses some of who became defence witnesses following their recantation in favour of the accused. Others claimed interference occurred by persons perceived to be acting on behalf of the Rwandan government to dissuade witnesses from testifying in favour of the accused.⁷

For instance, in Akayesu, an individual of Tutsi ethnicity (and thus from the ethnic group which Jean-Paul Akayesu was alleged to have victimised) came forward after trial to provide a detailed notarized statement to the effect that evidence against Akayesu had been systematically manufactured with the intervention of government agents. The Appeals Chamber however

⁴ C. Tertsakian, *Le Château, The Lives of Prisoners in Rwanda* (Arves Books, 2008), 360-380.

⁵ See also N. Combs, *Fact-Finding without Facts: The Uncertain Foundation of International Criminal Convictions* (2010), Ch 1-5, in particular 131-135.

⁶ See e.g. *Prosecutor v Nyiramasuhuko et al*, Decision on Ntahobali's Motion for an Investigation Relative to False Testimony and Contempt of Court, Case No. ICTR-98-42-T, 7 November 2008 ("Nyiramasuhuko, Decision on Ntahobali's Motion for an Investigation Relative to False Testimony"), para. 4.

⁷ Cryer 'Witness Tampering and International Criminal Tribunals', *supra* note 2, at 195.

declined to consider his testimony in a request for review.⁸ Witnesses in various other trials made similar claims.⁹

Also, persons held in custody in Rwandan prisons appear to be under the assumption that they will be rewarded if they testify against one of the ICTR defendants, and punished if they testify in their defence.¹⁰ To give an example, in Kajelijeli, a death row inmate testified that a Rwandan prosecutor threatened him and his family with adverse consequences if he were to testify in the defence of a former Rwandan Mayor and promised his death sentence would be commuted if he did not testify.¹¹

In light of the research in Rwandan prisons carried out by a human rights researcher, Tertsakian, it is not surprising that the prisoners may be desperate to change their situation. Some of them have been imprisoned for many years without ever having seen a case file.¹² Unless their conditions have significantly improved since this research was carried out, prisoners have very limited rights and time with their families. There appears to have been strong encouragement from the authorities for prisoners to confess and incriminate others.¹³

Other witnesses have claimed that civil society groups instigated and sometimes bribed them to give false testimony against the accused.¹⁴ Some witnesses have gone even further and claimed they were threatened when they refused to do so.¹⁵ Professor Reyntjens, the noted Belgian scholar and jurist testified to this effect in the case of Kanyabashi (Butare).¹⁶

Though not as frequent, claims of concoction on the defence side have also been made. For instance, in Ngirabatware, allegations of threats and attempted bribes of prosecution witnesses were made against a defence investigator and resource person,¹⁷ as well as other persons

⁸ *Prosecutor v Akayesu*, Arret (Requete Aux Fins de Renvoi De L'affaire Devant La Chambre de Premiere Instance I), Case No. ICTR-96-4-A, 16 May 2001.

⁹ See e.g. *Prosecutor v. Nyiramasuhuko et al.*, Judgement and Sentence (“Butare Judgment”), Case No. ICTR-98-42-T, 24 June 2011, paras. 246-384, 1671-1673.

¹⁰ *Ibid*, paras. 249, 320. See also the testimony of Professor Reyntjens on behalf of Mr. Kanyabashi, *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, T. 2 October 2007, p. 44; and *Prosecutor v. Karemera et al*, ICTR-98-44-T, T 10, 14, 15, 16, 17 April 2008. See further Combs, *Fact-Finding Without Facts*, *supra* note 5, 136-137.

¹¹ *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Decision on Defence Motion to Hold the First Deputy Prosecutor of Rwanda in Contempt of the Tribunal, 28 November 2003.

¹² Tertsakian, *Le Château*, *supra* note 4.

¹³ *Ibid*. See also Butare Judgment, *supra* note 9, paras. 249, 320, as well as Reyntjens’ testimony in the Butare trial, *supra* note 10, T. 2 October 2007, p. 44.

¹⁴ *Nyiramasuhuko*, Decision on Ntahobali’s Motion for an Investigation Relative to False Testimony *supra* note 6, para. 4; Butare Judgment, *supra* note 9, paras. 247-248, 283-290. See also Combs, *Fact-Finding Without Facts*, *supra* note 5, at 155-157.

¹⁵ See e.g. *Prosecutor v. Nahimana et al*, Case No. ICTR-99-52-T, Transcript of 13 March 2003, at 61; *Prosecutor v. Niyitegeka*, Judgment, Case No. ICTR-96-14-T, 16 May 2003, para. 222; *Prosecutor v. Nyiramasuhuko et al*, Judgement and Sentence, Case No. ICTR-98-42-T, 24 June 2011, paras. 334-338.

¹⁵ See e.g. *Prosecutor v. Seromba*, Judgment, Case No. ICTR-2001-66- I, 13 December 2006, para. 73.

¹⁶ Butare Judgment, *supra* note 9, paras. 316-318; Reyntjens’ testimony in the Butare trial, *supra* note 10, T. 24 September 2007, pp. 40-41.

¹⁷ *Prosecutor v Ngirabatware*, Decision on Allegations of Contempt, Case No. ICTR-99-54-T, 21 February 2013, para. 14.

perceived as acting on behalf of the accused,¹⁸ or from the witness's community.¹⁹ Further, it has often been concluded that an alibi defence involving several defence witnesses was contrived and "too neatly tailored".²⁰ But this conclusion never had consequences for any of the witnesses who, if it were true, would then have provided false testimony. Issues of alibi have been treated as a matter of credibility assessment rather than an issue of perjury and conclusions often based, in part, on the fact that a notice was given late.²¹

Professors Guichaoua and Reyntjens have both made the point that the credibility of both prosecution and defence witnesses is in dispute because they are frequently identified and prepared by either the former or present Rwandan authorities.²² Guichaoua's research suggests that "[b]oth the associations of survivors and the network of former authorities, supporting prosecution or defence respectively, had established a kind of subcontracting network for the preparation of witnesses who came to the tribunal".²³

Tribunal's Response

The ICTR Trial and Appeal Chambers have recognised the danger that false testimony might be given before the tribunal, as well as the possibility of interference with the testimony of other witnesses who may appear before the Court. Such practices have been stated to be unacceptable, "both for the impact that they have on the trial as well as the impact that they have on the Tribunal's mandate to seek justice and establish the truth".²⁴ Both the giving of false testimony under solemn declaration and contempt of the Tribunal have been described "as very grave offences, as they constitute a direct challenge to the integrity of the trial process."²⁵ Whilst recognising that all perjury is serious, the Tribunal has taken the position that "the most serious category is where the perjured evidence is being given to lead to the conviction of an innocent person and the second most serious category is where [...] the perjured evidence is given in the

¹⁸ *Prosecutor v Ngirabatware*, Decision on Prosecution Oral Motion for Amendment of the Chamber's Decision on Allegations of Contempt, Case No. ICTR-99-54-T, 6 July 2010.

¹⁹ *Prosecutor v Ngirabatware*, Decision on Prosecution Oral Motion for Rule 77 Investigation Related to Witness ANAF, Case No. ICTR-99-54-T, 30 October 2009.

²⁰ *Prosecutor v Kanyarukiga*, Judgement and Sentence, Case No. ICTR-2002-78-T, 1 November 2010, paras. 124-25; *Kanyarukiga v Prosecutor*, AC Judgement, Case No. ICTR-02-78-A, 8 May 2012, paras. 101-102, 109, 126; *Prosecutor v Nchamihigo*, Judgement and Sentence, Case No. ICTR-01-63-T, 12 November 2008, para. 20.

²¹ See e.g. *Prosecutor v Ngirabatware*, Judgement and Sentence, Case No. ICTR-99-54-T, 20 December 2012, para. 696.

²² Butare Judgment, *supra* note 9, paras. 317, 342. Professor Guichaoua is a professor of Sociology at the University of Lille, and well known expert on the Rwandan genocide, whom the Prosecution itself employed to write a voluminous report to serve as background for the Judges at the ICTR.

²³ The Tribunal for Rwanda: from Crisis to Failure? Cited in Butare Judgment, *supra* note 9, para. 342.

²⁴ *Nyiramasuhuko*, Decision on Ntahobali's Motion for an Investigation Relative to False Testimony, *supra* note 6, para. 21; *Kamuhanda v. the Prosecutor*, Appeals Hearing, Transcript, 19 May 2006.

²⁵ *Prosecutor v GAA*, Judgement and Sentence, Case No. ICTR-07-90-R77-I, 4 December 2007 ("GAA Judgement"), para. 10.

hope of procuring the acquittal of a guilty person.”²⁶ The culpability of a person who induces false testimony, in particular when done on a large scale, is perceived as greater than that of the person who gives false testimony.²⁷

The principal question then is how to tackle this problem. The judges can do two things. They can rely on Rule 91 and order an investigation, and eventually the prosecution of persons who provide false testimony. Alternatively or additionally, they can themselves initiate contempt proceedings pursuant to Rule 77 and prosecute those who induce false testimony.

Rule 91

On the basis of Rule 91(B)(i) of the Rules of Procedure and Evidence, a chamber can direct the Prosecutor to conduct an investigation into a witness’s testimony if it has strong grounds for believing he or she knowingly and wilfully testified falsely. An investigation can be ordered at the chamber’s own initiative or at the request of a party. If the investigation is requested by a party, that party has the onus to establish strong grounds that a witness’s declaration under oath was false, and the witness was aware of its falsehood at the time of making it, and had the wilful intent to mislead the tribunal or cause harm by providing false information.²⁸ Both an affirmation of a false fact or a negation of a true fact may qualify as a false declaration.²⁹

If the chamber considers there are sufficient grounds to proceed, giving due consideration to the above factors, it may direct the Prosecutor to prosecute the witness for false testimony (Rule 91(C)(i)). It will do so only if the allegedly false statement relates to a material issue in the case and has a potential bearing on the chamber’s ultimate finding.³⁰ In the event there is a conflict of

²⁶ GAA Judgement, *ibid*, para. 10. This standpoint goes further than the position taken, for instance, by A. Trotter who states: ‘The manipulation of defense witnesses is equally incapacitating for justice, and also calls for appropriate security measures’. See A. Trotter, *Witness Intimidation in International Trials: Balancing the Need for Protection against the Rights of the Accused*, (2012) 44 *The Geo. Wash. Int’l L. Rev.* 521, at 525.

²⁷ GAA Judgement, *ibid*, para. 11.

²⁸ *Prosecutor v Karemera et al*, Decision on Defence Motion for Investigation of Prosecution Witness Ahmed Mbonkiza for False Testimony, Case No. ICTR-98-44-T, 29 December 2006 (“*Karemera* Decision on Prosecution Witness Mbonkiza”), para. 6; *Prosecutor v Bagosora et al*, Decision on Defence Request for an Investigation into Alleged False Testimony of Witness DO, Case No. ICTR-98-41-T, 3 October 2003 (“*Bagosora* Decision concerning Witness DO”), paras. 8-9; *Prosecutor v Akayesu*, Decision on the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness “R”, Case No. ICTR-96-4-T, 9 March 1998 (“*Akayesu* Decision on False Testimony”); *Prosecutor v Bizimungu et al.*, Decision on Defence motion seeking the appointment of Amicus Curiae to investigate possible false testimonies by Witnesses GFA, GAP AND GKB, Case No. ICTR-99-50-T, 23 July 2008 (“*Bizimungu* Decision concerning Witnesses GFA, GAP and GKB”), para. 6.

²⁹ *Bizimungu* Decision concerning Witnesses GFA, GAP and GKB, *ibid*, para. 5; *Akayesu* Decision on False Testimony, *ibid*, p. 3.

³⁰ For instance, falsely denying a prior meeting with the prosecution does not concern a matter material to the case. See *Bagosora* Decision concerning Witness DO, *supra* note 28, para. 11. See also *Prosecutor v Karemera et al*, Decision on Joseph Nzirorera’s Motions to Appoint an Amicus Curiae to Investigate GAP for False Testimony and to Appoint an Amicus Curiae to Investigate Prosecution Witness BDW for False Testimony, Case No. ICTR-98-44-T, 6 April 2010 (“*Karemera* Decision on GAP and BDW for False Testimony”), para. 7.

interest with the Prosecutor,³¹ the chamber can 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 to initiate proceedings against the witness for false testimony (Rule 91(B)(ii)).³² If sufficient grounds exist, considering similar factors as under Rule 91(C)(i),³³ the chamber may issue an order directing the *amicus curiae* to prosecute the witness (Rule 91(C)(ii)).

Nobody other than a person who provided false information under oath can be prosecuted under Rule 91. However, the investigation under Rule 91 may focus on whether others induced the false testimony, and if so who.³⁴ Thus, the scope of an investigation under Rule 91 includes questions, such as whether threats, payments or inducements were offered to the person who testified falsely.³⁵ But Rule 91 does not allow an inquiry into the conduct of persons if such is not specifically connected to the testimony of the witness being investigated.³⁶ On that basis, in the Butare trial, the chamber refused to order an investigation into the alleged inducement by certain individuals of unidentified witnesses or the general allegation that Rwandan authorities had threatened and, or incited such other witnesses, even though these allegations affected the same case.³⁷ While the scope of an investigation under Rule 91 includes reviewing the role of those who induced identified witnesses to testify falsely, to prosecute such persons chambers will rely on Rule 77 or their inherent discretion to prosecute such persons for contempt.³⁸

Rule 77

Rule 77 makes it an explicit offense to knowingly and wilfully interfere with the Tribunal's administration of justice, including the disclosure of "information relating to those proceedings

³¹ For instance, when the Prosecutor has pressed for charges of a recanting prosecution witness (see *Prosecutor v Karemera et al*, Decision on Remand Following Appeal Chamber Decision of 16 February 2010, Case No. ICTR-98-44-T, 18 May 2010, para. 6); or where a witness alleges that prosecution authorities had procured his false testimony (see *Prosecutor v. Karemera et al.*, Decision on Prosecutor's Confidential Motion Pursuant to Rules 54 and 91(B) to Investigate BTH for False Testimony, Case No, ICTR-98-44-T, 14 May 2008 ("Karemera Decision to Investigate Witness BTH"), para. 6); or occasionally on the mere ground that the suspect was a prosecution witness (see *Nyiramasuhuko*, Decision on Ntahobali's Motion relative to False Testimony, *supra* note 6, par. 27).

³² *Bizimungu* Decision concerning Witnesses GFA, GAP and GKB, *supra* note 28, para. 4; *Nyiramasuhuko*, *ibid*, para. 19.

³³ *Karemera* Decision on GAP and BDW for False Testimony, *supra* note 30, para. 5; *Bizimungu*, *ibid*, para. 6; *Prosecutor v Muhimana*, Decision on the Defence Motion to Appoint an Amicus Curiae in Proceedings Against Investigator Tony Lucassen for False Testimony, Case No. ICTR-95-1B-T, 6 May 2004.

³⁴ *Karemera* Decision to Investigate Witness BTH, *supra* note 31, para. 7; *Nyiramasuhuko* Decision on Ntahobali's Motion relative to False Testimony and Contempt of Court, *supra* note 6, para. 24.

³⁵ *Nyiramasuhuko* *ibid*, para. 11.

³⁶ *Nyiramasuhuko* *ibid*, para. 25; *Karemera* Decision to Investigate Witness BTH, *supra* note 31, para. 7.

³⁷ *Nyiramasuhuko* *ibid*, para. 25.

³⁸ *Prosecutor v Nshogoza*, Decision on Defence Preliminary Challenge to Prosecutor's Jurisdiction and Subsidiary Motion to Dismiss the Indictment, Case No. ICTR-07-91-PT, 17 December 2008, para. 20. For further details on the chamber's inherent jurisdiction to prosecute individuals for contempt, see Allison Turner, 'Contempt before the ad hoc Tribunals. A discussion of Rule 77 RPE ICTY/ICTR', in *Rome Statute of the International Criminal Court (Art. 70) in Law Annotated International Criminal Law and Procedure* (Larcier Law Annotated, Brussels, Belgium, 1 May 2013), pp 358-359.

in knowing violation of an order of a Chamber” (Rule 77(A)(ii); to threaten, intimidate, cause any injury or offer a bribe to, or otherwise interfere with, “a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness” (Rule 77(A)(iv)); or to threaten, intimidate, offer a bribe to, or otherwise seek to coerce “any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber” (Rule 77(A)(v)). Any incitement or attempt to commit such an offense is similarly punishable as contempt (Rule 77(B)).

Pursuant to Rule 77(C), 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.

If the chamber considers that there are sufficient grounds to proceed against a person for contempt, the chamber may either direct the Prosecutor to prosecute this person (Rule 77(D)(i)) or, if an *amicus curiae* was appointed, issue an order directing the *amicus curiae* to prosecute the person (Rule 77(D)(ii)) or, alternatively, prosecute the person itself (Rule 77(D)(iii)). Contempt investigations may be ordered at the chamber’s own initiative or on the request of a party, in which case the party must show that the alleged contemnor acted with the requisite specific intent for contempt.³⁹ Similarly to Rule 91, the interference with the Tribunal’s administration of justice must be conducted “knowingly and wilfully”, thus with wilful intent to do so.⁴⁰ Such intent is proven where the evidence demonstrates that the alleged contemnor willingly and knowingly performed one of the acts described under Rule 77(A), or any other act deemed by the chamber to interfere with the administration of justice.⁴¹ The Appeals Chamber has held that any violation of a chamber’s order interferes with the administration of justice.⁴² Accordingly, “any knowing and wilful conduct in violation of a Chamber’s order meets the requisite *mens rea* for contempt, that is, it is committed with the requisite intent to interfere with the administration of

³⁹ *Prosecutor v Nchamihigo*, Decision on Defence Motion on Contempt of Court and Reconsideration of Protective Measures for Defence Witnesses, Case No. ICTR-2001-63-T, 9 August 2007, para. 9.

⁴⁰ *Prosecutor v Karemera et al*, Decision on Defence Motions for Appointment of Amicus Curiae, Case No. ICTR-98-44-T, 26 September 2007, para. 8; *Prosecutor v Rukundo*, Decision on the Haguma Report, Case No. ICTR-2001-70-T, 14 December 2007, para. 14.

⁴¹ The list of acts under Rule 77(A) is not exhaustive.

⁴² *Prosecutor v. Jović*, AC Judgement, IT-95-14 & 14/2/R77-A, 15 March 2007, para. 30.

justice.”⁴³ There is no “gravity threshold”; rather, “any deliberate (knowing and wilful) conduct that interferes with the administration of justice is sufficiently serious to be punished as contempt”.⁴⁴ No “additional proof of harm to the Tribunal’s administration of justice” is required.⁴⁵ It is not any interference with witnesses which qualifies as contempt, but only undue interference, which includes “acting in knowing and wilful violation of a witness protection order”, or seeking to intimidate witnesses or induce them to change their testimony.⁴⁶

Unlike an inquiry under Rule 91, requiring ‘strong grounds for believing’ that a witnesses had acted knowingly and wilfully, a Rule 77 inquiry only requires that a chamber ‘has reason to believe’ that the person in question may have acted knowingly and wilfully.⁴⁷ The Appeals Chamber found that these are two materially different standards.⁴⁸ It remains, however, within the chamber’s discretion not to initiate contempt investigations even if a *prima facie* case of contempt has been established.⁴⁹ It may decide not to proceed where the gravity of the alleged contempt is low,⁵⁰ its impact insignificant or where witnesses who were improperly contacted did not feel threatened.⁵¹ However, such considerations are relevant only in connection with the decision whether to initiate proceedings or in sentencing, but not in the determination whether the conduct of the accused amounts to contempt.⁵² And it is not a defence to allege that other persons have engaged in similar conduct without being prosecuted for it.⁵³

Rule 91 standard too high?

The test which a Trial Chamber will apply in deciding whether or not to order an investigation into false testimony is high, arguably too high. That is also Zahar’s view, who defined it as “an almost impossibly high test for a party-initiated Rule 91 inquiry”.⁵⁴

⁴³ *Prosecutor v. Nshogoza*, Judgement, Case No. ICTR-07-91-T, 7 July 2009, para. 179.

⁴⁴ *Ibid.*, para. 174.

⁴⁵ *Prosecutor v. Nshogoza*, AC Judgement, No. ICTR-2007-91-A, 15 March 2010, para. 56.

⁴⁶ *Prosecutor v. Kajelijeli*, Decision on Kajelijeli’s Motion to Hold Members of the Office of the Prosecutor in Contempt of the Tribunal (Rule 77(C)), Case No ICTR-98-44A-T, 15 November 2002, para. 9.

⁴⁷ *Prosecutor v. Karemera et al.* Decision on “Joseph Nzirorera’s Appeal from Refusal to Investigate [a] Prosecution Witness for False Testimony”, Case No. ICTR-98-44-AR.91, 22 January 2009, para. 18.

⁴⁸ *Ibid.*

⁴⁹ *Prosecutor v Nsengimana*, Decision on Prosecution Appeal of Decision Concerning Improper Contact with Prosecution Witnesses, Case No. ICTR-01-69-A, 16 December 2010 (“*Nsengimana* Decision on Prosecution Appeal Concerning Improper Contact”), para. 17; *Nshogoza* Judgement, *supra* note 43, para. 176.

⁵⁰ *Nshogoza v Prosecutor*, Decision on Nshogoza’s Appeal of Decision on Allegations of Contempt by Members of the Prosecution, Case No. ICTR-07-91-AR77, 7 July 2011, paras. 16-20 (“*Nshogoza* Appeal of Decision on Allegations of Contempt by Prosecution”).

⁵¹ *Nsengimana* Decision on Prosecution Appeal Concerning Improper Contact, *supra* note 49, para. 34.

⁵² *Nshogoza* AC Judgement, *supra* note 45, para. 57.

⁵³ *Ibid.*, para. 57.

⁵⁴ A. Zahar, The Problem of False Testimony at the International Criminal Tribunal for Rwanda, in A. Klip and G. Sluiter, (Eds.), *Annotated Leading Cases of International Criminal Tribunals, Vol. 25: International Criminal Tribunal for Rwanda, 2006-2007* (Intersentia, 2010), at 24.

It has indeed proven difficult for parties to demonstrate that strong grounds exist for believing that a witness wilfully and knowingly provided false testimony. The fact that a witness's testimony lacks credibility has been held not necessarily to amount to false testimony under Rule 91 and therefore rarely warrants an investigation.⁵⁵ Nor do discrepancies between a witness's prior statement and his or her testimony,⁵⁶ or between different testimonies of the same witness in different trials before the ICTR necessarily justify an investigation into false testimony.⁵⁷ Indeed, trial chambers have repeatedly affirmed that “[m]ere inconsistencies are not sufficient for an investigation into false testimony, but rather, can be taken into account by the Chamber when assessing the credibility of the witness, and the overall probative value of the evidence given by the witness at trial”.⁵⁸ Contradictory evidence between witnesses is similarly insufficient to demonstrate that one of them intended to deceive the chamber, unless there is more in support of such a conclusion.⁵⁹ Even evidence of the production of forged documents has been held not to be sufficient to justify an investigation.⁶⁰ In one case, the chamber considered that there were insufficient grounds to order an investigation notwithstanding that six defence witnesses contradicted the allegedly false allegations of a prosecution witness, a defence investigator alleged that the witness recanted to him and an expert report indicated that documents submitted by the witness to the chamber may have been falsified.⁶¹ The reason for taking a conservative approach to investigating and eventually prosecuting alleged perjurers was explained by one ICTR judge in that it would discourage witnesses from testifying.⁶² There is, however, nothing to suggest that a tougher approach to perjurers would scare off honest

⁵⁵ *Niyitegeka v Prosecutor*, Decision on Third Request for Review, Case No. ICTR-96-14-R, 23 January 2008, para. 32.

⁵⁶ *Renzaho v Prosecutor*, Decision on Tharcisse Renzaho's Motions for Admission of Additional Evidence and Investigation on Appeal, Case No. ICTR-97-31-A, 27 September 2010, para. 31; *Simba v Prosecutor*, AC Judgement, Case No. ICTR-01-76-A, 28 November 2007, para. 32; *Bizimungu*, Decision concerning Witnesses GFA, GAP and GKB, *supra* note 28, para. 7; *Karemera*, Decision on GAP and BDW for False Testimony, *supra* note 30, para. 4.

⁵⁷ *Prosecutor v Nyiramasuhuko et al*, Decision on Arsene Shalom Ntahobali's Motion to Have Perjury Committed by Prosecution Witness QY Investigated, Case No. ICTR-98-42-T, 23 September 2005.

⁵⁸ *Bizimungu* Decision concerning Witnesses GFA, GAP and GKB, *supra* note 28, para. 7; *Karemera* Decision on Prosecution Witness Mbonnyunkiza, *supra* note 28, para. 7.

⁵⁹ *Karemera*, Decision on GAP and BDW for False Testimony, *supra* note 30, para. 4; *Prosecutor v Bagilishema*, Decision on the Request of the Defence for the Chamber to Direct the Prosecutor to Investigate a Matter with a view to the Preparation and Submission of an Indictment for False Testimony, Case No. ICTR-95-1A-T, 11 July 2000, paras. 6-7; *Bizimungu*, Decision concerning Witnesses GFA, GAP and GKB, *supra* note 28, para. 15; *Nyiramasuhuko* Decision on Ntahobali's Motion relative to False Testimony and Contempt of Court, *supra* note 6, para. 23.

⁶⁰ *Prosecutor v Karemera et al*, Decision on Defence Motions for Appointment of Amicus Curiae, Case No. ICTR-98-44-T, 26 September 2007, para. 9 - submission of forged letters of an accused falsely claiming he authorized Interahamwe to erect roadblocks did not provide strong grounds for believing that witnesses who testified about the letter had any harmful intent or intended to subvert the trial.

⁶¹ *Karemera*, Decision on GAP and BDW for False Testimony, *supra* note 30, paras. 10-14.

⁶² Judge Arrey's intervention at *Tribunal Penal International Pour le Rwanda: Modele ou Contre-Modele pour la Justice Internationale? Le Point de Vue des Acteurs*, Conference held in Geneva on 9, 10, 11 July, 2009, available at <http://genevaconference-tpir.univ-paris1.fr/> (“Geneva ICTR Conference”).

witnesses, who have nothing to fear from such an approach. One has to trust the judges to be able to distinguish a confused but honest witness from a lying witness. Judges are trusted to make such determinations at the end of the trial. Logic suggests they should be able to make such a distinction also at an earlier stage.

Even if some honest witnesses would be unwilling to testify due to fear of prosecution, it is a price worth paying for conveying a message that if persons seek to twist the evidence, there will be consequences. As Klip has pointed out “[p]erjury hinders the course of justice and might even lead to miscarriages of justice.”⁶³ The only way to avoid this is by reacting strongly and consistently to signals that the tribunal cannot rely on the honesty of those giving evidence. According to Klip, “[w]henver this trust is abused it deserves a reaction.”⁶⁴

Thus, there should come a point where contradictions and inconsistencies in the witness’s own testimony or by comparison with the testimony of other witnesses are such that, at the very least, an investigation into the matter is warranted. An investigation may shed light on whether and, if so, why false information was provided under oath. Such an investigation may shed light on collusion of evidence in a concerted manner. Alternatively, the investigation may suggest that there are insufficient indications that false evidence was provided, but then at least the judges are better informed. Unfortunately, as it stands now, no inconsistency or discrepancy appears to be considered significant enough to justify an investigation under Rule 91.

Understandably, trial chambers are reluctant to set the standard too low and make credibility determinations of witnesses before the final deliberation, unless absolutely necessary. Issues affecting a witness’s credibility are also rarely dealt with in response to ‘half time’ submissions based on a Rule 98*bis* application, unless a witness is incapable of belief.⁶⁵ But one of the problems of delaying the Rule 91 assessment until the end of trial is that, at that stage, the parties have little interest in pursuing the matter under Rule 91 because there is nothing left to gain from it, allowing lying witnesses to escape from prosecution.⁶⁶ This is troublesome because extensive lies on significant issues have gone without sanction or disapproval. Consistent investigations and prosecutions of lying witnesses or those who incite others to lie would appear to be the most effective manner to prevent future potential perjurers from doing the same.

⁶³ A. Klip, ‘Commentary on Decisions Relating to the False Testimony of Dragan Opacic’, Annotated Leading Cases of International Criminal Tribunals, Vol. I: The International Criminal Tribunal for the Former Yugoslavia 1993-1998, Intersentia 1999, p. 214.

⁶⁴ Ibid.

⁶⁵ *Prosecutor v. Jelusic*, AC Judgement, IT-95-10-A, 5 July 2001, para. 55.

⁶⁶ Zahar, The Problem of False Testimony at the International Criminal Tribunal for Rwanda, *supra* note 54, at 26.

Even more troubling however is the fact that recanting witnesses are, for now, the only ones who run a risk of being investigated, and potentially prosecuted for perjury.⁶⁷ This may prevent them from recanting even if their initial statement was false. In other words, where a witness has been induced to make a false statement in advance of the trial, they are better served by sticking to those lies for ever thereafter rather than by admitting their initial falsity and indicating a willingness, at a later stage, to tell the truth. This is obviously counter-productive to the Tribunal's mandate to ascertain the truth. Indeed, defence counsel for Joseph Kanyabashi had a valid point when he argued that such an approach risks discouraging, in the future, "those who had given false testimony from coming forward to rectify the situation before the Chamber and to ask for a pardon".⁶⁸ If the tribunal is genuinely interested in the truth, then it should encourage rather than discourage witnesses to come forward and correct earlier falsities. Even if complete immunity from prosecution could not be promised, then at least such confessions should be strong mitigation, in particular where the confession is the only reason why the crime of perjury has been discovered.

Double Standards?

Over the years, inquiries under Rule 91 and, or Rule 77 have increased. But rarely do such inquiries lead to actual prosecutions. The 'reason to believe' standard under Rule 77 is not as high as the Rule 91 standard and chambers are less reluctant to order an investigation into alleged contempt than false testimony. However, such investigations are mostly limited to alleged violations of court's orders and seldom lead to prosecutions. Given the wide discretion chambers enjoy under Rule 77 to decide whether an investigation is warranted in a specific case, a legitimate question arises as to whether this discretion is always exercised fairly and without prejudice to either party. In the Ngirabatware case, for instance, the chamber issued an order in lieu of an indictment, charging a defence investigator and a resource person with contempt by threatening, intimidating and bribing witnesses, noting that "the *prima facie* standard is a relatively low burden which requires the Chamber to take the evidence adduced in support of the

⁶⁷ See, for instance, *Bizimungu*, Decision concerning Witnesses GFA, GAP AND GKB, *supra* note 28, para. 15; *Prosecutor v Rukundo*, Decision on the Motions Relating to the Scheduled Appearances of Witness BLP and the Defence Investigator, Case No. ICTR-2001-70-T, 4 July 2007; *Prosecutor v Nyiramasuhuko et al*, Decision on Ntahobali's Motion for an Investigation into False Testimony and Kanyabashi's Motion for an Investigation into Contempt of Court Relative to Prosecution Witnesses QY and SJ, Case No. ICTR-98-42-T, 19 March 2009; *Prosecutor v Ndindiliyimana et al*, Decision on Ndindiliyimana's Motion Requesting a Remedy for Possible Witness Recantation, Case No. ICTR-00-56-T, 4 August 2009); *Prosecutor v Bizimungu et al*, Decision on Jerome-Clement Bicamumpaka's Motion for the Recall of Witness GAP, Case No. ICTR-99-50-T, 5 March 2009, para. 27.

⁶⁸ *Nyiramasuhuko* Decision on Ntahobali's Motion relative to False Testimony and Contempt of Court, *supra* note 6, para. 15.

allegations as true”.⁶⁹ This order was, however, overturned by the single judge of the Mechanism for International Criminal Tribunals (“MICT”) who determined that the evidence, when considered together and accepting it as true, could not form a basis upon which to proceed with contempt charges because nearly all the recorded statements were filled with inconsistencies and ambiguity.⁷⁰ The same chamber in *Ngirabatware* had a very different reaction when various defence witnesses testified that they had received offers of payment from one of the prosecution witnesses. In response, one of the judges routinely suggested that the witnesses had invented these claims. At one occasion, he stated: “Please, be honest, be frank, and be concise in your answers to my questions. And so, please, do not beat about the bush. Please, Witness.”⁷¹

It is also interesting to note that the only prosecution that has been carried out was of a witness who allegedly falsely recanted in favour of a convicted person, Jean de Dieu Kamuhanda, before the Appeals Chamber.⁷² The Appeals Chamber ordered an investigation into the matter.⁷³ The witness was arrested by the Rwandan authorities to whom he had given a statement on 14 June 2007 that his recantation in favour of Kamuhanda was false.⁷⁴ He was subsequently transferred to the ICTR where he pleaded guilty to giving false testimony before the Appeals Chamber because of inducement by Kamuhanda’s defence investigator, Leonidas Nshogoza, who had allegedly offered him a million Rwandan francs.⁷⁵ The witness was sentenced to nine months imprisonment.⁷⁶

This led to the arrest and trial of Nshogoza. The chamber found that the recanting witness’s account was neither credible nor consistent and was uncorroborated on significant points; they acquitted Nshogoza on all allegations of witness interference and bribery.⁷⁷ The judges also found there was insufficient evidence to conclude that Nshogoza was aware of the falsity of the witness’s recanting statements, or even had reason to know they were false, but they declined to go further and consider whether, in fact, the witness’s recantation was truthful and his initial accusations against Kamuhanda were not, as the defence sought to prove.⁷⁸ Nshogoza was found

⁶⁹ *Prosecutor v Ngirabatware*, Decision on Allegations of Contempt, Case No. ICTR-99-54-T, 21 February 2013, para. 7.

⁷⁰ *In Re. Sebureze and Turinabo*, Decision on Allegations of Contempt of the ICTR, MICT-13-40-R90 & MICT-13-41-R90, 17 July 2013, para. 54. Before rendering this decision on the merits, the Single Judge had held that the order in lieu of an indictment had no legal effect before the MICT in *In Re. Sebureze and Turinabo*, Decision on Deogratias Sebureze and Maximilien Turinabo’s Motions on the Legal Effect of the Contempt Decision and Order issued by the ICTR Trial Chamber, MICT-13-40-R90 & MICT-13-41-R90, 20 March 2013.

⁷¹ *Prosecutor v. Augustin Ngirabatware*, ICTR-99-54-T, T. 22 August 2011, pp. 3-15 (DWAN-13 and DWAN-9).

⁷² *Prosecutor v. GAA* Judgement, *supra* note 25.

⁷³ *Nshogoza* Judgement, *supra* note 43, para. 69.

⁷⁴ *Ibid*, para. 117.

⁷⁵ *Prosecutor v. GAA* Judgement, *supra* note 25, para. 5.

⁷⁶ *Ibid*, p. 6.

⁷⁷ *Nshogoza* Judgement, *supra* note 43, paras. 113, 121, 127, 139-140, 151-152, 190-212.

⁷⁸ *Ibid*, paras. 95-102.

guilty of contempt for contacting protected prosecution witnesses in violation of a protective measures order and by discussing the testimony of two recanting witnesses in each other's presence and disclosing their identities to a public notary's office.⁷⁹ He was sentenced to ten months imprisonment but had served even longer in pre-trial detention: seventeen months!⁸⁰ An extraordinarily lengthy sentence for a mere violation of a protective measures order, in particular since he followed lead counsel's instructions,⁸¹ the first contact was made by one of the recanting witnesses and not the investigator,⁸² and the witnesses had already spoken between themselves prior to meeting with Nshogoza.⁸³ A ten-months sentence far exceeds any other sentence ever imposed for conduct of similar gravity by either the ICTY or ICTR. Indeed, as noted by Judge Robinson in his partially dissenting opinion on appeal, such conduct is typically not prosecuted, but merely reprimanded, or results exclusively in a fine.⁸⁴ Understandably, reliance on counsel's instructions does not completely remove the investigator's own responsibility, particularly as he is a qualified lawyer. One might think, however, that it would amount to significant mitigation, particularly where Counsel herself was not being prosecuted. But the trial chamber took this circumstance into account as aggravating rather than mitigating.⁸⁵ Yet, with two judges partially dissenting on the sentence, both the conviction and sentence were upheld on appeal.⁸⁶

This penalty stands in stark contrast with the same chamber's refusal to open an investigation into contempt on similar allegations on the prosecution side, namely that members of the Prosecutor's office had met with several defence witnesses in violation of protective measures orders. The chamber held that the meetings may have resulted from a good faith but mistaken believe they were authorised and were not of sufficient gravity to justify an investigation for contempt.⁸⁷ In its judgment against Nshogoza, on the other hand, the same chamber explicitly held that a mistake of law is no defence to contempt and that there is no minimum gravity

⁷⁹ Ibid, paras. 85, 160-172, 179-189.

⁸⁰ Ibid, paras. 232, 234.

⁸¹ Ibid, paras. 79-81. Lead counsel told him one of them was not a protected witness and instructed him erroneously he was able to contact both after the Kamuhanda judgment was rendered. Ironically, not only has she been spared an enquiry but was for a long time on the board of ethics for the International Criminal Court.

⁸² Ibid, paras. 86-87.

⁸³ Ibid, para. 187.

⁸⁴ *Nshogoza* AC Judgement, *supra* note 45, VII Partially Dissenting Opinion of Judge Patrick Robinson, para. 7.

⁸⁵ *Nshogoza* Judgement, *supra* note 43, para. 222.

⁸⁶ *Nshogoza* AC Judgement, *supra* note 45, para. 112. Both dissenting judges expressed the view that the fact that Mr. Nshogoza acted on the instructions of lead counsel should be mitigating rather than aggravating. See VII Partially Dissenting Opinion of Judge Patrick Robinson, paras. 4-5; VIII Partially Dissenting Opinion of Judge Mehmet Güney, para. 2.

⁸⁷ *Prosecutor v Nshogoza*, Decision on Defence Allegations of Contempt by Members of the Prosecution, Case No. ICTR-07-91-A, 25 November 2010, paras 18, 23-24. The Appeals Chamber upheld the decision: *Nshogoza* Appeal of Decision on Allegations of Contempt by Prosecution, *supra* note 50, paras. 16-20.

requirement.⁸⁸ The inescapable conclusion seems to be that Nshogoza was simply unlucky that he had originally been prosecuted for contempt based on more serious allegations of which he was found not guilty. But for this, it appears he may not have been prosecuted at all, let alone have received one of the harshest sentences ever imposed for contempt in the *ad hoc* tribunals.⁸⁹ Given that he was indeed acquitted of these more serious allegations, is this then not, as dissenting Judge Pocar describes it a “wholly irrelevant consideration”?⁹⁰ If similar conduct on the part of the prosecution is deemed to be insufficiently grave to justify an investigation into contempt, then one cannot but agree with Judge Pocar that Nshogoza’s harsh sentence by comparison is “patently unreasonable and clearly highlights a double standard”.⁹¹

Alternative Ways to Combat Collusion of the Evidence

The responsibility to fight against collusion of the evidence does not solely lie with the judges. The primary responsibility to ensure that only truthful, credible and reliable evidence is adduced before the chamber lies with the parties. Whilst recognising the difficulty to distinguish a convincing liar from a truthful witness, in particular if unfamiliar with the witness’s language, culture and customs,⁹² it is suggested that a lot more can be done to avoid that witnesses whose credibility is seriously questionable are called to testify.

To avoid reliance on evidence that is fabricated, the parties must carefully scrutinise it before presenting it in the courtroom. The parties must be alert for the possibility of witness interference, which too often occurs on large scale under their eyes. They must not turn a blind eye to dubious practices around them simply because they do not want to lose a witness who supports their thesis. It is no easy task to keep sight over the collection of the evidence in a foreign country, in particular because there are often many interest groups or individuals outside the reach or control of either party who are active on the ground in seeking to manipulate the evidence.⁹³ It is therefore of the utmost importance for the parties to keep in close contact with their witnesses, not to accept their accounts at face-value but to routinely test their evidence on

⁸⁸ *Nshogoza* Judgement, *supra* note 43, para. 174.

⁸⁹ See *Nshogoza* Appeal of Decision on Allegations of Contempt by Prosecution, *supra* note 50, Separate Opinion of Judge Mehmet Güney, para. 3 “had Nshogoza been indicted only of the crimes of which he was convicted, it might have not have led to the launching of an investigation by the Tribunal, which stands in stark contrast with the severity of the sentence”. Only Seselj received a higher sentence. See Allison Turner, ‘Contempt before the *ad hoc* Tribunals. A discussion of Rule 77 RPE ICTY/ICTR’, *supra* note 38, pp 362-363.

⁹⁰ *Ibid*, Dissenting Opinion Judge Fausto Pocar, para. 6.

⁹¹ *Ibid*, para. 7.

⁹² See the observations of Cécile Aptel and Getti at the Geneva ICTR Conference, *supra* note 62. Combs points out additional difficulties of witnesses not being able to write and read or to understand maps or similar tools. See Combs, *Fact-Finding Without Facts*, *supra* note 5, pp. 21-44 63-66.

⁹³ This observation is based on the author’s own experience in conducting investigations in Rwanda, DRC, Kenya, Sierra Leone and Kosovo.

consistency and ask critical open, not leading, questions.⁹⁴ It is also important to verify their accounts by speaking to other witnesses to the same events or looking for corroborative documentary or forensic evidence.⁹⁵ Finally, when a witness is called to testify in multiple trials and significantly varies his or her account depending on the case and the accused, in particular where such a witness has been treated as an unreliable witness by one or more trial chambers, the ethical response is to routinely re-evaluate whether the witness is still considered sufficiently credible to be relied upon in subsequent proceedings.⁹⁶

Lessons to be learned

In summary, lessons to be learned for future courts, including the permanent International Criminal Court include awareness that witness interference is a frequent problem, which can be reduced only if everyone concerned takes it seriously and acknowledges it occurs at all sides. The parties should be more pro-active in ensuring that the evidence they present is trustworthy and reliable. If, despite the best efforts of the parties to produce such evidence, trial chambers are confronted with potentially fabricated evidence – they should not shy away from opening an investigation, provided they deal with the evidence of both parties even handedly. Only if all involved make more efforts in detecting, preventing and penalising collusion of the evidence can a distortion of the truth be avoided.

⁹⁴ This accords with the advice of Anthony Forde who conducts training in investigation techniques. See ICC Defence Investigative Interview Course 2011, The Institute for International Criminal Investigations (IICI), on file with the author. See also Combs, *Fact-Finding Without Facts*, *supra* note 5, pages 106-122.

⁹⁵ According to Alison DesForges and Timothy Longman, no serious efforts have been made to collect documentary or forensic evidence to link identified suspects to particular crimes. See A. DesForges and T. Longman, *Legal Responses to Genocide in Rwanda*, in *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, 49, 53. There has also been a lack of effort to find corroborating witnesses to events. See for instance *Prosecutor v. Nsengiyumva and Bagosora*, Judgement and Sentence, Case No. ICTR-98-41-T, 18 December 2008, paras. 1548-1557.

⁹⁶ For instance, Ruggiu was discredited by the Cyangugu Chamber but nonetheless called in the Bagosora case. See *Prosecutor v. Nsengiyumva and Bagosora*, Judgement and Sentence 18 December 2008, ICTR-98-41-T, para. 1984. Serushago gave a different account in each case in which he testified, but continued to be relied upon (see e.g. Nahimana et al Judgment, para. 824).