Leiden Journal of International Law, 21 (2008), pp. 917–923
 Printed in the United Kingdom doi:10.1017/S0922156508005451

Witness Proofing in International Criminal Tribunals: Response to Ambos

RUBEN KAREMAKER, B. DON TAYLOR III, AND THOMAS WAYDE PITTMAN*

Abstract

This article examines the analytical framework and key arguments used by K. Ambos to conclude that witness proofing is neither a legally permissible nor necessary useful practice before the ICC in his reply to 'Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence'. Contrary to Ambos, the article argues that witness proofing cannot be both acceptable at the UN international criminal tribunals and per se inappropriate at the ICC, given the ICC's procedural regime allowing for trials to be conducted in a form almost identical to those of the UN tribunals. A related argument is that the practice of witness proofing is not prohibited in the law governing the ICC, even if not provided for. Further arguments conclude that reliance upon spontaneity of a witness in court as a guarantee of reliability is misplaced, that the merits of national practices are irrelevant to the overall analysis, and that international judges are competent to manage the negligible risks associated with witness proofing.

Key words

International Criminal Court; international criminal trials; International Criminal Tribunal for Rwanda; International Criminal Tribunal for the former Yugoslavia; international criminal tribunals; Special Court for Sierra Leone; witness proofing

We appreciate this opportunity to respond to Kai Ambos's reply[1] to our article 'Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence',[2] and we wholeheartedly agree with him on 'the importance of the topic'. Indeed, we believe the issue to be of such importance as to warrant a considered and critical response to certain arguments which, in our view, ignore or even obfuscate relevant questions and thereby fail significantly to advance the substantive debate.

* Ruben Karemaker is a lawyer from the Netherlands and B. Don Taylor III and Thomas Wayde Pittman are lawyers from the United States. All the authors are legal officers in the Chambers Legal Support Section of the International Criminal Tribunal for the former Yugoslavia. The views expressed herein are solely those of the authors and do not reflect the positions or views of the International Criminal Tribunal for the former Yugoslavia or the United Nations.

1 K. Ambos, '"Witness Proofing" before the International Criminal Court: A Reply to Karemaker, Taylor, and Pittman', in this issue.

2 R. Karemaker, B. D. Taylor, and T. W. Pittman, 'Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence', (2008) 21 LJIL 683.

1. THE 'SYSTEM DIMENSION' OF WITNESS PROOFING

Ambos frames his argument as a horizontal comparison of the underlying legal systems influencing the practice of the ad hoc tribunals with regard to the production and presentation of evidence, referring to this as the 'system dimension' of witness proofing.[3] Within this dimension, he finds that structural differences (or frictions) arise from contradictions between a tribunal's underlying legal system and its procedural practices. Having established this framework, he explains the uniform jurisprudence of these tribunals in favour of proofing in two steps: first, by concluding *a priori* that 'proofing would certainly produce no structural frictions if these tribunals followed a purely adversarial system' and, second, by characterizing these tribunals as 'adversarial in nature and practice'.[4] Accordingly, Ambos concedes that proofing is appropriate at the ad hoc tribunals.

Ambos then proceeds to distinguish the International Criminal Court (ICC) from the ad hoc tribunals, by virtue of the former possessing a '*truly mixed*' procedure. The undeniable implication of this distinction is that he believes whatever underlying structural differences may exist between the ICC on the one hand and the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL) on the other, simultaneously illegitimize witness proofing at the ICC while resulting in firm legal acceptance at the ad hoc tribunals.[5] This analytical construct proceeds, unfortunately, upon a false premise. This is because the ICC – at least with regard to *trial* procedures governing the production and presentation of evidence – is not necessarily as different from the ad hoc tribunals as Ambos suggests.

In our view, it is an overstatement to characterize the relevant aspects of the ICC's procedural regime as a '*truly mixed* procedure' rather than a *potentially mixed* procedure. The ICC's procedural regime vests extraordinary discretion in the trial chamber to determine which form trial proceedings will take.[6] Structurally, trial proceedings in any given case might be virtually identical to the trials conducted before the ad hoc tribunals. Indeed, in the *Lubanga* case itself, the trial chamber recognized the parties' agreements on the presentation of evidence at trial, apparently countenancing a trial format which will deviate only insignificantly – if at all – from trials before the ad hoc tribunals.[7] It is puzzling that Ambos appears to

3 Ambos, *supra* note 1, section 2.

4 Ibid. The ad hoc tribunals are nominally more adversarial in form than the ICC, primarily with regard to the pre-trial proceedings. Proofing, however, is associated with trial. See *infra*, nn. 6–7 and accompanying text.

5 Ambos, *supra* note 1, section 2.

6 See Rome Statute, Art. 64(8)(b) ('At the trial, the presiding judge may give directions for the conduct of proceedings . . .'); Rules of Procedure and Evidence (RPE), Rule 140 (noting that if the presiding judge does not issue directions pursuant to Art. 64(8)(b) 'the Prosecutor and the defence *shall* agree on the order and manner in which the evidence shall be submitted to the Trial Chamber', and that, where no such agreement is reached, 'the Presiding Judge *shall* issue directions) (emphasis added).

7 For example, the prosecution will present all its evidence at the beginning of the trial, followed by the defence. Rebuttal and rejoinder are subject to the discretion of the trial chamber. The party presenting a witness examines the witness first and the scope of that examination should be limited to matters relevant to the case. Leading questions are not permitted except where the witness is providing background or undisputed evidence. Cross-examination (called subsequent questioning) shall follow, using leading questions. Re-examination should, as a rule, be permitted, and limited to issues arising out of cross-examination. See

https://doi.org/10.1017/S0922156508005451 Published online by Cambridge University Press

be arguing that a practice acceptable at the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), or the Special Court for Sierra Leone (SCSL) is problematic at the ICC *even where the trial format is identical*. Ultimately, Ambos cannot play both sides. Putting the *lex lata* question aside momentarily – addressed directly in section 4 *infra* – proofing cannot be 'acceptable' at the ad hoc tribunals but per se inappropriate at the ICC.

On a related note, Ambos inexplicably asserts that cross-examination 'is no common practice before an international criminal tribunal that, as the ICC, has a mixed procedure'.[8] Given that no trials have yet occurred at the ICC, such a generalization simply has no basis.[9] Indeed, the universe of ICC cases from which the assertion can begin to be assessed – those in which procedures have been prescribed, a sum total of one (*Lubanga*) – flatly contradicts the assertion.[10] Moreover, Ambos ignores the fact that the ICC's Rules of Procedure and Evidence (RPE) secure the right to question all witnesses to the prosecution, the defence, the trial chamber, and any party that calls the witness.[11] Ambos's observation that cross-examination might 'only be practised effectively by common lawyers who are familiar with this practice' is not an argument for the prohibition of proofing. So long as ICC trial chambers possess the discretion to establish a trial format resembling those at the ad hoc tribunals, the ability to cross-examine a witness effectively will remain a necessary skill of the competent counsel.[12]

2. The straw man spectre of US-style witness preparation

In characterizing our arguments as flawed and unconvincing, Ambos refers to 'show elements of . . . US jury trials' and finds it 'puzzling' that we do not address domestic witness preparation practices – particularly those in the United States.[13] At no point, however, have we advocated or defended *any* particular domestic witness preparation practices, much less the largely unregulated US-style witness preparation for which Ambos exhibits clear disdain. Nor – as is apparent from a careful reading of the relevant jurisprudence – have the judges, prosecutors, or defence lawyers actually dealing with the issue at the ad hoc tribunals done so. Moreover, despite

---

Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04–01/06, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, 1–2 (citing ICC-01/04-01/06-953, Prosecution's submission regarding the subjects that require early determination; status of the evidence heard by the Pre-Trial Chamber; status of the decisions of the Pre-Trial Chamber, and manner in which evidence shall be submitted, 12 September 2007, paras. 28–38 [Prosecution's *Lubanga* Submission] and ICC-01/04–01/06–1033, Conclusions de la Défence sur des questions devant être tranchées à un stade précoce de la procédure, 16 November 2007, paras. 45–46).

8 Ambos, *supra* note 1, section 4.c.i.

9 We recognize that the *Lubanga* trial, currently scheduled to begin in June 2008, should be well under way, if not completed, by the time of publication.

10 See *supra* note 7.

11 RPE, Rule 140(2); see also Rome Statute, Art. 67.

12 Even should a trial chamber adopt a less 'adversarial' format, the parties will always have the right to examine witnesses, and it is difficult to conceive of any trial before the ICC in which the ability to cross-examine a witness effectively would be of no benefit to the accused.

13 Ambos, *supra* note 1, section 4.a.

https://doi.org/10.1017/S0922156508005451 Published online by Cambridge University Press

Ambos's implication that proofing could produce 'pseudo-evidence [which] . . . manipulates the facts', such evidentiary moulding is clearly not what the ICC Prosecutor proposed in the *Lubanga* case. In describing exactly how it proposed to proof witnesses, the prosecution stated that

> the series of questions put to the witness in court is not a rehearsal of the questions asked during the proofing session, and in no instance is any of the participants in a proofing session making comments on the statements of the witness in the presence of the witness concerned.[14]

Ultimately, the merits of *any* domestic witness preparation practices are entirely beside the point. Thus for Ambos to raise the spectre of US-style witness preparation serves little purpose other than to shift the focus from the relevant issue – the practice of proofing at international criminal tribunals. As we noted, our purpose was to 'focus on the relative merits of proofing as analysed in the case law of the international criminal tribunals in order to arrive at a conclusion as to whether proofing is beneficial to the administration of international justice'.[15] We are convinced that the state of international criminal procedure has moved beyond preoccupation with the systemic struggles which hark back to the infancy of the discipline.

3. The fallacy of the 'spontaneous witness'

Ambos boldly asserts in furtherance of his stance against witness proofing that 'the spontaneous witness is much more useful than the proofed witness since spontaneity guarantees authenticity.'[16] We would hardly agree that spontaneity guarantees authenticity.

Preliminarily, we assume that Ambos does not use the term 'authenticity' as an evidentiary term of art – that is, defining whether a piece of material evidence, usually a document, is what it purports to be.[17] Ambos cannot be saying that when one speaks as a witness in court under oath without proofing by counsel – as close to spontaneity as a criminal trial allows – one's words are guaranteed to be truthful. After all, if spontaneity guaranteed authenticity in this context we could dispense with judges altogether and legally presume that every witness has spoken the truth. Ambos appears to be using the term as a substitute for credibility, veracity, or truthfulness. Additionally, the word 'guarantees' is a strong word, and we shall assume that Ambos did not use the word in its literal sense. In fact, spontaneity is but one of many factors when one is considering the believability of a witness. Experienced counsel – prosecution or defence – know this well. Hence there is not only an ethical barrier to coaching or rehearsing a witness (as opposed to proofing), but experienced counsel have a professional motivation not to proof a witness in such a way as to eliminate whatever spontaneity exists. It simply is not persuasive.

---

14 See ICC-01/04–01/06-T-58-ENG, 57–58 (30 October 2007).
15 Karemaker et al., *supra* note 2, at 684.
16 Ambos, *supra* note 1, section 4.b.
17 See *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Admission of Tab 19 of Binder Produced in Connection with Appearance of Witness Maxwell Nkole, Trial Chamber, 13 September 2004, para. 8 (describing authenticity as 'the document is actually what the moving party purports it to be').

Moreover, we would argue that the type of spontaneity Ambos seemingly prefers is an unreliable gauge of truthfulness because it presumes surprise. Yet every crime-base witness called to give evidence at the ad hoc tribunals has in some way already told his or her factual version of events, otherwise they would not be called. Thus the surprise element of a witness's prospective testimony has already long been revealed by way of investigative statements and disclosure. The notion of absolute spontaneity is itself, of course, imaginative. In our view, Ambos accords too much weight to the illusory 'benefits' of witness spontaneity, and ignores the detrimental effects of witness box surprise.

4. *LEX LATA* VERSUS *DE LEGE FERENDA*

Ambos suggests that we have 'push[ed] the legal questions involved aside [too] lightly', by failing to grasp that 'proofing is only possible before the ICC if it is provided for, at least implicitly, in its governing law'. Yet we acknowledged this legal question directly. We certainly concede that if the Rome Statute or the ICC's Rules of Procedure and Evidence do prohibit proofing, then all that remains is 'a pure policy discussion *de lege ferenda* with a view to possible reforms of the ICC Statute'. Contrary to Ambos's assertion, however, it is not that we 'do not really care what the existing law of the ICC says' but, rather, that that law is far from being as clear as Ambos would like to paint it. Moreover, Ambos's construction of the parameters of the question itself skews the debate. The question is not whether proofing is only possible where 'provided for . . . in the governing law', but whether it is *prohibited* in the governing law.[18] Proofing – similar to many aspects of actual practice – is not provided for in the governing law of the ad hoc tribunals. No procedural code could hope to regulate every aspect of a tribunal's operation, and to presume that a practice that is not expressly provided for is thereby prohibited would cripple practitioners and judges alike.

Ambos's concluding implication that the Rome Statute prohibits proofing – relying solely upon the *Lubanga* decisions and his own (as yet unpublished and unavailable) defence of those same decisions – simply states too much. A detailed deconstruction of the *Lubanga* decisions is beyond the scope of this brief response; however, it is far from clear that the result reached in either decision was inevitable. The *Lubanga* chambers themselves did not fully agree in their reasoning,[19] and neither chamber grounded its rejection of proofing in a finding that the ICC's

18 See Prosecution's *Lubanga* Submission, *supra* note 7, para. 28 (arguing that, from 'the presence and construct of Article 70(1)(c) . . . pre-testimony meetings, or proofing, with a witness by a party is not prohibited *ab initio*, [but] rather is regulated to prohibit witness and evidence tampering').

19 They disagreed, for example, on whether proofing was an established practice at the ad hoc tribunals. Whilst the Pre-trial Chamber found that this submission was 'unsupported' (para. 33), the trial chamber unequivocally acknowledged it (para. 43). In another disagreement, the Pre-trial Chamber determined that proofing is prohibited in 'Brazil, Spain, France, Belgium, Germany, Scotland, Ghana, England and Wales and Australia' (para. 37), whilst the trial chamber cited Australia as an example where proofing as submitted by the prosecution was *allowed*, and nuanced the Pre-trial Chamber's view of the law of England and Wales (paras. 40, 42).

https://doi.org/10.1017/S0922156508005451 Published online by Cambridge University Press

Statute or rules 'prohibit' the practice.[20] Moreover, the *Lubanga* trial chamber certainly voiced policy concerns with the practice,[21] the very policy issues we believe warrant the current debate.

So long as the Rome Statute empowers trial chambers to establish trial procedures indistinguishable from those at the ad hoc tribunals – a format within which Ambos seems to concede that proofing is a 'necessary ingredient' – then, as and for the reasons we discussed in our article, permitting proofing is a distinctly better modality for enhancing the efficiency, integrity, and legitimacy of the truth-seeking process than prohibiting the practice. Accordingly, if Ambos is correct that proofing is not 'legally admissible' at the ICC, states must give serious consideration to legislative reform.

5. (Un)professional judges and their power to regulate behaviour

Ambos asserts that we mistakenly rely on the doubtful superiority of professional judges over lay jurors to verify the authenticity of a witness statement.[22] But we have made no such assertion. Rather, we have argued that cross-examination *by the parties* is no less important where judges – rather than lay jurors – serve as the fact finders. Moreover, we argue that judges at international criminal tribunals, possessing unlimited powers to question all witnesses and call additional witnesses and evidence as they see fit, are exceedingly well equipped to manage the comparatively negligible risk that proofing will unduly influence the evidence. Ambos appears to have little confidence in the judicial abilities of some judges at the ICC, asserting that 'too many judges . . . only pass the eligibility test (Art. 36(3)(b) [Rome] Statute) because of an all too generous interpretation of the requirement of "competence in relevant areas of international law"'.[23] However, no judicial system can operate effectively upon the baseline assumption that the relevant actors, be they judges, prosecutors, or defence counsel, are incompetent or unethical or both. Indeed, all the relevant presumptions are quite the opposite.[24] Moreover, if Ambos is correct in his low regard for the quality of some of the ICC's judges, then the states parties to the Rome Statute have a far greater problem to deal with than the negligible risks of proofing.

---

20 Nothing in either decision supports a conclusion that either the ICC Statute or Rules prohibits proofing. The trial chamber agreed with the Pre-trial Chamber 'that the concept of 'witness proofing' as advanced by the prosecution could not be found within the Statute or Rules . . . and further [found] no provision in the texts to justify the practice'. *Lubanga* Trial Decision, *supra* note 7, at paras. 35–36. In fact, had either chamber found that the Statute or rules *prohibited* proofing, it *could not* have dealt with the secondary sources of law in Article 21(b) or (c).

21 *Lubanga* Trial Decision, *supra* note 7, paras. 51–52. The opinions expressed in these paragraphs (expressly characterized as such by the trial chamber) have no basis in law, yet they seem to articulate determining factors for the trial chamber's decision to prohibit proofing.

22 Ambos, *supra* note 1, section 4.c.ii.

23 Ibid.

24 See, e.g., *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-A, Appeal Judgement, 21 July 2000, para. 197 (recognizing a presumption that judges are impartial); *Prosecutor v. Blagojević and Jokić*, Case No. IT-02–60-A, Appeal Judgement, 9 May 2007, para. 23 (noting that counsel is presumed to be competent); *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, para. 183 (presuming that the prosecution carries out its function in good faith).

https://doi.org/10.1017/S0922156508005451 Published online by Cambridge University Press

Ambos also faults us for having 'incorrectly suggested' that the ICC judges have contempt powers similar to judges at the ad hoc tribunals. What we actually said is that the contempt powers of the ad hoc tribunals provide for harsh punishment of those who unduly influence witnesses and that 'the [ICC] judges appear no less well equipped'. Although Ambos concedes that Article 71 of the Rome Statute is comparable to the ad hoc tribunals' contempt powers, he argues that the sanctions for such conduct are not as far-reaching. This argument misses the mark, however. As we noted, Article 70 of the Rome Statute provides that presenting false evidence or 'corruptly influencing a witness' – the unethical behaviours which Ambos implies are the risks of proofing – are actually crimes within the jurisdiction of the ICC which may be punished with up to five years' imprisonment. Moreover, as we noted, 'considering Art. 70(4), the ICC judges would appear to have even greater enforcement powers in this regard than the ICTY, the ICTR, and the SCSL, which cannot require states to criminalize domestically contempt of the tribunals, nor empower their judges to direct domestic prosecutions'.[25]

6. Conclusion

We remain convinced that the various mechanisms outlined in our article provide a considerable margin of protection and fully counterbalance the perceived risks of proofing. We also remain convinced that the perceived risks of proofing do not outweigh the detrimental effects to the truth-seeking process when proofing is prohibited.

25 Karemaker et al., *supra* note 2, n. 92.

https://doi.org/10.1017/S0922156508005451 Published online by Cambridge University Press