Tribunal Pénal International pour le Rwanda
International Criminal Tribunal for Rwanda

ICTR-98-44-AR73.8
11 May 2007
(1796/H – 1790/H)

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Adama Dieng

Decision of: 11 May 2007

THE PROSECUTOR

v.

Édouard KAREMERA
Mathieu NGIRUMPATSE
Joseph NZIRORERA

Case No. ICTR-98-44-AR73.8

Decision on Interlocutory Appeal Regarding Witness Proofing

Office of the Prosecutor:

Mr. Hassan Bubacar Jallow
Mr. James Stewart
Mr. Don Webster
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Counsel for the Defence:

Ms. Dior Diagne Mbaye and Mr. Félix Sow for Mr. Édouard Karemera
Ms. Chantal Hounkpatin and Mr. Frédéric Weyl for Mr. Mathieu Ngirumpatse
Mr. Peter Robinson and Mr. Patrick Nimy Mayidika Ngimbi for Mr. Joseph Nzirorera

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994 ("Appeals Chamber" and "Tribunal", respectively) is seized with an interlocutory appeal filed by Mr. Joseph Nzirorera[1] against a decision taken by Trial Chamber III concerning the practice of "witness proofing".[2] The Prosecution responded on 29 March 2007,[3] and Mr. Nzirorera replied on 2 April 2007.[4]

BACKGROUND

2. On 13 November 2006, Mr. Nzirorera asked the Trial Chamber to prohibit the Prosecution from preparing its witnesses prior to their testimony ("witness proofing"), pointing principally to a decision limiting this practice rendered by Pre-Trial Chamber I of the International Criminal Court ("ICC") in the *Dyilo* case.[5] The Trial Chamber distinguished the *Dyilo* Pre-Trial Decision and denied Mr. Nzirorera's request, ultimately concluding that "the practice of reviewing a witness'[s] 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".[6] On 14 March 2007, the Trial Chamber granted Mr. Nzirorera's request for certification to appeal the decision.[7]

DISCUSSION

3. This appeal raises the principal question of whether the practice of witness proofing, as defined by the Trial Chamber in the Impugned Decision, is compatible with the Tribunal's Statute and Rules of Procedure and Evidence ("Rules"). As this matter relates to the general conduct of trial proceedings, it falls within the discretion of the Trial Chamber.[8] The Trial Chamber's exercise of

[1] Joseph Nzirorera's Interlocutory Appeal on "Witness Proofing", 19 March 2007 ("Nzirorera Appeal").
[2] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motions to Prohibit Witness Proofing, 15 December 2006 ("Impugned Decision").
[3] Prosecutor's Reply to Joseph Nzirorera's Interlocutory Appeal on Witness Proofing, 29 March 2007 ("Prosecution Response").
[4] Reply Brief: Joseph Nzirorera's Interlocutory Appeal on "Witness Proofing", 2 April 2007 ("Nzirorera Reply").
[5] Impugned Decision, para. 1, referring to *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on Practices of Witness Familiarisation and Witness Proofing, 8 November 2006 ("*Dyilo* Pre-Trial Decision").
[6] Impugned Decision, para. 17.
[7] *The Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motion for Certification to Appeal Decision on Witness Proofing, 14 March 2007.
[8] *See Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-2001-73-AR73, Decision on Interlocutory Appeal, 30 October 2006, para. 9 ("*Zigiranyirazo* Appeal Decision"); *The Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR 98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66(B) of the Tribunal's Rules of

discretion to permit the continued practice of witness proofing in this case will be reversed only if Mr. Nzirorera can demonstrate that the Trial Chamber made a discernible error in the Impugned Decision because it was based on an incorrect interpretation of governing law, was based on a patently incorrect conclusion of fact, or was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[9]

4. The Trial Chamber described the scope of acceptable witness proofing in the Impugned Decision as follows:

> Provided that it does not amount to the manipulation of a witness'[s] 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'[s] testimony.[10]

5. Relying primarily on the ICC's *Dyilo* Pre-Trial Decision, Mr. Nzirorera challenges the Impugned Decision on three principal grounds. First, Mr. Nzirorera contends that the Trial Chamber erred in finding that the practice of witness proofing is a sanctioned practice at the Tribunal.[11] In this respect, he points to the *Dyilo* Pre-Trial Decision,[12] which held that the Prosecution in the ICC had failed to prove that the practice of witness proofing "is widely accepted practice in international criminal law".[13] Second, he argues that the Trial Chamber erred in distinguishing national prohibitions and in finding that the nature of the cases prosecuted at the international tribunals justified a departure from domestic rules prohibiting the practice.[14] In this respect, he emphasizes that national jurisdictions prosecute similar crimes, notably following Rule 11*bis* transfers.[15] Third, he disputes the Trial Chamber's characterization of witness proofing as a useful practice which does not cause undue prejudice to the accused, highlighting the number of times that the Prosecution has given notice that witnesses will change their testimony after proofing sessions.[16] He requests the

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Procedure and Evidence, 25 September 2006, para. 6 ("*Bagosora et al.* Appeal Decision (25 September 2006)"); *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-00-55A-AR73(C), Decision on Interlocutory Appeal, 29 May 2006, para. 5 ("*Muvunyi* Appeal Decision"). *See also Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR73.1, Decision on Interlocutory Appeal against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65*ter* Witness List, 20 April 2007, para. 8 ("*Milutinović et al.* Appeal Decision").

[9] *Zigiranyirazo* Appeal Decision, para. 9; *Bagosora et al.* Appeal Decision (25 September 2006), para. 6; *Muvunyi* Appeal Decision, para. 5. *See also The Prosecutor v. Théoneste Bagosora et al.*, Case Nos. ICTR-98-41-AR73, ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decisions on Witness Protection Orders, 6 October 2005, para. 3 ("*Bagosora et al.* Appeal Decision (6 October 2005)"; *Milutinović et al.* Appeal Decision, para. 10.

[10] Impugned Decision, para. 15.

[11] Nzirorera Appeal, paras. 23, 29-34.

[12] Nzirorera Appeal, para. 31, citing *Dyilo* Pre-Trial Decision, para. 33.

[13] *Dyilo* Pre-Trial Decision, para. 33.

[14] Nzirorera Appeal, paras. 24, 35-40.

[15] Nzirorera Appeal, paras. 24, 35-40.

[16] Nzirorera Appeal, paras. 25, 41-49.

Appeals Chamber to take the same approach to witness proofing as taken in the ICC's *Dyilo* Pre-Trial Decision, and to prohibit it.[17]

6. The crux of Mr. Nzirorera's submissions is the supposition, predicated on his reading of the *Dyilo* Pre-Trial Decision, that witness proofing is considered unethical and unlawful in the ICC and in most major legal systems in the world.[18] Accordingly, he asserts that the Trial Chamber erred in distinguishing the *Dyilo* Pre-Trial Decision, and makes limited or no reference in support of his argument to any provision of the Tribunal's Statute or Rules or to its jurisprudence.[19] The Appeals Chamber finds Mr. Nzirorera's submissions unpersuasive.

7. There is no doctrine of precedence in international law which requires a Trial Chamber to follow practices or decisions adopted by another international court. Accordingly, while a Trial Chamber may find the rulings of another international jurisdiction persuasive, it is not bound to apply them to its own proceedings. Indeed, the Appeals Chamber has previously held that a Trial Chamber is not obligated to follow or to distinguish the decisions of other Trial Chambers of the Tribunal.[20] It is only decisions of the Appeals Chamber that are binding on Trial Chambers of this Tribunal.[21] Therefore, there is no discernible error in the manner in which the Trial Chamber distinguished the *Dyilo* Pre-Trial decision, a decision of another international court which cannot bind this Tribunal. The present interlocutory appeal must necessarily turn on an assessment of the Trial Chamber's application of the Tribunal's Statute, Rules, and jurisprudence in the Impugned Decision.

8. The Tribunal's Statute and Rules do not directly address the issue of witness proofing. In the absence of express provisions, Rule 89(B) of the Rules generally confers discretion on the Trial Chamber to apply "rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law." It is evident from the jurisprudence of the *ad hoc* Tribunals that, as Trial Chambers have exercised this discretion, a practice of witness proofing has developed and has been accepted in various cases.

9. For example, in the *Gacumbitsi* Appeal Judgement, the Appeals Chamber considered a challenge to a Trial Chamber's decision to credit a particular witness's testimony based, *inter alia*,

[17] Nzirorera Appeal, para. 50.
[18] Nzirorera Appeal, paras. 23-25, 27-29, 35, 50.
[19] Nzirorera Appeal, paras. 27-28.
[20] *See Bagosora et al.* Appeal Decision (6 October 2005), para. 33 ("Trial Chamber III's Decision in the *Karemera* case is not binding authority on Trial Chamber I, and Trial Chamber I need not have distinguished its Impugned Decision from the *Karemera* Decision."). *See also Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, para. 114 ("*Aleksovski* Appeal Judgement").

on assertions that the witness had been "coached" by the Prosecution.[22] In rejecting this argument, the Appeals Chamber stated that "the passage of Witness TBH's testimony concerning the alleged prosecutorial coaching demonstrates no impropriety."[23] The Appeals Chamber added that it "[saw] no reason to doubt the Prosecution's statement that 'the witness was involved in normal preparation to give evidence, and nothing more'".[24] Significantly, the Appeals Chamber then concluded that "[i]t is not inappropriate *per se* for the parties to discuss the content of testimony and witness statements with their witnesses, unless they attempt to influence that content in ways that shade or distort the truth."[25] The Trial Chamber's definition of acceptable witness proofing in the instant case is consistent with the approach sanctioned by the Appeals Chamber in the *Gacumbitsi* Appeal Judgement.

10. In addition, the decisions referred to in the Impugned Decision further establish the practice of witness proofing. With respect to this Tribunal, the Impugned Decision refers to jurisprudence from the *Simba, Bagosora et al.*, and *Rwamakuba* cases related to the Prosecution's practice of disclosing "will-say" or "reconfirmation statements", a product of proofing sessions, which implicitly condones the practice of witness preparation.[26] The Impugned Decision also refers to ICTY Trial Chamber decisions in the *Milutinović et al., Limaj et al.*, and *Blagojević and Jokić* cases explicitly condoning witness proofing.[27] The Appeals Chamber also recalls that in the *Krstić* case, the ICTY Appeals Chamber acknowledged, in deciding whether it would be appropriate to issue a subpoena to allow a party to meet with prospective witnesses before presenting their testimony as additional evidence on appeal, that it would be contrary to the duty owad by counsel to their client

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[21] *See Aleksovski* Appeal Judgement, para. 113.
[22] *Sylvestre Gacumbitsi v. The Prosecutor*, Case No. ICTR-2001-64-A, Judgement, 7 July 2006, para. 73 ("*Gacumbitsi* Appeal Judgement").
[23] *Gacumbitsi* Appeal Judgement, para. 74.
[24] *Gacumbitsi* Appeal Judgement, para. 74, fn. 176.
[25] *Gacumbitsi* Appeal Judgement, para. 74. Mr. Nzirorera attempts to distinguish this holding as a "passing reference". *See* Nzirorera Appeal, fn. 26. However, it is clear from the relevant passages of the *Gacumbitsi* Appeal Judgement that this holding was essential to disposing of the argument advanced on appeal.
[26] Impugned Decision, para. 11, citing *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Decision on the Admissibility of Evidence of Witness KDD, 1 November 2004, para. 9; *The Prosecutor v. Théoneste Bagosora et al.*, Case No. 98-41-T, Decision on Admissibility of Witness DBQ, 18 November 2003; *The Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, Decision on the Defence Motion Regarding Will-Say Statements, 14 July 2005.
[27] Impugned Decision, paras. 13, 14, citing *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-T, Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses, 10 December 2004 ("*Limaj et al.* Decision"); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion to Prohibit Witness Proofing, 12 December 2006 ("*Milutinović* Decision"); *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-06-T, Decision on Prosecution's Unopposed Motion for Two Day Continuance for the Testimony of Momir Nikolić, 16 September 2003. In the *Milutinović et al.* case, after distinguishing the *Dylio* Pre-Trial Decision and considering the *Limaj et al.* Decision, the Trial Chamber stated: "the Chamber is satisfied 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." *Milutinović* Decision, para. 22.

to act skillfully and with loyalty to force a witness to give evidence "cold" without first knowing what he will say.[28] Mr. Nzirorera does not address this jurisprudence.

11. Furthermore, the submission that a number of national jurisdictions prohibit the practice of witness proofing to varying degrees does not, in the view of the Appeals Chamber, make such practice incompatible with the Tribunal's Statute and Rules or with general principles of law. Indeed, Rule 89(A) of the Rules expressly provides that "[t]he Chambers shall not be bound by national rules of evidence." The Appeals Chamber also notes that, as the *Dylio* Pre-Trial Decision acknowledges, the approach of different national jurisdictions to witness proofing "varies widely",[29] and while it is prohibited in some jurisdictions,[30] others, such as the United States, accept it and consider it good professional practice.[31]

12. Mr. Nzirorera's assertion that the practice of witness proofing is inherently prejudicial focuses primarily on the number of times that the Prosecution has conveyed notices of new material pursuant to Rule 67(D) of the Rules containing "material which brings the witness'[s] testimony in line with other prosecution evidence in the case".[32] However, the Appeals Chamber observes that the Prosecution's act of disclosing new material to the Defence as a result of a proofing session does not mean that the Trial Chamber will allow the evidence to be led or that it will ultimately credit the testimony in its final assessment of the case.[33] Moreover, in the Impugned Decision, the Trial Chamber expressly prohibited witness preparation to the extent that it involves "manipulation of a witness'[s] evidence".[34] In addition, the Trial Chamber explained that issues of witness preparation have been explored on cross-examination with a number of witnesses, and that it had no basis to conclude that any proofing sessions to date had been improper.[35] Mr. Nzirorera does not dispute this conclusion.

13. The Appeals Chamber observes that there are several ways for parties to address the possibility that witness preparation might have improperly influenced testimony. For example,

[28] *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003, para. 8 ("*Krstić* Appeal Decision"). The Dissenting Opinion of Judge Shahabuddeen in that decision expressly refers to witness proofing. *See Krstić* Appeal Decision (Dissenting Opinion of Judge Shahabuddeen), paras. 33-35.
[29] *Dylio* Pre-Trial Decision, paras. 36.
[30] *Dylio* Pre-Trial Decision, para. 37.
[31] *Dylio* Pre-Trial Decision, para. 37.
[32] Nzirorera Appeal, para. 47 (citing seven notices of additional evidence filed in the case).
[33] For example, in the *Simba* case, the Trial Chamber admitted testimony based on a "will-say" statement, after according the Defence what it deemed sufficient time to prepare for the evidence, but ultimately disregarded the incriminating aspects of this testimony based on credibility concerns. *See, e.g., The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-T, Judgement and Sentence, 13 December 2005, paras. 40, 259, 268, 278. In particular, the Trial Chamber noted, "[t]he emergence of these incriminating allegations for the first time in a will-say statement disclosed only at the commencement of trial raises too many questions."
[34] Impugned Decision, paras. 12, 15.

through careful cross-examination, a party can explore the impact of preparation on the witness's testimony and use this to call into question the witness's credibility. In addition, intentionally seeking to interfere with a witness's testimony is prohibited, and if evidence of this comes to light, a Trial Chamber can take appropriate action by initiating contempt proceedings under Rule 77 of the Rules and by excluding the evidence pursuant to Rule 95 of the Rules.

14. Accordingly, the Appeals Chamber finds that Mr. Nzirorera has not demonstrated that the Trial Chamber committed a discernible error by permitting the Prosecution to proof its witnesses as described above.

DISPOSITION

15. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Nzirorera Appeal in all respects.

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

Done this 11th day of May 2007,
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding

[Seal of the Tribunal]

[35] Impugned Decision, paras. 21-24.