The problem of false testimony at the International Criminal Tribunal for Rwanda

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Abstract: Academic literature on the ad hoc international tribunals has all but ignored the problem of perjury. Furthermore, it has failed to problematize the weak foundations of fact-finding at the tribunals and everything this entails for our faith in the convictions and occasional acquittals tribunal judges hand down. The paper examines the problem of perjury, or false testimony, at the ICTR. The *Rwamakuba* trial judgement (*Prosecutor v. Rwamakuba*, Trial Judgement, ICTR, 20 September 2006) can be seen as the problem's apex. The problem of perjury may be defined as a reluctance to prosecute the offence where its commission is suspected. The hypothesis explored in this paper is that the problem of perjury at the ICTR has combined with a systemic temptation for Rwandan witnesses to testify falsely, thus encouraging actual perjury. Along with other factors, the combination contributes to the unreliability of judicial fact-finding at the ICTR. The discussion in the paper fits within a broader questioning of the ability of international criminal tribunals to discover the truth.

Key words: perjury, false testimony, witness testimony, lying witnesses, judicial fact-finding, Rwamakuba case, Akayesu case, GAA case, ICTR, ICTY, international criminal tribunals.

I. Introduction

Academic literature on the ad hoc international tribunals has all but ignored the problem of perjury. Until recently,[1] moreover, commentators had failed to problematize the weak foundations of fact-finding at the tribunals and all that this entails for our faith in the convictions – and occasional acquittals – the tribunal judges hand down.

[1] See Nancy Combs's seminal *Fact-finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions*, Cambridge University Press, 2010.

In this paper I examine the problem of perjury, or false testimony, at the ICTR, with particular reference to the *Rwamakuba* trial judgement,[2] which did more to reveal the extent of the problem than any tribunal decision before it.

The *problem* of perjury may be defined as a reluctance to prosecute the offence where its commission is suspected. The hypothesis explored in this paper is that the problem of perjury at the ICTR has combined with a systemic temptation for Rwandan witnesses to testify falsely, thus encouraging actual perjury. Along with other factors, the above combination contributes to the unreliability of judicial fact-finding at the ICTR and the risk of conviction of innocent persons.

The discussion that follows fits within a broader questioning, begun by Professor Combs, of the ability of international criminal tribunals to discover the truth.[3]

II. The prosecution's "unconvincing" witnesses in *Rwamakuba*

Several features combine to make André Rwamakuba's case unusual: he was arrested by the Namibian authorities (not clear why) in 1995, released upon a request of the ICTR Prosecutor in 1996, and arrested again in 1998;[4] more than five years elapsed before his trial could start; soon after it opened, it was abandoned when the presiding judge withdrew (she had co-habited, for a short period of time, with the prosecutor);[5] the indictment was amended and finalized only in June 2005; a new trial commenced in the same month, almost seven years after Rwamakuba's re-arrest;[6] the accused never attended his trial, protesting from his cell the falsehood of the allegations against him.[7]

[2] *Prosecutor v. Rwamakuba*, Trial Judgement, 20 September 2006 (henceforth *Judgement*).

[3] See note 1, supra.

[4] *Judgement*, par. 4-5.

[5] *Judgement*, par. 6.

[6] *Judgement*, par. 6-7.

[7] *Judgement*, par. 9.

In September 2006 Rwamakuba was acquitted of all charges when the prosecution's evidence was thrown out after the close of the hearings.[8]

Of all the peculiar aspects of the case, I will focus on the last.

Rwamakuba faced four main allegations of genocide: that he supplied machetes which were later used in killings; that he ordered and participated in the killing of three Tutsi persons; that he carried out large-scale killings at a health centre; and that he took part in other killings at a university hospital.[9]

The trial chamber judges observed that the case against him "consisted mainly of hearsay evidence concerning both the content of the allegations and also the identification" of the accused, with only five of the eighteen prosecution witnesses claiming to have direct knowledge of him.[10] The key witnesses suffered from remarkably messy memories, giving "irreconcilable versions of the facts",[11] which the judges, unusually for the ICTR, made little effort to smooth over.[12] Accounts of facts supposedly recalled by the witnesses kept shifting over the years;[13] critical facts were

[8] Up until Rwamakuba's acquittal, the ICTR had convicted 34 persons and acquitted four. Seventeen more convictions have followed. There has been one further acquittal.

[9] *Judgement*, par. 16.

[10] *Judgement*, par. 36.

[11] *Judgement*, par. 64.

[12] On this point, see A. Zahar, 'Witness Memory and the Manufacture of Evidence at the International Criminal Tribunals', in C. Stahn and L. van den Herik (eds), *Future Directions in International Criminal Justice*, TMC Asser Press/Cambridge University Press, 2009. In *Rwamakuba* the judges evidently had a hunch that the prosecution's case was unacceptably weak, and worked backwards from their theory to dismiss every incriminating allegation. The ICTR's usual practice is to move backward from a theory of guilt to a reconciled evidentiary basis, using techniques described in the cited paper. Some techniques used by the *Rwamakuba* judges to discard evidence (e.g. *Judgement*, par. 114, 150) are just as implausible as those used in other settings to repair it.

[13] E.g. *Judgement*, par. 113, 131, 145, 172, 188.

dredged up for the first time when a witness spoke in court,[14] or were contradicted by the evidence of other prosecution witnesses;[15] or they simply made no sense.[16]

The evidence concerning the supply of machetes was quickly dismissed as essentially meaningless.[17] A witness dubbed GAC was linked to the machete allegations. GAC already had been condemned as unreliable by another ICTR trial bench.[18] That he was recycled by the prosecution in the *Rwamakuba* case is a sign of desperation if not want of professionalism. The *Rwamakuba* judges said of GAC that his evidence was "tainted with major internal inconsistencies which seriously challenge his credibility".[19] They repeated their concerns about him several times.[20]

Witness GIN was called to support the allegation about the killing of the three Tutsi. In her several prior out-of-court statements, her story about Rwamakuba's role and other aspects of the incident kept changing. She did not hold up under cross-examination.[21] The Trial Chamber concluded that "These major inconsistencies between GIN's testimony and her prior statements cannot be explained by the time elapsed, translation discrepancies, the manner in which the statements were taken or the impact of trauma inflicted upon the witness"[22] – marking off some of the techniques commonly used at the ICTR to excuse difficulties in prosecution witness recollection. Moreover, "Neither can they be considered additional details provided to the witness's prior statements."[23]

What, then, *can* they be considered? And if the aforementioned inconsistencies cannot be explained by the factors listed, what *does* explain them? Evidently, to the reader of

[14] E.g. *Judgement*, par. 66, 173.

[15] E.g. *Judgement*, par. 68.

[16] E.g. *Judgement*, par. 112, 170-1.

[17] *Judgement*, par. 104, 110.

[18] *Judgement*, par. 109-110.

[19] *Judgement*, par. 110.

[20] *Judgement*, par. 114-16, 118.

[21] *Judgement*, par. 131.

[22] *Judgement*, par. 132.

[23] *Judgement*, par. 132.

the judgement, they were lies. A witness who first denies that the accused was present at the scene of a crime and later insists that indeed he was present,[24] must at least be *suspected* of lying. But the judges stopped short of calling GIN a liar. Why they stopped short they never explained.[25]

GAB claimed to be an eyewitness to the killings at the health centre. Like GAC, he had been found to be not credible by a prior ICTR case, but he was called anyway.[26] GAB supposedly heard Rwamakuba call out to the assembled fighters that the Tutsi should be killed "so that in [the] future, a Hutu who is born asks what a Tutsi look[ed] like" (brackets in original).[27] We first come across this leitmotif of the 1994 lore in the *Akayesu* case. There, witnesses testified that one Kubwimana had said during a public meeting chaired by Akayesu that all the Tutsi were to be killed "so that someday Hutu children would not know what a Tutsi looked like".[28] Possibly in elaboration of this theme, Akayesu himself is said to have called out to men committing rape, "Never ask me again what a Tutsi woman tastes like".[29] Anyone with experience of prosecution witness testimony at the ICTR (whether direct experience or indirect from study of the transcripts) will have been struck by certain clichéd renditions of events, hackneyed set pieces of evil-doing, so idealized that witnesses easily transpose them from one case to another, changing few details except the identity of the accused.

A remarkable feature of the *Rwamakuba* judgement is that this phenomenon, or syndrome, is, for the first time, noticed and remarked upon by a bench of judges. The judges observed that GAB's testimony in the ICTR's *Kamuhanda* case had been

[24] *Judgement*, par. 145.

[25] GIN was the source of much of the evidence against Jean de Dieu Kamuhanda, who was convicted more than two years before the *Rwamakuba* case was decided (*Prosecutor v. Kamuhanda*, Trial Judgement, 22 January 2004). GIN was witness GEK in that case. The different pseudonyms help disguise cross-case identities.

[26] *Judgement*, par. 146.

[27] *Judgement*, par. 139.

[28] *Prosecutor v. Akayesu*, Trial Judgement, 2 September 1998, par. 118.

[29] Ibid., par. 422.

“disturbingly similar” to that in *Rwamakuba*, for GAB “described André Rwamakuba’s behaviour and the account of the events in the same way as he described Kamuhanda’s criminal acts [...] he also attributed much of the same words to Kamuhanda and Rwamakuba.”[30] This was pointed out to the witness, and GAB conceded that he had attributed to the two accused the “same logic”.[31]

He was a witness of logic, it seems, not fact.

The judges “cast serious doubt” on GAB’s credibility, but took no further action.[32] They observed that a second witness, RJ, had testified using what we might henceforth call the logical (or is it analogical?) method,[33] but took no action against her either, except to declare her not credible.[34]

The university hospital allegations portrayed Rwamakuba as Doctor Death.[35] Of the six witnesses summoned for this episode, only XV claimed personal knowledge of the accused.[36] XV clearly had set out to smear Rwamakuba, deciding to backdate the accused’s anti-Tutsi sentiments to 1973. It was a reckless gamble, and he was effortlessly exposed.[37] XV had not troubled even to find out what Rwamakuba looked liked, as the court was soon to discover.[38] He too eagerly made last-minute adjustments to his stories to fit to Rwamakuba the model (or logic) he was working from:

> Witness XV explained that the absence of any reference to the Accused in seven of his prior statements was due to the fact that “[he] could only think of [Rwamakuba] when it was the time of his trial”. The Chamber notes that in 2003, XV was on the Prosecution’s

[30] *Judgement*, par. 149. Footnote 401 of the judgement illustrates the transposition between the two cases.

[31] *Judgement*, par. 149.

[32] *Judgement*, par. 152.

[33] *Judgement*, par. 192.

[34] *Judgement*, par. 193.

[35] See the indictment paragraphs reproduced at *Judgement*, par. 160.

[36] *Judgement*, par. 163.

[37] The effort is dismissed in *Judgement*, par. 171.

[38] *Judgement*, par. 174. Rwamakuba’s boycott of the proceedings was an advantage to him in this respect.

> witness list for the first trial against André Rwamakuba [in which Rwamakuba was one of four co-accused], and his reconfirmation statement was made in Arusha in preparation for his testimony in that trial. This reconfirmation statement, however, did not mention major elements of the evidence that he gave in this trial.[39]

We can see in this passage strong indicators, even intimations, of deliberate falsification by XV, but the Trial Chamber would not bring itself to say so openly.

As XV's evidence evaporated, so the significance of the other hospital witnesses diminished. All of them relied on hearsay to place Rwamakuba at the hospital.[40] I will briefly refer to the court's findings on one of these witnesses, HF.

HF claimed to have seen Rwamakuba committing crimes at the hospital while dressed in banana leaves.[41] The leaves are another leitmotif of the Rwandan civil war. According to the lore, fighters resorted to traditional tribal gear when decking out for violence.[42] Projecting the image onto Rwamakuba, HF did not think it odd that a resident doctor would put on banana leaves before his round of the wards to kill Tutsi patients. In the event, when HF came before the court, "she denied all this", observed the Chamber dryly, "along with other matters recorded in [her prior] statements".[43] She did claim, though, that her sister was abducted from the hospital and killed. When it emerged that HF had testified in a Rwandan (state) court that a sister of hers with the same first name as her hospital sister was killed in totally different circumstances, HF "explained that she had twin sisters with the same Christian name".

[39] *Judgement*, par. 173.

[40] *Judgement*, par. 175-7.

[41] *Judgement*, par. 188.

[42] Banana leaves come to prominence in *Prosecutor v. Musema*, Trial Judgement, 27 January 2000, par. 372, and then much is made of them in *Prosecutor v. Bagilishema*, Trial Judgement, 7 June 2001.

[43] *Judgement*, par. 188.

The reaction to these revelations at the ICTR? "The Chamber is not convinced by this explanation."[44] Is that it? Just *not convinced*? The comment is typical of a studied, unnatural understatement that mars the judgement.

Having decided that all the key prosecution witnesses had been, in effect, making up evidence against Rwamakuba, the judges, instead of instituting proceedings against them for suspected perjury, acquitted the accused and called the proceedings to a close. By that point, Rwamakuba had been in the Tribunal's custody for nearly eight years.[45]

What are the roots of apathy towards falsification in the *Rwamakuba* judgement? There is no doubt that the trial chamber was aware of a serious underlying problem. "The Prosecution witnesses' testimonies were tainted of [sic] *major deficiencies* which could not be justified by the time elapsed, translation discrepancies, the manner in which the prior statements were taken or the impact of trauma inflicted upon the witnesses."[46] But the Chamber evidently felt no obligation to get to the bottom of the major deficiencies. It saw no connection, it would appear, between them and the integrity of the proceedings. The chamber had an acknowledged obligation to "ascertain the truth",[47] but it seems to have construed "truth" narrowly. It acknowledged that "This Tribunal was established to contribute to the process of reconciliation and to the restoration of peace and security in Rwanda",[48] but did not ask how the deficient prosecution of Rwamakuba was compatible with that aim.

[44] *Judgement*, par. 189.

[45] *Judgement*, par. 5 (noting that Rwamakuba was arrested on 21 October 1998 and transferred to the Tribunal the following day).

[46] *Judgement*, par. 156, emphasis added.

[47] ICTR RPE, Rule 90(F).

[48] *Judgement*, par. 210.

III. *Akayesu*'s influence on the interpretation of Rule 91 at the ICTR

In a 1999 paper which is probably the earliest academic comment on the power of the ad hoc international tribunals to punish false testimony, Professor Klip wrote:

> Perjury hinders the course of justice and might even lead to miscarriages of justice. Especially in the serious cases pending before the International Criminal Tribunal it is important that the Trial Chamber can rely on those giving evidence. Whenever this trust is abused it deserves a reaction.[49]

It is hard to disagree with this statement of principle. Professor Klip cannot have known at that early date that the perjury power against witnesses would remain remarkably underutilized at the tribunals.[50] At the ICTR, the contribution of the *Akayesu* Trial Chamber to this effect was critical. *Akayesu*'s influence was both jurisprudential and ideological, as I will try to explain.

In the *Akayesu* case, the defence complained that witness R's testimony was so self-contradictory as to constitute false testimony. The Trial Chamber, in its decision,[51] stated that where a party moves for a Rule 91 investigation, "the onus is on th[e] party

[49] A. Klip, 'Commentary on Decisions Relating to the False Testimony of Dragan Opacić', *Annotated Leading Cases of International Criminal Tribunals, Vol. 1: The International Criminal Tribunal for the Former Yugoslavia 1993-1998*, Intersentia, 1999, p. 214. Professor Klip was commenting on *Prosecutor v. Tadić*, Order for the Prosecution to Investigate the False Testimony of Dragan Opacić, Trial Chamber, 10 December 1996. The case against Opacić was discontinued: *Prosecutor v. Tadić*, Order for the Return of a Detained Witness, Trial Chamber, 27 May 1997.

[50] Professor Klip goes on to argue in his paper that the ICTY has no jurisdiction to prosecute persons for false testimony, the power is not inherent, and the Tribunal ought to have sought such jurisdiction from the UN Security Council. While I agree with this assessment, and have taken a similar line myself with respect to the contempt power more generally (A. Zahar, 'International Court and Private Citizen', (2009) 12 *New Criminal Law Review* 569), I will assume, for the purposes of the present comment, that the jurisdictional issue does not arise. (It certainly is not a *reason* for the paucity of perjury prosecutions at the tribunals.)

[51] *Prosecutor v. Akayesu*, Decision on the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness "R", Trial Chamber, 9 March 1998.

to convince the Chamber that there exist strong grounds for believing that a witness has knowingly and wilfully given false testimony".[52]

This interpretation of Rule 91 is inaccurate and misleading. The clear meaning of the rule is not that a party must *convince* the Chamber of any thing, but that it must show, *to the satisfaction* of the Chamber, that there exist strong grounds for believing that a witness has knowingly and wilfully given false testimony. In other words, the moving party need only satisfy the trial judges that there exists a sufficient suspicion of perjury to warrant a formal investigation.

At the ICTR (as at the ICTY) the early formulation of Rule 91 (entitled "False Testimony under Solemn Declaration") was succeeded after several years by an elaborated version. I reproduce the key provisions of each:

Rule 91 (June 1995-May 2003)

(A) A Chamber, on its own initiative or at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so.

(B) If a Chamber has strong grounds for believing that a witness *has*[53] knowingly and wilfully given false testimony, it may direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony. [...]

[52] Ibid., emphasis added. (Several of these early decisions do not use paragraph numbers.)

[53] Emphasis added. In several editions of the RPE after 1995 and before 2003 (available from the ICTR's web site), the "has" in this position has mistakenly been changed to "may have", thus radically altering the test. The first (1995) edition of the ICTR RPE correctly shows the "has", which of course was copied verbatim from the ICTY RPE. The post-1995 transcription error in the RPE was transmitted to ICTR decisions. For example, in *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, 11 July 2000, par. 3, the Trial Chamber incorporates the incorrect "may have" version of the rule; similarly in *Prosecutor v. Bagosora et al.*, Decision on Defence Request for an Investigation into Alleged False Testimony of Witness DO, Trial Chamber, 3 October 2003, par. 8.

Rule 91 (May 2003-present)

(A) A Chamber, *proprio motu* or at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so.

(B) If a Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may:

(i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony; or

(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 proceedings for false testimony.

(C) If the Chamber considers that there are sufficient grounds to proceed against a person for giving 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. [...]

(H) Paragraphs (B) to (G) apply *mutatis mutandis* to a person who knowingly and willingly makes a false statement in a written statement taken in accordance with Rule 92 *bis* [“Proof of Facts Other Than by Oral Evidence”] which the person knows or has reason to know may be used as evidence in proceedings before the Tribunal.

The basic test on the face of the rule is both perspicuous and constant.

To further confuse matters, the *Akayesu* Chamber stated later in the same decision that “the onus is on the party pleading a case of false testimony to *prove*: the falsehood of the witness[’s] statements; that these statements were made with harmful intent, or at

least that they were made by a witness who was fully aware that they were false; and the possible bearing of the said statements upon the judge's decision".[54]

Whatever one makes of the last requirement in this passage, which is quite unclear, a glance at either version of Rule 91, above, reveals the incorrectness of contending that the moving party must *prove* both the actus reus and the mens rea of the offence. For if that were the case, the rule's continuation, that the Chamber "may direct the Prosecutor to investigate the matter", is rendered senseless. Also senseless becomes the rule's requirement that a perjury indictment must be decided by a Trial Chamber *other* than the one deciding the Rule 91 motion.[55]

In truth, "proof" in the framework of Rule 91 is something to be pursued upon an indictment by an amicus investigator/prosecutor before a different bench of judges; it has nothing to do with the original Trial Chamber's determination or the burden of the party initiating the action.

The *Akayesu* Trial Chamber denied the motion in question on the ground that the defence had not "demonstrated" witness R's mens rea. The defence's arguments were said to be "pertinent only to raising doubts as to the credibility of the statements made by the witness". They were not "sufficient to establish" that R knowingly and wilfully gave false testimony.

The *Rutaganda* case, on the heels of *Akayesu* (and with the same judges), gave rise to three decisions. The first concerned defence evidence that prosecution witness E had falsely denied that he had a criminal record. The motion was dismissed using the same text as the *Akayesu* decision.[56] In a second motion, the defence claimed that the witness had contradicted himself in relation to incidents he had witnessed. The prosecution

[54] *Prosecutor v. Akayesu*, Decision on the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness "R", Trial Chamber, 9 March 1998, emphasis added.
[55] Rule 91(D) of the pre-May 2003 ICTR RPE; and Rule 91(F) of the post-May 2003 ICTR RPE.
[56] *Prosecutor v. Rutaganda*, Decision on the Defence Motion to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness "E", Trial Chamber, 10 March 1998.

responded that the issue went to weight and was a matter for evaluation in the context of all the evidence adduced. The Chamber again dismissed the motion using the words of the *Akayesu* decision.[57]

The *Rutaganda* decisions went on appeal, presenting the ICTR Appeals Chamber with its first opportunity to comment on the interpretation of Rule 91.[58]

Rutaganda's complaint on appeal was that the Trial Chamber had used an improperly high legal standard. He argued that the test should be set at the level of ICTR Rule 47(A) ("satisfied that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime").

The Appeals Chamber dismissed the appeal as inadmissible on procedural grounds. However, it inserted the following, remarkable, comment: "an investigation for false testimony is ancillary to the proceedings and does not impact on the accused's right to a fair trial [...] a credibility determination may be based, but does not necessarily depend, on a judicial finding that a witness has given false testimony".[59] We see in this idea a strikingly narrow conception on what impacts an accused's right to a fair trial. The witness who knows that a casual approach to the truth may trigger an investigation for perjury obviously is in a different position from the witness who believes that a fabrication, should it be noticed, will be treated as an inconsistency going to weight. The Appeals Chamber did not consider the broader consequences of its dictum.

[57] *Prosecutor v. Rutaganda*, Decision on the Defence Motion to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness "CC", Trial Chamber, 10 March 1998.

[58] *Prosecutor v. Rutaganda*, Decision on Appeals Against the Decisions of the Trial Chamber Rejecting the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witnesses "CC" and "E", Appeals Chamber, 8 June 1998 (text of oral summary of decision).

[59] The first part of this quoted statement is later repeated by the Appeals Chamber in *Prosecutor v. Simba*, Judgement on Appeal, 27 November 2007, par. 33.

In the *Bagilishema* case,[60] the defence submitted evidence tending to show that witness H's claim that certain people were in the presence of the accused at certain times could not possibly be true. The Trial Chamber adopted the *Akayesu* test, requiring "proof" of the elements of the offence. It said that while there was evidence of a "contradiction" in H's account, "This does not *suffice to demonstrate* that the witness intended to mislead the Chamber and to cause harm."[61] The Chamber added that "contradiction" is common in criminal cases, and deferred its decision on the credibility of H until such time as all evidence in the case was presented.[62]

Already by the time of *Bagilishema*, then, a patterned judicial response to Rule 91 defence motions is clear.

In the next case, *Nahimana*, the defence claimed that, under cross-examination, prosecution witness AEN had contradicted his own evidence-in-chief. In the resulting Rule 91 decision,[63] the Trial Chamber proceeded directly to review AEN's answers under questioning, concluding that while there had been a lack of clarity, there had been no obvious contradiction. It then restated the *Akayesu* test on the need for "proof", and reaffirmed the position in the *Rutaganda* decision on witness CC[64] that such matters are best left to the end of a case, when witness credibility determinations can be made in the context of all the evidence.

In *Bagosora*, one aspect of witness DO's testimony on indictment-related events was highly implausible. The witness, who was serving a life sentence in Rwanda, also made

[60] *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, Trial Chamber, 11 July 2000.

[61] Ibid., par. 6, emphasis added.

[62] Ibid., par. 7.

[63] *Prosecutor v. Nahimana et al.*, Decision on the Defence Motion to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness "AEN" in Terms of Rule 91(B), Trial Chamber, 27 February 2001.

[64] See above.

allegations about current threats against him by the family of one of the accused; but when questioned further, he was not able to substantiate them. In its Rule 91 decision,[65] the Trial Chamber affirmed the *Akayesu* test, noting that while the rule "does not *expressly* require a party to prove false testimony as a prerequisite to the Chamber exercising its power to direct an investigation [...] an onus rests on the requesting party to *prove* that the testimony was given knowingly and willfully".[66] There is a "strong preference", added the Chamber, "for considering such matters as part of the evaluation of credibility".[67] The motion was denied on the ground that the highly implausible aspect of the testimony "[did] not concern a matter material to the case",[68] whereas the allegations against the family had been retracted by DO almost as soon as they were made, casting doubt, it was said, on the existence of mens rea.[69]

Again, *Bagosora* contains no explanation of its departure from the plain meaning of the rule. *Akayesu* is thus unreflectively recycled.

Rule 91 actions came to some prominence in the ICTR's *Butare* case. In one action,[70] the defence argued that witness QY had given evidence with an intention to falsely incriminate the accused, citing inconsistencies with statements made by her in another Tribunal case, as well as her "harebrained" explanations of them.[71] The defence conceptualized litigation under Rule 91 as going beyond the immediate concerns about QY; the procedure, according to the defence, held out the promise of a "public sanction [...] to deter other potential witnesses from following this course of action".[72] The Trial Chamber dismissed the motion with minimal reasoning.[73]

[65] *Prosecutor v. Bagosora et al*., Decision on Defence Request for an Investigation into Alleged False Testimony of Witness DO, Trial Chamber, 3 October 2003.

[66] Ibid., par. 9, emphasis added.

[67] Ibid.

[68] Ibid., par. 11.

[69] Ibid., par. 13.

[70] *Prosecutor v. Nyiramasuhuko et al*., Decision on Arsène Shalom Ntahobali's Motion to Have Perjury Committed by Prosecution Witness QY Investigated, Trial Chamber, 23 September 2005.

[71] Ibid., par. 5.

[72] Ibid., par. 6.

However, some time after the first QY decision, QY and SJ (another witness in the *Butare* case) appeared as witnesses in a trial in Canada against one Munyaneza. In the light of what transpired at that trial, the two witnesses were recalled to the ICTR for further cross-examination. This resulted in admissions by both witnesses that they had testified falsely in the course of their earlier ICTR appearances.[74] A new Rule 91 motion was filed by the defence. The Trial Chamber cited *Akayesu* as the authority for the applicable test.[75] But because the witnesses had already admitted to lies and manipulation, the question of "proof" did not require (or attract) any comment by the Chamber.[76] The real puzzle in this case is why the judges, who had all the information they needed to initiate Rule 91 proceedings themselves, passively waited for a motion to this effect by the defence.

In the event, the Chamber ordered the appointment of an amicus investigator with a broad mandate, under both Rules 91 and 77 (contempt of court).[77]

One defendant, Joseph Nzirorera, in the *Karemera* case, made three separate motions in the course of the prosecution's case to have the first prosecution witness in the case, M, investigated for false testimony.[78] Nzirorera complained that later prosecution witnesses had been contradicting M.[79] His motion was denied. The Trial Chamber, referring to decisions in *Akayesu*, *Bagilishema*, and other ICTR cases, distilled the following principle:

[73] Ibid.

[74] *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, Trial Chamber, 19 March 2009, par. 13.

[75] Ibid., par. 10.

[76] Ibid., par. 14.

[77] Ibid., par. 17.

[78] *Prosecutor v. Karemera et al.*, Decision on Defence Motion for Investigation of Prosecution Witness Ahmed Mbonyunkiza for False Testimony, Trial Chamber, 29 December 2006, par. 1.

[79] Ibid., par. 2.

> Contradictory evidence between witnesses' testimony is insufficient evidence to demonstrate that a witness intended to mislead the Chamber and to cause harm. Instead, contradictory evidence is used when determining the probative value of the evidence presented by the parties during trial.[80]

This is an illogical view, both of evidence and of the role of the judge. The Trial Chamber seems to be saying that contradictory evidence merely lessens the probative value of that evidence and nothing more; alternatively, that the role of the judge is limited to weighing up the evidence and making a judgement on probative value in relation to a fact in issue. Both these positions omit to mention the essence of fact-finding, namely that the assessment of testimonial evidence is ultimately about the credibility of witnesses. Whether by intuitive means or through analysis of what a witness says over time, a decision is made about his or her credibility. Where the question concerns what to do with a witness who is found to be not credible and who may have been lying, a judge, contrary to the *Karemera* Chamber's suggestion in the excerpt above,[81] need not wait until after all the evidence in the case has been presented to make a determination on credibility. The determination can be made, and the possibility of lying investigated, even before the very first witness in the case has completed his or her testimony.[82]

In another *Karemera* decision,[83] the Rule 91 issue arose from the use of forged documents, which renders the Trial Chamber's decision to deny the motion unexpected, to say the least. Prosecution witnesses ALG and HH, both of whom were in detention in Rwanda on criminal charges, claimed to have had contemporaneous knowledge of

[80] Ibid., par. 7.

[81] Later in the decision this is made explicit (ibid., par. 11): "any alleged discrepancy in the testimony of Witness Mbonyunkiza will be addressed by this Chamber at a later stage when assessing the evidence adduced by each party in the present case as a whole. To make a finding now on allegedly contradictory evidence would be pre-judging the issues and is premature."

[82] At the time of writing, Nzirorera's case was still in trial and the Trial Chamber's determination, finally, of M's credibility was still unknown.

[83] *Prosecutor v. Karemera et al.*, Decision on Defence Motions for Appointment of Amicus Curiae, Trial Chamber, 26 September 2007.

letters written by one of the accused in April 1994 exhorting the Interahamwe militia to kill Tutsi persons. The letters, which were introduced into evidence by another witness, were later independently determined to be forgeries.[84] Quite apart from the fact that this discovery creates at least a presumption of false testimony on behalf of the two witnesses, it was known to the Trial Chamber that HH had confessed to being part of a "conspiracy to frame" another ICTR accused, François Karera.[85] The *Karemera* judges took the following position:

> in the Chamber's view, at this stage, the evidentiary foundation for the allegations of the Defence does not constitute strong grounds for believing in any harmful intent of the witnesses concerned nor that their testimony results from a plan to subvert the trial as submitted. Furthermore, the allegations made by [the accused] concerning a conspiracy to make false accusations against them are part of their challenge to the Prosecution's case and reflect a theory that the Defence has been advocating. The Chamber, however, recalls that *the burden of proof is on the Prosecution and cannot be made to shift to the Defence*. [...] The interests of justice do not require or make it desirable for the Chamber to engage an investigation on a collateral exercise on the basis of the unsupported suspicions expressed by the Defence. This goes outside what is necessary for justice to be done in this case.[86]

If the disinclination to proceed on a "collateral exercise" alludes to the common law's finality rule, this would constitute a misapplication of the rule, in light of the well-established exceptions going to bias, partiality, and prior inconsistency of the witness. And while the Chamber's statement, above, is open to attack on many sides, the italicized portion is perhaps the most surprising. After years of recycling the *Akayesu* test, to the effect that the moving party must "prove" its allegations, here the Tribunal descends deeper into misconception about who must prove what in the context of Rule 91. The italicized text makes no sense at all.

[84] Ibid., par. 2, 9.

[85] Ibid., par. 5.

[86] Ibid., par. 9-11, emphasis added.

In yet another Rule 91 decision in the same case,[87] BTH was a prosecution witness who admitted lying both in the *Karemera* trial and in other ICTR proceedings. All parties, including the prosecution, wanted him investigated for perjury. In the Trial Chamber's decision, nominal reference was made to the *Akayesu* decision,[88] but no need arose to reflect on the test at any length, or, in fact, at all, given that BTH had practically confessed. The Chamber gave orders for an amicus investigator to be appointed, with powers to investigate, as well, the extent to which the witness's perjury had been procured by others.

The BTH decision in *Karemera* is part of a small constellation of decisions late in the life of the ICTR that have ordered Rule 91 investigations. (Another is *Butare*'s QY decision, discussed above; chronologically it comes after the BTH order.) The case that revitalized the discourse on perjury, however, and began to help the ICTR out of the rut set by *Akayesu*, was *GAA*, which began life in 2005. I will consider GAA's case below.

Witness BTH testified under the pseudonym GFA in the ICTR's *Bizimungu* case.[89] Some three years after his testimony in *Bizimungu*, GFA arranged to meet with representatives of the prosecutor and the defence to confess that he had given false testimony against one of the accused. He said that while he was imprisoned in Rwanda, he and other prisoners had colluded to fabricate stories they would tell the ICTR.[90] He was recalled by both the *Karemera* and the *Bizimungu* Trial Chambers for further cross-examination; however, at one point, BTH/GFA "absconded" and has not been heard from since.[91]

[87] *Prosecutor v. Karemera et al.*, 'Decision on Prosecutor's Confidential Motion to Investigate BTH for False Testimony', Trial Chamber, 14 May 2008.

[88] Ibid., par. 5.

[89] *Prosecutor v. Bizimungu et al.*, 'Decision on Defence Motion Seeking the Appointment of *Amicus Curiae* to Investigate Possible False Testimony by Witnesses GFA, GAP and GKB', Trial Chamber, 23 July 2008.

[90] Ibid., par. 10.

[91] Ibid., par. 13.

The *Bizimungu* decision restates the *Akayesu* "proof" requirement.[92] Clearly, however, here too, the Chamber's decision to order a Rule 91 investigation of GFA was made on the brute strength of the extraordinary facts. By contrast, the Chamber dismissed the motion with respect to witnesses GAP and GKB, even though they had been fellow prisoners of GFA – and, according to GFA, fellow colluders – and had presented inconsistent testimonies, albeit, in the case of GAP at least, of a more conventional fault-profile than that of GFA.[93] The relatively powerful and unusual evidence for a Rule 91 action against GKB did not seem to move the Chamber.[94]

IV. GAA is jailed

At the time of writing (August 2009), GAA is the only person to have been convicted of false testimony at the ICTR and ICTY.[95] (GAA was also charged with, and pleaded guilty to, contempt of court.[96] His was thus also the only case where acts amounting to perjury resulted in a conviction for contempt.[97])

GAA appeared before the ICTR Appeals Chamber in May 2005 and recanted testimony he had given before the Trial Chamber in the *Kamuhanda* case. He claimed that, despite what he had said at first instance, he had never witnessed unlawful acts by the accused, Kamuhanda. Later, in August 2007, he recanted his recantation and confessed to have "knowingly and wilfully" testified falsely on this matter before the Appeals Chamber.[98]

In determining the sentence to be imposed, the Trial Chamber to which GAA's case had been referred, said of the gravity of the offence of false testimony:

[92] Ibid., par. 6.

[93] Ibid., par. 18.

[94] Ibid., par. 24-28.

[95] *Prosecutor v. GAA*, Judgement and Sentence, Trial Chamber, 4 December 2007, par. 7.

[96] Ibid., par. 3.

[97] Ibid., par. 7.

[98] Ibid., par. 5.

> The Chamber considers false testimony under solemn declaration and contempt of the Tribunal as very grave offences, as they constitute a direct challenge to the integrity of the trial process. Maintaining the integrity of the administration of justice is particularly important in trials involving serious criminal offences. [...] Although all perjury is serious, the Chamber is of the view 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, as in this case, the perjured evidence is given in the hope of procuring the acquittal of a guilty person. The Chamber therefore considers that the gravity of the offence requires that a custodial sentence must be imposed.[99]

GAA was sentenced to nine months' imprisonment. Because this penalty was for perjury of the lesser kind (as distinguished in the text above), it follows from the view expressed by the Trial Chamber that a witness found to have knowingly and wilfully testified falsely to attain "the conviction of an innocent person" (meaning, in fact, any person on trial) could expect a jail term of *at least* nine months, assuming, that is, that he or she were prepared to plead guilty to the charge of perjury. Without a guilty plea, and in the absence of other mitigating circumstances going in the defendant-perjurer's favour, he or she would do well to be advised to expect a jail term considerably longer than nine months if convicted.[100]

As seen from the material presented in this paper, almost all instances of apparent false testimony at the ICTR fall into the "most serious category" of false incrimination.

It is perhaps no surprise that GAA was not allowed to escape Rule 91 proceedings after changing his trial testimony and confronting the Appeals Chamber with a new version of events.[101] Clearly, GGA's case did not consist merely of the constantly shifting

[99] Ibid., par. 10.

[100] GAA's sentence would have been even higher had it not been for evidence that he had been suborned by one Léonidas Nshogoza (ibid., par. 11). Moreover, mitigating factors, in addition to the guilty plea, were taken into account (ibid., par. 12).

[101] For an explanation of the Appeals Chamber's finding that GAA testified falsely on appeal, see *Prosecutor v. Kamuhanda*, Judgement on Appeal, 19 September 2005, par. 216-21.

witness accounts seen, for example, in *Rwamakuba*; it had an extra dimension.[102] The same is true of the three other instances mentioned above (BTH, GFA, and QY) in which a Trial Chamber ordered a Rule 91 investigation. In all these cases, the perjury had been effectively admitted.

Even there, however, none of the decisions taken was pursuant to a Rule 91 process initiated by the Trial Chamber itself. The judges remained apathetic until they were moved to action.

V. Explaining a tradition of apathy in the face of perjury

The above review of Rule 91 decisions at the ICTR does not reflect the full extent of the problem of perjury at the Tribunal. As the *Rwamakuba* trial judgement itself illustrates, most instances of apparent perjury are passed over, by the parties as much as by the judges, without any comment except on the credibility, for evidentiary purposes, of the witness. In the notes, I refer to some of the most striking cases of apparent perjury, where the "strong grounds" of the Rule 91 test abound.[103] In some we see the judges acknowledging evidence of the mens rea of the offence, yet never taking any action.[104]

[102] At the same time, it is remarkable that the other witness in GAA's case, known as GEX, who had not testified at the trial but had given a statement to the prosecution implicating the accused, sought to retract her statement and support GAA's story about pressure having been put on the pair to falsify evidence against the accused. GAA and GEX were really in the same boat, as far as the facts revealed (*Prosecutor v. Kamuhanda*, Judgement on Appeal, 19 September 2005, par. 222-6). GEX's case was no less extra-dimensional. Yet the Appeals Chamber branded *her* testimony at the appellate hearing merely "unreliable" (ibid., par. 226), as opposed to the "not credible" (ibid., par. 221) for GAA, and initiated proceedings only against GAA.

[103] *Prosecutor v. Kamuhanda*, Trial Judgement, 22 January 2004, par. 282; *Prosecutor v. Ntagerura et al.*, Trial Judgement, 25 February 2004, par. 321 (the allegation that the accused had cut out the hearts of seventeen victims and eaten them is particularly striking); *Prosecutor v. Ndindabahizi*, Trial Judgement, 15 July 2004, par. 197; and *Prosecutor v. Seromba*, Trial Judgement, 11 December 2006, par. 254.

[104] *Prosecutor v. Rutaganda*, Trial Judgement, 6 December 1999, par. 298 ("The inference to be drawn is that this defence was an afterthought and that the account of dates was tailored by the Accused and

Explanations of the ICTR judges' apathy towards possible perjury might include a misapprehension that it is for the parties to initiate proceedings. Or perhaps the judges consider perjury proceedings to be too trivial or too tangential to the main case. They might view the Rule 91 process as a drain on tribunal resources, or be concerned that heavy-handed tactics could scare away witnesses. They likely pity some of the evidently damaged witnesses. And they have to contend with the authoritarian government of Rwanda, still controlled by the war's victors, on whose pleasure depends the smooth operation on the Tribunal (including facilitation of witness travel).[105]

None of these are valid justifications. They trivialize that which is self-evidently serious. We have seen evidence of systemic pressures operating on witnesses resident in Rwanda, which are aimed at, or serve as incentives for them to distort their testimonies when they come before the ICTR.[106] It is difficult to understand how such disturbing

Defense Witness DDD, following the conclusion of the Prosecution's case"); *Prosecutor v. Niyitegeka*, Trial Judgement, 16 May 2003, par. 222 ("As the witness claimed that he had made a false statement, the Chamber finds that Witness TEN-6's evidence is of questionable veracity"); *Prosecutor v. Ntagerura et al.*, Trial Judgement, 25 February 2004, par. 322 and 438 ("leaves the impression of fabrication ... leaves the impression that his testimony is for sale ... Witness LAP admitted to falsifying evidence related to other cases"); *Prosecutor v. Seromba*, Trial Judgement, 11 December 2006, par. 92 ("Witness FE36 is not credible, as he admits having lied before the Chamber"); ibid., par. 237 ("The witness provided no convincing explanation for these contradictions, merely claiming that the statements were occasionally false, occasionally incomplete or drafted under duress or with a view to financial compensation"); ibid., par. 249 ("Witness FE32 explained that he made this statement 'in order to please some people who wanted me to implicate Father Seromba'"); and *Prosecutor v. Nahimana et al.*, Appeal Judgement, 28 November 2007, par. 446 ("Witness EB denies before the Chamber being the author of a recantation statement, but an expert retained by the Prosecutor unhesitatingly attributes to him the handwriting and signature on that statement; and ... several genocide survivors consider him ready to do anything for money").

[105] See A. Zahar, 'Witness Memory and the Manufacture of Evidence at the International Criminal Tribunals', in C. Stahn and L. van den Herik (eds), *Future Directions in International Criminal Justice*, TMC Asser Press/Cambridge University Press, 2009.

[106] There is much compelling evidence that prosecution witnesses often experience pressure by individuals and groups in Rwanda to testify falsely against ICTR defendants. In addition to evidence cited

evidence can be ignored by the tribunal judges, who must be assumed to have some concern about defending the integrity of their own proceedings.

We have also seen that when the Trial Chamber came to punish GAA, it described perjury as relatively serious on the scale of offences. False testimony in the ICTR's Rules became more, not less, serious over the years. The maximum penalty of imprisonment for false testimony initially was set at twelve months.[107] As of 2003 it was increased to five years.[108] It is noteworthy that the ICTR's maximum penalty for false testimony was initially set twice as high as the imprisonment penalty for contempt (Rule 77). The latter was held at a six-month upper limit[109] until 2003, when it too was raised to five years.[110] Only since 2003, then, have the maxima of Rules 77 and 91 been equalized at the ICTR; for eight years, false testimony was regulated as an offence of greater consequence than contempt of court.[111]

elsewhere in the paper, see *Prosecutor v. Nyiramasuhuko et al*., Decision on Kanyabashi's and Nsabimana's Motions to Cross-Examine Prosecution Witness QA on Additional Topics, Trial Chamber, 28 October 2008. See also *Prosecutor v. Kajelijeli*, Trial Judgement, 1 December 2003, par. 94 (AVEGA representatives ask witness to make false allegations against the accused by saying he raped her in 1994; in return they promise to assist the witness to recover her property and to receive a government pension); and *Prosecutor v. Ndindabahizi*, Trial Judgement, 15 July 2004, par. 111 ("Witness DF charges that Witness CGH, while working as a prison guard, boasted that he was going to manufacture evidence against the Accused. Witness DC alleges that Witness CGH took him to see the inspector of judicial police, who was with two white people. They offered to pay him fifty dollars if he testified about crimes committed by the Accused. When he refused, Witness CGH implied that he would be deprived of prison privileges because of his failure to cooperate").

[107] ICTR RPE, 29 June 1995, Rule 91(E).

[108] ICTR RPE, 27 May 2003, Rule 91(G).

[109] ICTR RPE, 29 June 1995, Rule 77(A).

[110] ICTR RPE, 27 May 2003, Rule 77(G).

[111] The ICTY moved to equalization and stiffer penalties for both offences almost five years before the ICTR. It, too, started out with a twelve-month maximum for false testimony and a six-month maximum for contempt (ICTY RPE, 11 February 1994, Rules 91(E) and 77(A), respectively). In 1998, it increased the imprisonment limit for false testimony to seven years (ICTY RPE, 4 December 1998, Rule 91(E)). For contempt, it distinguished between two categories; in effect, lesser and greater contempt. The new rule limited the sentencing maxima for these forms of contempt to twelve months and seven years of imprisonment, respectively (ICTY RPE, 4 December 1998, Rule 77(H)). (This distinction has since been

I have argued that the constellation of decisions late in the life of the ICTR ordering perjury investigations against GAA, BTH/GFA, and QY must be categorized as exceptional on the facts. The *Rwamakuba* judgement's monolithic presence in the ICTR's twilight years can only reasonably be explained as the product of a long tradition which is only partly jurisprudential; a good part of it is cultural or ideological. I have described the jurisprudential tradition in terms of *Akayesu*'s setting of an almost impossibly high test for a party-initiated Rule 91 inquiry.[112] The ideological tradition is also *Akayesu*'s making. I give an outline of it below.

The *Akayesu* trial judgement initiated a tradition at the ICTR of excusing inaccuracies or inconsistencies in witness evidence. Shifting testimonies were to be seen as *natural* to human beings, psychologistic intuitions were to be deployed to explain away gaps

abandoned: ICTY RPE, 12 July 2002, Rule 77(G).) Thus, just over four years after the first ICTY Rules were promulgated in 1994, during which period perjury was regarded as surpassing contempt in seriousness, the ICTY came to regard contempt and false testimony as potentially equally grave offences, and moreover as significantly graver offences than the ICTR with its lesser maxima has ever done. Another peculiar difference between the two tribunals is that whereas the ICTY increased the monetary fine for both contempt and false testimony from US$10,000 to €100,000 at the same time it raised the limits on incarceration, the ICTR has, from the start, kept the fine for the two offences unchanged at US$10,000 (ICTR RPE, 14 March 2008, Rules 77(G) and 91(G)). As for the International Criminal Court, false testimony is penalized under Article 70 of the ICC Statute. The maximum term of imprisonment for the offence is five years (ICC Statute, Article 70(3)). The ceiling of the monetary fine is unquantified, although it is limited with reference to the convicted person's assets (ICC RPE, Rule 166(3)). The ICC's other contempt powers are also controlled by Article 70; however, they are much narrower than those claimed by the ad hoc tribunals.

[112] *Akayesu*'s "proof" test has never been overturned. In addition to the citations already given, *Akayesu*'s test is reiterated with approval in *Prosecutor v. Musema*, Trial Judgement, 27 January 2000, par. 99; *Prosecutor v. Niyitegeka*, Trial Judgement, 16 May 2003, par. 42; *Prosecutor v. Niyitegeka*, Appeal Judgement, 9 July 2004, par. 253; and *Prosecutor v. Simba*, Appeal Judgement, 27 November 2007, par. 31 (where the Chamber's "conviction" about the elements of the offence is said to be required). Consider also *Prosecutor v. Kajelijeli*, Trial Judgement, 1 December 2003, par. 683 ("the Chamber finds, in the *absence of corroboration* of Witness ZLA's allegation, insufficient evidence to determine that subornation of perjury or intimidation attempts *did in fact occur*", emphasis added; note that nowhere does the Trial Chamber make any finding to the effect that ZLA is not a credible witness).

and contradictions, and judicial ingenuity in smoothing over evidentiary issues was to be prized. The threshold indication of false testimony was thus raised even higher than the artificially high jurisprudential threshold.

Here is a sample of *Akayesu*'s ideology, dressed as an empirically grounded psycho-physiology:

> an often levied criticism of testimony is its fallibility. Since testimony is based mainly on memory and sight, two human characteristics which often deceive the individual, this criticism is to be expected. Hence, testimony is rarely exact at to the events experienced. To deduce from any resultant contradictions and inaccuracies that there was false testimony, would be akin to criminalising frailties in human perceptions. [...] Memory over time naturally degenerates, hence it would be wrong and unjust for the Chamber to treat forgetfulness as being synonymous with giving false testimony.[113]

Akayesu, the ICTR's defining judgement, proceeded to add a moral gloss to its pro-prosecution rhetoric of the senses. If "victims" had to be cared for, so had their testimony:

> The possible traumatism of these witnesses caused by their painful experience of violence during the conflict in Rwanda is a matter of particular concern to the Chamber. The recounting of this traumatic experience is likely to evoke memories of the fear and the pain once inflicted on the witness and thereby affect his or her ability fully or adequately to recount the sequence of events in a judicial context. [...] The Chamber is unable to exclude the possibility that some or all of these witnesses did actually suffer from post traumatic or extreme stress disorders [...] Inconsistencies or imprecisions in the testimonies, accordingly, have been assessed in the light of this assumption, personal background and the atrocities they have experienced or have been subjected to.[114]

In other words, to question evidence is to question victimhood.

[113] *Prosecutor v. Akayesu*, Trial Judgement, 2 September 1998, par. 140.

[114] Ibid., par. 142-3. The Trial Chamber is careful to point out that this is the proper attitude towards both prosecution and defence witnesses.

The baleful influence of *Akayesu* has combined with an inexorable fact about applied international criminal law, viz. that the culturally remote judges at the international criminal tribunals have experienced great difficulty in "reading" witnesses as persons. They much prefer to read them as text.[115] The preference we have seen expressed time and again in the material cited in this paper for making credibility determinations only once all the evidence has been admitted is a subterfuge for a deep anxiety shared by ICTR judges. Once all the evidence is admitted, they can go into seclusion with the text.

The tribunal judge's in-court alienation from the Rwandan witness, accounts, in my view, for the tendency we have seen here, of Trial Chambers, in effect, postponing the Rule 91 procedure until the conclusion of the evidentiary hearings. The problem, by that stage, however, is that there is no advantage, at least for the defence, in pursuing the matter through Rule 91. A case in point is *Rwamakuba*. Following his acquittal, instead of expending resources on written motions for Rule 91 prosecutions of witnesses, which of course could not have resulted in any personal benefit to himself, Rwamakuba sought monetary compensation from the Tribunal for "grave and manifest injustice occasioned, inter alia, by the manipulation of evidence against him during his case".[116]

In closing arguments and briefs, defence teams continue their attacks on the credibility of prosecution witnesses, but no longer on the basis of Rule 91.[117] For the defence, at that stage, the meaningful moment has passed. Judicial apathy takes care of the rest.

[115] I have discussed this issue in A. Zahar, 'Witness Memory and the Manufacture of Evidence at the International Criminal Tribunals', in C. Stahn and L. van den Herik (eds), *Future Directions in International Criminal Justice*, TMC Asser Press/Cambridge University Press, 2009.

[116] *Prosecutor v. Rwamakuba*, Decision on Appropriate Remedy, Trial Chamber, 31 January 2007, par. 5.

[117] The defence tactic in the concluding stages of a case is to evoke conspiracies; see, for example, *Prosecutor v. Akayesu*, Trial Judgement, 2 September 1998, par. 44 (collusion in syndicate of informers); *Prosecutor v. E. and G. Ntakirutimana*, Trial Judgement, 21 February 2003, par. 751 (organized propaganda effort); *Prosecutor v. Niyitegeka*, Trial Judgement, 16 May 2003, par. 42 and 397 (subornation by RPF and IBUKA); *Prosecutor v. Kajelijeli*, Trial Judgement, 1 December 2003, par. 117 and 683 (fabricated testimonies); *Prosecutor v. Nahimana et al.*, Trial Judgement, 3 December 2003, par. 851-74 (subornation by IBUKA); and *Prosecutor v. Kamuhanda*, Trial Judgement, 22 January 2004, par.

VI. No justice for Rwamakuba

The Trial Chamber which dealt with Rwamakuba's petition for monetary compensation was the same one which acquitted him. While not affirming that there had been a grave and manifest injustice in his prosecution, it did not *dispute* the claim.[118] It concentrated instead on Rwamakuba's argument that Article 85(3) of the ICC Statute (which states that "In exceptional circumstances, where the Court finds conclusive facts showing that there has been a grave and manifest miscarriage of justice, it may in its discretion award compensation [...]") represents customary international law. The judges found that it does not. Rwamakuba appealed.

The Appeals Chamber confirmed the Trial Chamber's finding on the law.[119] But it did not stop there. Perhaps feeling that the Trial Chamber's decision left the impression, as indeed it does, that if only the law were different Rwamakuba might have qualified for compensation, the Appeals Chamber, in dismissing the appeal, took the additional, and strictly unnecessary step of purporting to refute Rwamakuba's claim that there had been a grave and manifest injustice in his case. The Appeals Chamber's argument[120] is not only too brief, it is transparent in its tendentiousness. It asserts that, but does not explain

70 (witnesses were out to discredit the accused and cause mischief). Such conspiracy theories are relatively easily – but often too easily – dismissed by the Trial Chambers, which always reduce the problem to whether individual witnesses are credible; for example, *Prosecutor v. Akayesu*, Trial Judgement, 2 September 1998, par. 46-7; *Prosecutor v. E. and G. Ntakirutimana*, Trial Judgement, 21 February 2003, par. 751-77; *Prosecutor v. Niyitegeka*, Trial Judgement, 16 May 2003, par. 397-401; *Prosecutor v. Nahimana et al*., Trial Judgement, 3 December 2003, par. 851-74; and *Prosecutor v. Kamuhanda*, Trial Judgement, 22 January 2004, par. 71.

[118] *Prosecutor v. Rwamakuba*, Decision on Appropriate Remedy, Trial Chamber, 31 January 2007, par. 21-31. In the trial judgement, the judges repeatedly referred to the prosecution's "failure" to make its case (e.g. *Judgement*, par. 158), stopping short, however, of calling it a sham.

[119] *Rwamakuba v. Prosecutor*, Decision on Appeal Against Decision on Appropriate Remedy, Appeals Chamber, 13 September 2007, par. 10.

[120] Ibid., par. 11-12.

why, Rwamakuba's claim is defeated by the fact that at no point prior to the final trial judgement was the evidence against him found to be unconvincing. An informed reader knows, however, that that fact was a consequence of the Trial Chamber's insistence on making such a determination only once it had all the evidence before it, at the end of the case. How, then, *could* the Trial Chamber have expressed any intermediate lack of conviction in the evidence when it had postponed such consideration to the final stages of deliberation? But even if the Trial Chamber had not taken that approach, there is no legal basis for the Appeals Chamber's position that the Trial Chamber's uncritical assessment of the evidence along the way, in particular its no-case-to-answer (Rule 98 bis) decision at the end of the prosecution's case, were unreviewable by the Appeals Chamber in the context of the compensation claim.

In the end, Rwamakuba paid a price for the Trial Chamber's reluctance, typical of ICTR judges, to make credibility findings before the close of the hearings. We sense the elements of a vicious circle: Rule 91 does not work for defendants in the course of trial; at the end of trial, it is irrelevant for those who have been acquitted; and if the latter ask for compensation, their claim is undermined by the fact that they had no success in attacking witness credibility midstream in the process. The Appeals Chamber in its decision on the compensation issue also wrongly asserted that Rwamakuba's alibi played a big role in his acquittal.[121] As I outlined earlier, the Trial Chamber found against the prosecution witnesses primarily for reasons unrelated to the alibi. The Appeals Chamber's alibi argument is not just inaccurate, it is irrelevant; the prosecution had been notified of the alibi long before the trial,[122] which makes it even harder to understand why it pressed ahead with such a weak case.

André Rwamakuba was brought to trial on the basis of the testimony of five lying witnesses. A whole trial was conducted at great expense to the international community and untold inconvenience to the accused. Both the prosecution lawyers and the lying

[121] Ibid., par. 12.

[122] *Judgement*, par. 82.

witnesses walked away from the disaster unscathed. The judges, captives of a judicial mindset, took no action to correct the injustice. Now there is nothing more to be done.