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International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

UNITED NATIONS
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OR: ENG

TRIAL CHAMBER III

Before Judges: Dennis C. M. Byron, Presiding
Emile Francis Short
Gberdao Gustave Kam

Registrar: Adama Dieng

Date: 15 December 2006

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THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-T

DECISION ON DEFENCE MOTIONS TO PROHIBIT WITNESS PROOFING

Rule 73 of the Rules of Procedure and Evidence

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INTRODUCTION

1. The proceedings in the instant case commenced on 19 September 2005. While the fourth trial session of the Prosecution's case was ongoing, the Defence for Nzirorera moved the Chamber to prohibit, with immediate effect, the Prosecution from "proofing" its witnesses before they testify.[1] To support its application, it relied upon a Decision rendered by Pre-Trial Chamber I of the International Criminal Court ("ICC") in the *Dyilo* case and requested the Chamber to apply the same standards.[2] The Defence for Ngirumpatse joins the application and the Prosecution opposes the Motion.[3]

DELIBERATIONS

2. In order to address the Defence Motions, the Chamber will first provide an analysis of the ICC Decision (1), then it will address the practice at the *ad hoc* Tribunals (2) and finally the practice of the Prosecution in this case (3).

1. Comments on the *Dyilo* Decision

3. On 8 November 2006, the Pre-Trial Chamber of the ICC ruled upon whether the practice of proofing witnesses as described by the Prosecution in the *Dyilo* case was admissible in proceedings before the ICC. In reaching its finding, the Pre-Trial Chamber applied the standards of applicable law as set out in Article 21 of its Statute.[4]

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[1] Joseph Nzirorera's Motion to Prohibit Witness Proofing, filed on 13 November 2006.

[2] ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Practices of Witness Familiarisation and Witness Proofing (Pre-Trial Chamber), 8 November 2006 ("*Dyilo* Decision").

[3] See Ngirumpatse's Motion filed on 17 November 2006; Prosecution Responses filed on 16 and 20 November; Nzirorera's Reply filed on 20 November 2006 and Ngirumpatse's Reply filed on 24 November 2006. The Defence for Nzirorera also orally requested the Chamber to take interim measures prohibiting witness proofing until such a time it will have delivered its decision. The Chamber denied this application for interim measures but reduced the time-limits for the Prosecution to file its response (see T. 14 November 2006).

[4] *Dyilo* Decision, paras. 7-9. ICC Statute, Article 21 (Applicable law):

1. The Court shall apply:
(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
(b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
(c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

4. The Pre-Trial Chamber divided the notion of "witness proofing" as described by the ICC Prosecution in that case into two components of goals and measures. The Pre-Trial Chamber defined the first component, labelled "witness familiarization" by the Pre-Trial Chamber, as "a series of arrangements to familiarise the witnesses with the layout of the Court, the sequence of events that is likely to take place when the witness is giving testimony, and the different responsibilities of the various participants at the hearing".[5] The Pre-Trial Chamber found that this first component, "witness familiarization", was not only admissible but also mandatory under the ICC Statute.[6] Furthermore, in the Pre-Trial Chamber's view, "the [Witnesses and Victims Unit], in consultation with the party that proposes the relevant witness, is the organ of the Court competent to carry out the practice of witness familiarisation from the moment the witness arrives at the seat of the Court to give oral testimony".[7]

5. The Pre-Trial Chamber described the second component of the notion of witness proofing advanced by the ICC Prosecution as measures to review the witness' evidence "by *inter alia* (i) allowing the witness to read his or her statement, (ii) refreshing his or her memory in respect of evidence that he or she will give at the confirmation hearing, and (iii) putting to the witness the very same questions and in the very same orders as they will be asked during the testimony of the witness".[8] The Pre-Trial Chamber found that this second component was not covered by any provision of the Statute, the Rules or the Regulations.[9] It also considered that the ICC Prosecution failed to prove that the goals and measures described under the second component of witness proofing were widely accepted as practice in international criminal law.[10] It observed that the Prosecution did not put forward any jurisprudence from the ICTR authorising the practice of witness proofing as defined by the

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[5] *Dyilo* Decision, para. 15.

[6] *Dyilo* Decision, paras. 14 and 15. These goals and measures encompass:

> Assisting the witness testifying with the full comprehension of the Court proceedings, its participants and their respective roles, freely and without fear, through the following measures:
>
> i. To provide the witness with an opportunity to acquaint him/herself with the Prosecution's Trial Lawyer and other whom may examine the witness in Court;
>
> ii. To familiarise the witness with the Courtroom, the Participants to the Court proceedings and the Court proceedings;
>
> iii. To reassure the witness about his/her role in the Court proceedings;
>
> iv. To discuss matters that are related to the security and safety of the witness, in order to determine the necessity of applications for protective measures before the Court;
>
> v. To reinforce to the witness that he/she is under a strict legal obligation to tell the truth when testifying;
>
> vi. To explain the process of examination-in-chief, cross-examination and reexamination.

[7] *Dyilo* Decision, para. 24.

[8] *Dyilo* Decision, para. 40, see also paras. 16 and 17.

[9] *Dyilo* Decision, para. 28.

[10] *Dyilo* Decision, para. 33.

Prosecution, and it considered that the sole ICTY Decision rendered in the *Limaj* case did not regulate in detail the content of the practice of witness proofing.[11] The Pre-Trial Chamber also considered that the Prosecution's submission that the practice of witness proofing as defined in the Prosecution Information is a special feature of proceedings carried out before international adjudicatory bodies due to the particular character of the crimes over which such bodies have jurisdiction is also unsupported.[12]

6. In accordance with Article 21 of its Statute, the Pre-Trial Chamber then sought to determine whether the second component of the definition could be embraced by "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards".[13]

7. The Pre-Trial Chamber observed that this second component would be either unethical or unlawful in jurisdictions as different as Brazil, Spain, France, Belgium, Germany, Scotland, Ghana, England and Wales and Australia, whereas in other national jurisdictions, particularly in the United States of America, the practice of witness proofing along the lines advanced by the Prosecution is well accepted, and at times even considered professional good practice.[14] The Pre-Trial Chamber particularly emphasised that the second component of the practice as described by the ICC Prosecution would be in direct breach of the professional standards of the Code of Conduct of the Bar Council of England and Wales that the ICC Prosecution had expressly undertaken to comply with.[15] In light of these circumstances, the Pre-Trial Chamber concluded that

> the second component of the definition of the practice of witness proofing advanced by the Prosecution is *not embraced by any general principle of law* that can be derived from the national laws of the legal systems of the world.[16] On the contrary, if any general principle of law were to be derived from the national laws of the legal systems of the world on this particular matter, it would be the duty of the Prosecution to refrain from undertaking the [above-mentioned] practice of witness proofing".[17]

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[11] *Dyilo* Decision, paras. 31 and 32. *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses (TC), 10 December 2004 ("*Limaj* Decision").
[12] *Dyilo* Decision, para. 34.
[13] ICC Statute, Article 21. See *Dyilo* Decision, paras. 35 and seq.
[14] *Dyilo* Decision, para. 37.
[15] *Dyilo* Decision, paras. 38-41.
[16] *Dyilo* Decision, para. 42 (emphasis added).
[17] *Dyilo* Decision, para. 42.

8. In this Chamber's view, the process by which the *Dyilo* Chamber came to its decision is not based on a comprehensive knowledge of the established practice of the *ad hoc* Tribunals, which is justified by the particularities of these proceedings that differentiate them from national criminal proceedings, as explained hereinafter. This was also recently reiterated in the *Milutinovic et al.* case, where the Trial Chamber of the International Criminal Tribunal for Former Yugoslavia ("ICTY") denied a Defence application seeking the Chamber to apply the exact same standards set out in the *Dyilo* Decision.[18]

2. Practice of the *Ad Hoc* Tribunals and the Rights of the Accused

9. Both this Tribunal and the ICTY have consistently allowed the practice of pre-testimony interviews of witnesses for the better administration of justice, in the particular context of their proceedings, and to reduce any element of surprise to the Defence. This practice is in accordance with the Appeals Chamber's finding that each party has the right to interview a potential witness.[19]

10. The practice of witness familiarization not only poses no undue prejudice, but is also a useful and permissible practice.[20] As the *Milutinovic* Trial Chamber recently recalled, there is no reason for limiting witness familiarization to the Witnesses and Victims Support Section of the Tribunal.[21]

11. Although it has not been the subject of specific case-law at the ICTR, witness preparation has been recognized in the jurisprudence in relation to how the content of an interview with a witness is to be disclosed. The Prosecution has developed a practice of disclosing "will-say" or "reconfirmation statements" prior to the testimony of a witness. Contrary to Mathieu Ngirumpatse' assertions, this practice has been sanctioned by the Tribunal's jurisprudence.[22] In the *Simba* case, Trial Chamber I defined a will-say statement as "a communication from one party to the other party and the Chamber anticipating that a witness will testify about matters that were not mentioned in previously disclosed witness

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[18] *Prosecutor v. Milan Milutinovic et al.*, Case No. IT-05-87-T, Decision on Ojdanic Motion to Prohibit Witness Proofing (TC), 12 December 2006 ("*Milutinovic* Decision").

[19] *Prosecutor v. Mile Mrksic*, Case No. IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party (AC), 30 July 2003; see also, *Prosecutor v. Sefer Halilovic*, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas (AC), 21 June 2004, para. 12 to 15.

[20] *Milutinovic* Decision, para. 10.

[21] *Ibidem*.

[22] See for e,g., *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admissibility of Witness DBQ (TC), 18 November 2003; *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on the Admissibility of Evidence of Witness KDD (TC), 1 November 2004, par. 9; *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on the Defence Motion Regarding Will-Say Statements (TC), 14 July 2005, para. 4.

statements."[23] Trial Chambers have considered that will-say statements are in conformity with the Prosecution's obligations under Rule 67(D) of the Rules of the Rules of Procedure and Evidence which require each party to promptly notify the opposing party and the Chamber of the discovery and existence of additional evidence, information and materials that should have been produced earlier pursuant to the Rules.[24] The will-say statement generally supplements or elaborates on information previously disclosed to the Defence, but it may also bring new elements of which the Defence was not put on notice. Although it is not acceptable for the Prosecution to mould its case against the Accused in the course of the trial, it must be admitted that a witness may recall and add details to his or her prior statements. As explained by Trial Chamber I in the *Bagosora et al.* case

> [...] witness statements from witnesses who saw and experienced events over many months which may be of interest to this Tribunal, may not be complete. Some witnesses only answered questions put to them by investigators whose focus may have been on persons other than the accused rather than volunteering all the information of which they are aware.[25]

12. While this practice cannot be considered as permission to train, coach or tamper a witness before he or she gives evidence, the content of these statements under Rule 67(D) encompasses much of the elements described in the second component of witness proofing in the *Dyilo* Decision.

13. The ICTY has also developed a consistent practice of "witness proofing". An overview of recent proceedings before the ICTY shows that preparing witnesses, including the practice of putting questions to the witness concerning contradictions between prior statements, is an entire part of the proceedings.[26] In the *Limaj et al.* case, the Trial Chamber

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[23] *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on the Admissibility of Evidence of Witness KDD (TC), 1 November 2004, par. 9 ; see also *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on the Defence Motion Regarding Will-Say Statements (TC), 14 July 2005, para. 4.

[24] *Ibidem.*

[25] *Bagosora et al.*, Decision on Admissibility of Witness DBQ (TC), 18 November 2003, para. 29.

[26] See for e.g., *Prosecutor v. Mile Mrksic*, Case No. IT-95-13/1, T. 26 January 2006; *Prosecutor v. Naser Oric*, Case No. IT-03-68, T. 6 April 2006; *Prosecutor v. Prlic et al.*, Case No. IT-04-74, T. 10 July 2006; see also *Prosecutor v. Vidoje Blagojevic Dragan Jokic*, Case No. IT-02-60-T, Decision on Prosecution's Unopposed Motion For Two Day Continuance For The Testimony of Momir Nikolic (TC), 16 September 2003:

> **FINDING** that there was more than sufficient time for the Prosecution to complete all interviews and final proofing sessions with Mr. Nikolić and to inform the Defence of any new information arising out of such proofing sessions in advance of him being called to testify,
> **CONSIDERING** that the Prosecution has only disclosed the final notes from its last proofing sessions to the Defence on 16 September 2003, one day before Mr. Nikolic is to testify, and that this information needs to be translated into B/C/S for Defence review, [...]
> **REMINDING** the Prosecution that all such proofing sessions of witnesses – particularly witnesses whom it expects to testify at length – should be completed in sufficient time to allow the Defence to consider any new information gathered through such sessions, [...]

See also *Prosecutor v. Momcilo Krajisnik*, Case No. IT-0039-T, Order for Transfer of Detained Witness Pursuant to Rule90 *bis* (TC), 13 March 2006.

denied a Defence Motion seeking that the Prosecution cease "proofing" witnesses with immediate effect.[27] The Trial Chamber noted that the practice of proofing witnesses, by both parties, has been in place and accepted since the inception of the Tribunal. It also noted that "[i]t is a widespread practice in jurisdictions where there is an adversary procedure". The *Limaj* Chamber considered that this practice has a number of advantages for the due functioning of the judicial process.

14. Recently, in the *Milutinovic et al.* case, the Trial Chamber reaffirmed that "discussions between a party and a potential witness regarding his or her evidence can, in fact, enhance the fairness and expeditiousness of the trial, provided that these discussions are a genuine attempt to clarify a witness' evidence".[28] It considered that "the process by which the *Dyilo* Chamber came to its decisions [was] not applicable to [its] determination of the issue".[29] Considering the situation at the ICTY, which in view of the *Milutinovic* Chamber is radically different than the *Dyilo* case,[30] the *Milutinovic* Chamber found that "reviewing a witness' evidence prior to testimony is a permissible practice under the law of the Tribunal and, moreover, does not *per se* prejudice the rights of the Accused".[31]

15. Under these circumstances, this Chamber is satisfied that a practice of preparing witnesses before they testify has developed and has been sanctioned by both *ad hoc* Tribunals. Provided that it does not amount to the manipulation of a witness' evidence, this practice may encompass preparing and familiarizing a witness with the proceedings before the Tribunal, comparing prior statements made by a witness, detecting differences and inconsistencies in recollection of the witness, allowing a witness to refresh his or her memory in respect of the evidence he or she will give, and inquiring and disclosing to the Defence additional information and/or evidence of incriminatory or exculpatory nature in sufficient time prior to the witness' testimony. It is also admitted that "the practice of witness familiarization not only poses no undue prejudice, but is also a useful and permissible practice".[32]

16. In that respect, the Chamber notes that there are clear standards of professional conduct and ethics which apply to Prosecuting Counsel when conducting interviews. According to the Prosecutor's Regulations No. 2, the members of the Office of the

[27] *Limaj* Decision.
[28] *Milutinovic* Decision, para. 16.
[29] *Milutinovic* Decision, para. 13.
[30] *Milutinovic* Decision, para. 15.
[31] *Milutinovic* Decision, para. 22.
[32] *Milutinovic*, para. 10. and *Limaj* Decision.

Prosecutor can be regarded as permanent officers of the court who are "to serve and protect the public interest, including the interests of the international community, victims and witnesses, and to respect the fundamental rights of the suspects and accused" and are "not knowingly to make an incorrect statement of material fact to the Tribunal or offer evidence which Prosecution Counsel knows to be incorrect of false".[33]

17. The practice of reviewing a witness' evidence prior to testimony is consistent with the specificities of the proceedings before the *ad hoc* Tribunals and may contribute to a proper administration of justice in different circumstances: crimes charged in the indictment occurred many years ago and, in many cases, witness interviews took place a long time ago; matters that were relevant during the course of the investigations may need to be reviewed in light of the case the Prosecution intends to present; there might be differences of perception between the Prosecution investigator and Counsel who is going to lead the witness' evidence in court; the duration of the proceedings and the time elapsed between prior testimonies may require further interviews with a witness before he or she testifies and reduce the effect of surprise to the Defence in cases where the witness recollects elements that were not previously disclosed.[34]

18. This positive effect of meeting a witness before he or she testifies was even acknowledged by the Defence in the present case. The Defence for Nzirorera has requested several times to meet with Prosecution witnesses in order to better prepare its cross-examination and expedite the proceedings.[35] A recent example is that it met with Prosecution Witness GK a few weeks before his anticipated testimony, after the witness had arrived at the Tribunal to testify, and questioned the witness about some discrepancies with testimony in another case and a prior statement.[36] The witness was given an opportunity to explain these discrepancies.

19. In its Motion, the Defence contends that the Prosecution's practice of witness proofing in this case has created many problems of late disclosure and admission of evidence outside the scope of the Indictment.

20. The Chamber is not persuaded that reviewing a witness' evidence prior to testimony necessarily contributes to adduce evidence on matters outside the scope of the Indictment. In any event, should a witness recall and add details to his or her prior statements during the

[33] Prosecutor's Regulations No. 2 (1999), Standard of Professional Conduct Prosecution Counsel.
[34] See *Limaj* Decision.and *Milutinovic* Decision, para. 20
[35] See Joseph Nzirorera's Motion for Reconsideration of Witness Protection Order, filed on 25 September 2006.
[36] See Will-say Statement of Witness GK, dated 10 November 2006, filed 17 November 2006.

review of his or her evidence, several remedies are possible such as providing additional time to the Defence for its preparation or, where appropriate, the exclusion of the evidence.[37] Each time, the Chamber will apply the appropriate remedy on a case-by-case basis in conformity with the rights of the Accused, including the right to be tried without undue delay. The Chamber, however, considers that the Prosecution should give notice at the earliest possible date of any additional information the witness is likely to provide during testimony.[38]

3. "Witness Proofing" in the Present Case

21. The Defence for Ngirumpatse claims that, in the present case, the witnesses are actually prepared to recite their testimonies in court that they learnt from the Prosecution. In its view, witness proofing amounts to tampering with the witness and moulding the evidence against the Accused. The Prosecution explicitly "rebuts any suggestion or implication that the pre-trial interview is used to train, coach, and tamper with or in any manner whatsoever, to mould its case against the Accused".

22. While the Defence may query and challenge how the Prosecution prepares its witnesses before he or she testifies, the allegations of tampering with witnesses made by the Defence of Ngirumpatse are serious allegations and making them without any evidence to support or justify them is discourteous at the very least. On the contrary, the Chamber notes that several witnesses have been cross-examined on the conduct of the pre-trial interview and there has been no evidential basis to support such allegations. There is, however, no need to expunge Ngirumpatse's submissions from the Tribunal's record as requested by the Prosecution.[39]

23. As the Pre-Trial Chamber of the ICC stated, the expression "witness proofing" may encompass various practices which are not necessarily unlawful.[40] Neither the Defence nor the Prosecution provide detailed information as to how the Prosecution prepares its witnesses in this case before calling them to testify. According to disclosures of will-say statements and notices under Rule 67(D) in this case, the Chamber finds that there is a consistent practice by the Prosecution which consists of comparing statements made by a witness, detecting differences and inconsistencies in recollection of the witness, allowing a witness to refresh

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[37] *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admissibility of Evidence of Witness DP (TC), 18 November 2003; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admissibility of Evidence of Witness DBQ (TC), 18 November 2003.

[38] *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on the Defence Motion Regarding Will-Say Statements (TC), 14 July 2005, para. 7; *Milutinovic* Decision, paras. 22 and 23

[39] See Prosecutor's Response.

[40] *Dyilo* Decision, para. 12.

his or her memory in respect of the evidence he or she will give, inquiring and disclosing to the Defence additional information and/or evidence of incriminatory or exculpatory nature in sufficient time prior to the witness' testimony.[41] It is not shown by the Defence, nor does it transpire from the said disclosures that the Prosecution puts to the witness the exact questions to be asked during his or her testimony.

24. The Prosecution is presumed to act in good faith[42] and in accordance with standards of professional conduct and ethics. Failure by the Defence to show the contrary, the Chamber is not satisfied that any meeting held prior to the testimony of the witnesses were not in conformity with the established practice.

FOR THE ABOVE REASONS, THE CHAMBER DENIES the Defence Motions.

Arusha, 15 December 2006, done in English.

Dennis C. M. Byron	Emile Francis Short	Gberdao Gustave Kam
Presiding Judge	Judge	Judge

[Seal of the Tribunal]

[41] See for e.g., Prosecutor's Notice for GBU, filed 28 November 2006; Will-say Statement of Witness GK, filed on 17 November 2006.

[42] *Karemera et al.*, Decision on Joseph Nzirorera's Interlocutory Appeal (AC), 28 April 2006, para. 17; *Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-A, Judgement (AC), para. 183.