2254/H

UNITED NATIONS
NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal Pénal International pour le Rwanda

ICTR-98-44-AR.91
22 January 2009
{2254/H – 2245/H}

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Carmel Agius
Judge Mohamed Shahabuddeen
Judge Fausto Pocar
Judge Theodor Meron

Registrar: Mr. Adama Dieng

Decision of: 22 January 2009

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda
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NAME / NOM: ROSETTE MUZIGO-MORRISON
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THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-AR.91

ICTR Appeals Chamber
Date: 22 January 2009
Action: R. Tuma
Copied To: Concerned Judges, Archives, Parties, LOS, LSS

DECISION ON "JOSEPH NZIRORERA'S APPEAL FROM REFUSAL TO INVESTIGATE [A] PROSECUTION WITNESS FOR FALSE TESTIMONY" AND ON MOTION FOR ORAL ARGUMENTS

Counsel for the Appellant:

Mr. Peter Robinson and Mr. Patrick Nimy Mayidika Ngimbi

Counsel for Co-Accused:

Ms. Dior Diagne Mbaye and Mr. Félix Sow for Édouard Karemera
Ms. Chantal Hounkpatin and Mr. Frédéric Weyl for Mathieu Ngirumpatse

Counsel for the Prosecution:

Mr. Hassan Bubacar Jallow
Mr. Don Webster
Ms. Alayne Frankson-Wallace
Mr. Iain Morley
Mr. Saidou N'Dow
Ms. Gerda Visser
Ms. Sunkarie Ballah-Conteh
Mr. Takeh Sendze

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1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized of:

(1) "Joseph Nzirorera's Appeal from Refusal to Investigate [a] Prosecution Witness for False Testimony" filed on 24 November 2008 ("Appeal" and "Appellant", respectively); and

(2) "Motion for Oral Argument: Joseph Nzirorera's Appeal from Refusal to Investigate [a] Prosecution Witness for False Testimony" filed on 23 December 2008 ("Motion for Oral Arguments").

2. On 1 December 2008, the Prosecution filed its Response, opposing the Appeal,[1] and the Appellant filed his Reply on 3 December 2008.[2] The Prosecution filed its Response opposing the Motion for Oral Arguments on 29 December 2008.[3]

A. Background

3. The trial in the Appellant's case commenced on 19 September 2005 before Trial Chamber III ("Trial Chamber").[4] On 14 October 2005, the Appellant made an oral motion for an order directing an *amicus curiae* to investigate whether there were sufficient grounds for initiating proceedings for false testimony against Prosecution Witness Ahmed Mbonyunkiza ("Mbonyunkiza"),[5] which was denied.[6] On 29 May 2006, the Appellant filed a motion requesting, once again, an order directing that an *amicus curiae* be appointed to investigate Mbonyunkiza for false testimony,[7] which was also denied.[8] On 10 September 2008, the Appellant filed a motion in which he *inter alia* requested reconsideration of the Decision of 14 October 2005 and the Decision of 29 December 2006.[9] In its "Decision on Joseph Nzirorera's Omnibus Motion on the Testimony

[1] Prosecution's Response to Joseph Nzirorera's Appeal from Refusal to Investigate Prosecution Witness for False Testimony, 1 December 2008 ("Response").
[2] Reply Brief: Joseph Nzirorera's Appeal from Refusal to Investigate Prosecution Witness for False Testimony, 3 December 2008 ("Reply").
[3] Prosecutor's Response to "Joseph Nzirorera's Motion for Oral Argument: Joseph Nzirorera's Appeal from Refusal to Investigate Prosecution Witness for False Testimony, 29 December 2008 ("Response to the Motion for Oral Arguments").
[4] Decision on Defence Motion for Investigation of Prosecution Witness Ahmed Mbonyunkiza for False Testimony, 29 December 2006 ("Decision of 29 December 2006"), para. 1.
[5] T. 14 October 2005 pp. 19, 20.
[6] T. 14 October 2005 p. 21 ("Decision of 14 October 2005").
[7] *See* Motion for Investigation of Witness Ahmed Mbonyunkiza for False Testimony, 29 May 2006.
[8] Decision of 29 December 2006, p. 5.
[9] Joseph Nzirorera's Omnibus Motion on the Testimony of Ahmed Mbonyunkiza, 10 September 2008 ("Motion of 10 September 2008").

of Ahmed Mbonyunkiza, Notice of 15th Violation of Rule 72(E), and Motion to Strike the Prosecution's Response" of 19 November 2008 ("Impugned Decision"), the Trial Chamber *inter alia* denied this request and also denied Counsel's fees in relation to the Motion of 10 September 2008.[10] The Appellant now appeals against the Impugned Decision, submitting that the Trial Chamber erred: (1) by imposing "too high a burden of establishing intent"; (2) by finding that conflicting testimony does not suffice to demonstrate that a contradicted witness has given false testimony; and (3) by imposing sanctions on Counsel.[11] He also requests that a hearing be held on 2 February 2009 to present oral arguments.[12]

B. Submissions

4. The Appellant contends that the Appeal is admissible and draws similarities with a decision issued by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in the *Šešelj* case,[13] in this regard.[14] He states that in the *Šešelj* Decision, it was held that an appeal against the refusal to initiate an investigation for contempt proceedings, pursuant to Rule 77 of the ICTY Rules of Procedure and Evidence ("ICTY Rules"), was admissible.[15] In this regard, he argues that the provisions of Rule 77 of the ICTY Rules are identical to those of Rule 91 of the Tribunal's Rules of Procedure and Evidence ("Rules"), and that, therefore, the Appeal filed under Rule 91 is admissible.[16]

5. The Appellant submits that the Trial Chamber applied an incorrect legal standard by requiring a high standard of proof of intent to mislead the Trial Chamber and to cause harm.[17] In this regard, he refers to the *Šešelj* Decision and asserts that the ICTY Appeals Chamber in the *Šešelj* case held that the "sufficient grounds" standard envisaged in Rule 77(D) of the ICTY Rules requires the Trial Chamber only to establish whether the evidence before it gives rise to a *prima facie* case of contempt of the Tribunal.[18] He claims that the Trial Chamber committed a similar error to the Trial Chamber in the *Šešelj* case by requiring evidence beyond that which is necessary to establish a

[10] Impugned Decision, paras. 10-14, p. 5.
[11] Appeal, para. 26.
[12] Motion for Oral Arguments, para. 3.
[13] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR77.2, Decision on the Prosecution's Appeal Against the Trial Chamber's Decision of 10 June 2008, 25 July 2008 ("*Šešelj* Decision" and "*Šešelj* case", collectively).
[14] Appeal, paras. 21-25.
[15] Appeal, para. 22.
[16] Appeal, paras. 23, 24.
[17] Appeal, paras. 28-32.
[18] Appeal, para. 28.

prima facie case.[19] The Appellant argues that had the Trial Chamber applied the correct standard in his case, it would have concluded that a *prima facie* case for false testimony had been made out.[20]

6. The Appellant further contends that the Trial Chamber erred when it excluded contradictory evidence as a source of proof of false testimony.[21] He argues that it is not logical to conclude that the testimonies of five witnesses are insufficient to constitute strong grounds for believing that Mbonyunkiza's testimony was false, since it is contradictory evidence which has been the basis for many of the Trial Chamber's decisions on the credibility of witnesses.[22] The Appellant also asserts that this approach goes against public interest because it allows for prosecution only of those who confess to have given false testimony.[23] He argues that it encourages those who lied to remain steadfast in their denials, while deterring those who are ready to tell the truth.[24]

7. The Appellant claims that the Trial Chamber erred in finding that his motion for reconsideration was frivolous and consequently erred in sanctioning his Counsel. He argues that should the Appeals Chamber find merit in the Appeal, it is only fair that in reversing the decision of the Trial Chamber it reverses the imposition of the sanction against his Counsel.[25]

8. The Appellant argues that the Appeals Chamber should hear oral arguments before deciding the Appeal because the issue of false testimony is of general importance to the jurisprudence of the *ad hoc* Tribunals and the decision on the Appeal will set valuable precedent.[26] The Appellant asserts that given that the legal issues on appeal are substantial and novel, it is the first opportunity for the Appeals Chamber to interpret Rule 91 of the Rules.[27] He further asserts that the hearing of oral arguments will not cause any inconvenience to the Appeal Chamber, as it will sit in Arusha in February 2009 to deliver judgement in another case.[28] The Appellant also claims that there will be no additional travel expenses, as his Counsel, as well as the Prosecution, will already be in Arusha,[29] and that the Tribunal and the East African Community will benefit from observing what would be the first ever interlocutory appeal hearing in Arusha.[30] The Appellant submits that the "Presiding Judge of the Appeals Chamber in the instant case is a trial judge of the ICTY", who has never participated as a member of the Appeals Chamber, and hearing oral arguments will allow him

[19] Appeal, paras. 28, 29.
[20] Appeal, para. 29.
[21] Appeal, para. 35.
[22] Appeal, paras. 33, 34
[23] Appeal, para. 34.
[24] Appeal, para. 35
[25] Appeal, para. 37.
[26] Motion for Oral Arguments, paras. 3, 5.
[27] Motion for Oral Arguments, para. 6.
[28] Motion for Oral Arguments, para. 7.
[29] Motion for Oral Arguments, para. 9.
[30] Motion for Oral Arguments, para. 10.

to observe the Tribunal first hand and to take into account the differences in cultures and operations between the Tribunal and the ICTY, "which partially accounts for the high incidence of perjury at the [Tribunal]."[31]

9. In response, the Prosecution contends that the Appellant is in error as to the scope and application of the *Šešelj* Decision.[32] It argues that the facts and the applicable law which gave rise to the *Šešelj* Decision are clearly distinguishable from those in the present case.[33] According to the Prosecution, the Trial Chamber did not require production of conclusive proof of evidence,[34] and the Trial Chamber's conclusion that it did not have strong reasons for believing that Mbonyunkiza had knowingly and wilfully given false testimony bears upon the fact that the Appellant had failed to make a *prima facie* case of false testimony.[35]

10. The Prosecution submits that, while there may be similarities between Rule 77(D) of the ICTY Rules and Rule 91(B) of the Rules, a strict comparison between these rules cannot be made because: they apply to different issues; to different stages of the proceedings; and they encompass a different legal threshold.[36] It argues that Rule 91(B) of the Rules requires the existence of "strong grounds" for believing that a witness has knowingly and wilfully given false testimony, which must be seen as an even higher requirement than the "sufficient grounds" threshold encompassed in Rule 77(D) of the ICTY Rules.[37]

11. The Prosecution contends that the Appellant has failed to identify any discernible error of the Trial Chamber, and merely repeats arguments already considered and diligently ruled upon by the Trial Chamber.[38] It asserts that the Appellant's contention is that once there are inconsistencies in a witness's testimony, or inconsistencies between witnesses, these witnesses are guilty of giving false testimony.[39] According to the Prosecution, this is an incorrect statement of the principles relevant to the offence of false testimony.[40]

12. The Prosecution submits that good cause for hearing oral arguments has not been demonstrated.[41] It contends that the arguments advanced by the Appellant in support of his request for the hearing of oral arguments, can be made for most issues that are addressed in interlocutory

[31] Motion for Oral Arguments, para. 8.
[32] Response, paras. 9-13.
[33] Response, para. 10.
[34] Response, para. 11.
[35] Response, para. 11.
[36] Response, para. 12
[37] Response, para. 12.
[38] Response, paras. 14, 15.
[39] Response, para. 16.
[40] Response, para. 16.
[41] Response to the Motion for Oral Arguments, para. 4.

appeals, and that the Appeals Chamber should not be persuaded by them.[42] The Prosecution argues that the issue is whether the Trial Chamber correctly exercised its discretion and not whether the Impugned Decision was correct, in the sense that the Appeals Chamber would agree with it.[43] It asserts that this issue is not so complex as to warrant oral arguments, and that the written submissions will suffice.[44] Finally, the Prosecution argues that the Appeals Chamber's presence in Arusha cannot be advanced as an argument to depart from the general practice of considering interlocutory appeals on written submissions.[45]

C. Standard of Review

13. The Impugned Decision concerns the alleged false testimony of a witness and relates to the general conduct of trial proceedings in the Appellant's case. Decisions relating to the general conduct of trial proceedings fall within the discretion of a Trial Chamber, to which the Appeals Chamber must accord deference.[46] As such, the Impugned Decision is a discretionary decision. Where an appeal is filed against a discretionary decision of a Trial Chamber, the issue on appeal is not whether the decision was correct, in the sense that the Appeals Chamber agrees with it, but rather whether the Trial Chamber has correctly exercised its discretion in rendering the decision.[47] Consequently, the Trial Chamber's exercise of discretion will only be reversed where it is demonstrated that the Trial Chamber committed a discernible error in rendering the Impugned Decision, based on an incorrect interpretation of the governing law, a patently incorrect conclusion of fact, or where the Impugned Decision was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[48]

D. Discussion

14. The Appeals Chamber notes, in relation to the Motion for Oral Arguments, that interlocutory appeals are generally considered on arguments made in briefs without a hearing. A

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[42] Response to the Motion for Oral Arguments, para. 5.
[43] Response to the Motion for Oral Arguments, para. 5.
[44] Response to the Motion for Oral Arguments, para. 5.
[45] Response to the Motion for Oral Arguments, para. 6.
[46] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.11, Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008 ("*Karemera et al.* Decision of 23 January 2008"), para. 7, referring to *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.10, Decision on Nzirorera's Interlocutory Appeal Concerning his Right to be Present at Trial, 5 October 2007, para. 7 ("*Karemera et al.* Decision of 5 October 2007"); *The Prosecutor v. Élie Ndayambaje et al.*, Case No. ICTR-98-42-AR73, Decision on Joseph Kanyabashi's Appeals against the Decision of Trial Chamber II of 21 March 2007 concerning the Dismissal of Motions to Vary his Witness List, 21 August 2007 ("*Ndayambaje et al.* Decision of 21 August 2007").
[47] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.13, Decision on "Joseph Nzirorera's Appeal from Decision on Tenth Rule 68 Motion", 14 May 2008, para. 6, referring to *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.5, Decision on Vojislav Šešelj's Interlocutory Appeal Against the Trial Chamber's Decision on Form of Disclosure, 17 April 2007, para. 14.

party requesting leave to make oral arguments must demonstrate that the issues on appeal cannot be effectively addressed through written arguments.[48] In the present case, the Appellant has failed to show that the Appeal cannot be effectively addressed through written arguments and that oral arguments are, therefore, warranted. Consequently, the Appeals Chamber will proceed to consider the Appeal solely on the basis of the written briefs filed by the Parties.

15. On the issue of the admissibility of the Appeal, the Appeals Chamber notes that Rule 91(I) of the Rules provides that any decision rendered by a Trial Chamber under Rule 91 of the Rules shall be subject to appeal, and that such appeal must be filed within fifteen days from the filing of the impugned decision. In the present case, the Impugned Decision ruled on a request for reconsideration of the Decision of 14 October 2005 and the Decision of 29 December 2006, both of which were issued pursuant to Rule 91(A) and (B) of the Rules. Since both of these decisions could have been the subject of an appeal, a decision issued in their reconsideration, as the Impugned Decision, may also be appealed under Rule 91(I) of the Rules. Consequently, the Appeal, which was filed within the prescribed time-limit, is admissible.

16. The Appellant contends that the Trial Chamber ought to have concluded that a *prima facie* case for false testimony had been made out, but that it instead applied an incorrect legal standard by requiring a higher standard of proof.[50] The Appeals Chamber notes that in the Decision of 29 December 2006, the Trial Chamber stated:

> In determining whether "strong grounds" exist that the witness gave false testimony, a Chamber must therefore find, on a case-by-case basis in the particular circumstances of each case, evidence of an intention to commit this offence. Contradictory evidence between witness' 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.[51]

17. In the Motion of 10 September 2008, the Appellant requested the Trial Chamber to reconsider the aforementioned reasoning, in view of the findings in the *Šešelj* Decision, which he submitted was new law.[52] The *Šešelj* Decision held "that the 'sufficient grounds' standard under Rule 77(D) of the [ICTY] Rules requires the Trial Chamber only to establish whether the evidence before it gives rise to a *prima facie* case of contempt of the Tribunal and not to make a final finding

[48] *Karemera et al.* Decision of 23 January 2008, para. 7 referring to *Karemera et al.* Decision of 5 October 2007, para. 7; *Ndayambaje et al.* Decision of 21 August 2007, para. 10.
[49] *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-AR31.1, Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment, 25 April 2005, para. 4.
[50] Appeal, paras. 28-32.
[51] Decision of 29 December 2006, para. 7 (internal citations omitted).
[52] Motion of 10 September 2008, paras. 25-35.

on whether contempt has been committed".[53] The Trial Chamber denied the Appellant's request and reasoned that

> [t]he new law brought to the Chamber's attention does not concern Rule 91(B). The *Šešelj* Decision, which clarifies the standard for instigating contempt proceedings in the context of the disclosure of confidential information, confines itself to Rule 77(D), and does not mention or shed any new light on Rule 91(B).[54]

18. The Appeals Chamber agrees. Rule 91(B) of the Rules which concerns false testimony states that where there are "strong grounds" for believing that a witness has knowingly and wilfully given false testimony, a Chamber may direct the Prosecutor to investigate the matter with a view to submitting an indictment against the witness, or it may direct the Registrar to appoint an *amicus curiae* to investigate the matter as to whether there are sufficient grounds for initiating proceedings for false testimony against the witness. This provision is materially different from Rule 77(C) of the ICTY Rules and the analogous provision in Rule 77(C) of the Rules, which concern contempt of the Tribunal and provide for an investigation when a Chamber has "reason to believe" that a person may be in contempt. On completion of the process envisaged in Rule 91(B) of the Rules, the Chamber will then consider whether there are "sufficient grounds" to proceed against a witness for false testimony.[55] This provision is similar to that of Rule 77(D) of the ICTY Rules, and Rule 77(D) of the Rules, in that it also envisages a "sufficient grounds" standard.

19. The Appeals Chamber notes that in the *Šešelj* Decision, which forms the basis of the Appellant's arguments, the ICTY Appeals Chamber held that the "sufficient grounds" standard under Rule 77(D) of the ICTY Rules requires the Trial Chamber only to establish whether the evidence before it gives rise to a *prima facie* case of contempt of the Tribunal and not to make a final finding on whether contempt has been committed.[56] Putting this decision in context, it is worth noting that following an earlier appointment of an *amicus curiae*, the Trial Chamber in the *Šešelj* case took into account a report prepared by her to ascertain whether sufficient grounds existed to prosecute the persons concerned.[57] Since a *prima facie* case must be established to confirm an indictment,[58] it is therefore logical for a Chamber to employ this standard when ordering the prosecution of an individual. However, in the Appellant's case, the Trial Chamber was not required to make a determination on whether to prosecute Mbonyunkiza, pursuant to Rule 91(C) of the Rules, but to consider whether to direct the Registrar to refer the matter to an *amicus curiae* for

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[53] *Šešelj* Decision, para. 16.
[54] Impugned Decision, para. 13 (internal citation omitted).
[55] *See* Rule 91(C) of the Rules.
[56] *Šešelj* Decision, para. 16.
[57] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Motions by the Prosecution and the Accused to Investigate Contempt against Ms. Dahl (from the Office of the Prosecutor) and Mr. Vučić (Associate of the Accused), 10 June 2008, paras. 7, 12.

investigation, pursuant to Rule 91(B) of the Rules, since, the "sufficient grounds" standard and the requisite finding of a *prima facie* case are not applicable in the circumstances of the present case.

20. The Appeals Chamber recalls that in the *Kamuhanda* case it applied the "strong grounds" standard as prescribed in Rule 91(B) of the Rules and directed the Prosecutor to undertake a general investigation *inter alia* with a view to preparing and submitting an indictment for false testimony.[59] In this regard, the Appeals Chamber took into account significant discrepancies in testimonies given by witnesses, as well as evidence of allegations against two Tribunal employees in relation to the influence of a witness, and it had reason to believe that there may have been attempts to pervert the course of justice with the solicitation of false testimony.[60] The nature of these factors is materially different from that of the present case where the Appellant merely alleges discrepancies among testimonies of Prosecution witnesses in an ongoing trial.

21. The Appeals Chamber reiterates that a decision to initiate this type of proceedings falls within a Trial Chamber's discretion, as evidenced by the wording of Rule 91(B) of the Rules ("If a Chamber has strong ground ... it may..."). [61] In exercising this discretion, a Trial Chamber will take into account certain factors, such as (i) indicia as to the *mens rea* of the witness, including his intent to mislead and cause harm; (ii) the relationship between the statement in question and a material matter in the case; (iii) the possible bearing of the statement in question on the Chamber's final decision.[62] In other words, a Chamber will have to consider carefully if these proceedings are the most effective and efficient way to ensure compliance with obligations flowing from the Statute or the Rules in the specific circumstances of the case.

22. On the basis of the foregoing, the Appeals Chamber finds that the Appellant has failed to show that the Trial Chamber committed a discernible error in rendering the Impugned Decision. On the issue of the sanctions imposed on Counsel, the Appeals Chamber will not consider the request because there is no right of appeal in this regard.[63]

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[58] Article 18 of the Statute of the Tribunal and Article 19 of the Statute of the ICTY provide that an indictment shall be confirmed where a *prima facie* case has been established.
[59] *Jean de Dieu Kamuhanda v. The Prosecutor*, Case No. ICTR-99-54A-A, Oral Decision (Rule 115 and Contempt of False Testimony), 19 May 2005 ("*Kamuhanda* Decision"), pp. 2, 3.
[60] *Kamuhanda* Decision, p. 2.
[61] Emphasis Added. *Cf.* Rule 77(A) and (D) of the Rules.
[62] *See e.g. The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Decision on Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness "R", 9 March 1998 (signed on 24 March 1998), referred to in the Impugned Decision, para. 11.
[63] *Joseph Nzirorera v. The Prosecutor*, Case No. ICTR-98-44-AR73(F), Decision on Counsel's Appeal from Rule 73(F) Decisions, 9 June 2004, p. 3.

F. Disposition

23. For the aforementioned reasons, the Appeals Chamber:

DENIES the Motion for Oral Arguments; and

DENIES the Appeal.

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

Dated this the 22nd day of January 2009,
at The Hague,
The Netherlands.

Judge Liu Daqun,
Presiding

[Seal of the Tribunal]