

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR vs. THOMAS LUBANGA DYILO**

Public

**Prosecution's submissions regarding the subjects that require early determination:
procedures to be adopted for instructing expert witnesses, witness familiarization and
witness proofing**

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Background

1. The Prosecution makes reference to the “Background” section in its 11 September 2007 “Prosecution’s submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol”.¹

Prosecution’s submissions

The procedures to be adopted for instructing expert witnesses. Whether, in order to improve efficiency, it will be feasible for the parties to jointly instruct expert witnesses or, at the very least, to use common witnesses who will be instructed separately.

2. The Prosecution recalls its submission in the “Prosecution’s Submission in Anticipation of a Status Conference” (29 March 2007 Submission),² and reiterates its view that it envisages significant advantages to the judicial process through joint instruction of expert witnesses by the Participants.³
3. The Prosecution and the Defence are discussing the possibility of joint instruction of expert witnesses in respect of expert witnesses on context, on the anticipated testimony of the children witnesses and, possibly, on military matters. Whilst these discussions have not exceeded preliminary observations, the Prosecution is well prepared to continue to explore with the Defence ways to either jointly

¹ See “Prosecution’s submission regarding the subjects that require early determination: trial date, languages to be used in the proceedings, disclosure and e-court protocol”, public, ICC-01/04-01/06-951, 11 September 2007.

² See Prosecution’s Submission in Anticipation of a Status Conference, public redacted version, 29 March 2007, ICC-01/04-01/06-853, at paras, 8 to 12.

³ See 29 March 2007 Submission, at para. 11. In addition, the Prosecution specifically refers to para. 11 in the same filing, indicating that it is, for the reasons detailed, amenable to the idea of the instruction of experts by the Trial Chamber itself.

instruct expert witnesses or to use common expert witnesses who will be instructed separately.

4. In the meantime, the Prosecution has identified three potential experts on context, two potential experts on the aspects of the anticipated testimony of children witnesses, and four potential experts on military matters. *Inter alia* in light of the Prosecution's undertaking to refrain from discussing the substance of the topics with the potential expert witnesses pending possible orders of the Trial Chamber,⁴ the Prosecution has not made a determination which of these potential expert witnesses it would suggest to be jointly instructed.

The approach to be adopted to witness familiarisation and witness proofing. Whether familiarisation with the ICC procedure could be facilitated for witnesses whom the parties shall call at trial in a neutral manner and the extent, if at all, to which proofing of those witnesses shall be allowed

Background

5. On 1 November 2006, the Prosecution filed the "Prosecution's Information on the Proofing of a Witness" (Prosecution's Information to the Pre-Trial Chamber),⁵ which had been requested by the Pre-Trial Chamber in its "Decision concerning the Prosecution Information on the Proofing of a Witness" of 30 October 2006.⁶

⁴ *Ibid.* at para. 12 – The Prosecution met one expert on context. The expert has declined to be instructed as an expert witness.

⁵ Prosecution's Information on the Proofing of a Witness, confidential, 1 November 2006, ICC-01/04-01/06-638-Conf.

⁶ Decision concerning the Prosecution Information on the Proofing of a Witness, confidential, 30 October 2006, ICC-01/04-01/06-630-Conf.

6. On 3 November 2006, the Defence filed the "Response to Prosecution Information of Witness Proofing".⁷
7. The Pre-Trial Chamber rendered its "Decision on the Practices of Witness Familiarisation and Witness Proofing" (the Pre-Trial Chamber's Decision)⁸ on 8 November 2006 which, for the purposes of the Confirmation Hearing, prohibited the Prosecution from engaging with its sole witness for the hearings in what it had termed a "proofing session".

Prosecution's Submissions

8. The Prosecution submits that there may be a benefit derived from considering the procedures of *witness familiarisation* and *witness proofing* separately. The Prosecution does not take issue with the process of witness familiarisation being performed by the Victims and Witnesses Unit (VWU), within the parameters contemplated by the Decision of the Pre-Trial Chamber.
9. Witness proofing, when the definition and scope of such a term is properly understood, is appropriate and ought to be permitted in cases before the ICC. It is submitted that the ability of the Prosecution to meet with a witness prior to that witness testifying before the Chamber, and to discuss issues related to that witness's anticipated evidence, within limits, advances the Court's ability to ascertain truth. In addition, the Prosecution submits that proofing performed by

⁷ Response to Prosecution Information on Witness Proofing, confidential, 3 November 2006, ICC-01/04-01/06-653-Conf.

⁸ Decision on the Practices of Witness Familiarisation and Witness Proofing, public, 8 November 2006, ICC-01/04-01/06-679.

the Prosecution is congruent with its statutory obligations of investigation and disclosure.

10. With this overview, the Prosecution's submissions on witness proofing will focus on the following four main areas:

- (i) Witness Familiarisation;
- (ii) Definition and Practical Advantages of Witness Proofing;
- (iii) The Legal Position of Witness Proofing;
- (iv) The Unique Position of the Prosecution to Proof Witnesses.

11. The Prosecution recognizes that two other subjects to be resolved by this Chamber as matters for early determination are relevant to the issue of witness familiarisation and proofing. The Prosecution's submissions on witness proofing are interrelated to and made in conjunction with its submissions advanced on (a) the status of the decisions of the Pre-Trial Chamber and (b) the manner in which evidence shall be submitted subject to Article 64(8)(b) and Rule 140. The Chamber's decisions on these other two subjects will necessarily play a role in the issue of whether and to what extent witness proofing will be permitted.

Witness Familiarisation

12. In the Pre-Trial Chamber's Decision of 8 November 2006, a distinction was drawn between the separate practices of witness familiarisation and that of witness proofing.⁹ Familiarisation was held to encompass:

- (i) "assisting the witness to fully understand the Court proceedings, its participants and their respective roles;
- (ii) reassuring the witness about her role in the proceedings before the Court;
- (iii) ensuring that the witness clearly understands that she is under a strict legal obligation to tell the truth when testifying;
- (iv) explaining to the witness the process of examination first by the Prosecution and subsequently by the Defence;
- (v) discussing 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;
- (vi) making arrangements with the Prosecution in order to provide the witness with an opportunity to acquaint herself with the Prosecution's Trial Lawyer and others who may examine the witness in Court."¹⁰

⁹ See the Pre-Trial Chamber's Decision at paras. 11 to 15.

¹⁰ See the Pre-Trial Chamber's Decision at page 21.

13. The Pre-Trial Chamber noted that Article 43(6) of the Statute imposes upon the Registrar the duty to set-up a "Victims and Witnesses Unit" (VWU) and that Rules 16(2) and 17(2) prescribe the obligations and functions of the VWU which are to be performed in consultation with the Prosecution.¹¹ The Pre-Trial Chamber held that pursuant to these provisions the VWU would be the organ competent to undertake the practice of witness familiarisation.
14. The Prosecution agrees with this conclusion and does not advocate that any of the witness familiarisation duties deemed necessary (as outlined above) not be performed by the VWU in consultation with the Prosecution in accordance with the Statute and the Rules and subject to any order of the Chamber.

Definition and Practical Advantages of Witness Proofing

15. The Prosecution submits that proofing is a practice whereby a meeting is held between a party to the proceedings and a witness, before the witness is due to testify in Court, the purpose of which is to re-examine the witness's evidence to enable more accurate, complete and efficient testimony.¹² Where required by obligations established by Articles 54(1), 67(2) and Rule 77, the Prosecution will make records of and disclose information to the Defence from witness proofing sessions.

¹¹ See the Pre-Trial Chamber's Decision at paras. 22 to 25.

¹² *Prosecutor v. Haradinaj et al*, Case No. IT-04-84-T, Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, 23 May 2007, at para. 8.

16. Proofing has numerous judicially recognised, practical advantages which benefit the Court and the overall efficacy of judicial proceedings, which include, *inter alia*:

- (i) Providing a detailed review of relevant and irrelevant facts in light of the precise charges to be tried;
- (ii) Refreshing the witness's memory of past events through a review of previous statements;
- (iii) Ensuring the witness is aware of any issues on which he/she is not permitted to testify about (for instance, due to a previous ruling by the Chamber on inadmissibility of evidence);
- (iv) Enabling a more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial;
- (v) Identifying and putting the Defence on notice of any differences in recollection, thereby preventing undue surprise.¹³

17. The value of proofing is particularly evident for cases in which witness statements are taken well before of the conducting of trial proceedings in which the witness would be testifying in person. For example, the conduct of a proofing interview assists the witness by refreshing his or her memory of the event on

¹³ See *Prosecutor v. Limaj et al*, Case No. IT-03-66-T, Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses, 10 December 2004, at page 2; *Prosecutor v. Haradinaj et al*, *supra*, para. 8; *Prosecutor v. Milutinovic et al*, Case No. IT-05-87-T, Decision on Ojdanic Motion to Prohibit Witness Proofing, 12 December 2006, at para. 20.

which he or she is expected to testify and will assist them in recalling details previously mentioned in earlier statements. By clarifying the evidence to be called, assessing the credibility of the witness and by disclosing to the defence any new, additional or contradictory information, proofing can result in significant improvements in judicial economy and the accuracy of the testimony.

The Legal Position of Proofing

(a.) Jurisprudence at other International Criminal Tribunals

18. The Prosecution submits that proofing is a permissible, endorsed, and well-established practice; both at the international level and also with extensive use at the national level. In the international criminal tribunal sphere, the practice of witness proofing was permitted at the ICTY, the ICTR and the Special Court for Sierra Leone¹⁴ prior to the Decision of the Pre-Trial Chamber, and has been subsequently confirmed as a permissible practice at the ICTY¹⁵ and ICTR¹⁶.

19. In 2004, a Trial Chamber of the ICTY ruled on the practice of witness proofing in an interlocutory decision in *Limaj et al.*, wherein the benefits of proofing to the due functioning of the judicial process were detailed and expressly acknowledged and endorsed. These comprised:

- (i) Given that statements are usually taken before any charges have been made, matters thought relevant and irrelevant during investigation are

¹⁴ *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005.

¹⁵ *Prosecutor v. Milutinovic et al.*, *supra*, at para 16.

¹⁶ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007.

likely to require detailed review in light of the precise charges to be tried and enable the witness to focus on the facts which will be relevant when they come to testify;

- (ii) Addressing any differences in perception between the investigator who first took the witness' statement and the Prosecution counsel who will lead the witness in court;
- (iii) Events about which the witness is testifying frequently occurred years previously and so the process of human recollection is likely to be assisted by a detailed canvassing during proofing of the recollections of the witness;
- (iv) Witnesses are frequently testifying about very traumatic events and doing so in a formal setting in a foreign language – proofing can address this;
- (v) Proofing will extend to a detailed examination of deficiencies and differences in recollection when compared to an earlier statement of the witness and is likely to enable a more accurate, complete, orderly and efficient presentation of the evidence;
- (vi) Importantly, differences in recollection, especially additional recollections, can be identified and disclosed to the defence, before

evidence is given, thereby reducing the prospect that the Defence is taken entirely by surprise.¹⁷

20. In December 2006, the Trial Chamber of the ICTY in *Milutinovic et al.*, confirmed the permissibility of witness proofing at that Tribunal when asked to follow the Pre-Trial Chamber's decision and prohibit witness proofing. The Trial Chamber distinguished the Pre-Trial Chamber's decision, and held:

"This Chamber is of the view that discussions between a party and a potential witness regarding his/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. This is what the Chamber considers to be the essence of proofing conducted by the parties before the Tribunal and considers that this practice does not amount to "rehears[ing], practic[ing] or coach[ing] a witness."¹⁸

21. Also in December 2006, the Trial Chamber at the ICTR, in *Karemera et al.*, similarly declined to follow the Pre-Trial Chamber's decision to prohibit witness proofing, and held that proofing:

"[m]ay 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

¹⁷ *Prosecutor v. Limaj et al, supra*, at page 2.

¹⁸ *Prosecutor v. Milutinovic et al, supra*, at para. 16

in cases where the witness recollects elements that were not previously disclosed.”¹⁹

22. This decision of the ICTR Trial Chamber was upheld by the ICTR Appeals Chamber on interlocutory appeal.²⁰ In holding that the Trial Chamber did not err in this regard, the Appeals Chamber quoted, with approval, the July 2006 ICTR appellate decision of *Gacumbitsi*,²¹ and confirmed its approval of the proofing practice, holding in its decision: “Significantly, the Appeals Chamber [in *Gacumbitsi*] then concluded that ‘It is not inappropriate *per se* for the parties to discuss the content of the testimony and witness statements with their witnesses, unless they attempt to influence that content in ways that shade or distort the truth.’ The Trial Chamber’s definition of acceptable witness proofing is consistent with the approach sanctioned by the Appeals Chamber in the *Gacumbitsi* Appeal Judgement.”²²

23. Finally, in the 26 October 2005 decision of the Trial Chamber of the Special Court for Sierra Leone in the case of *Sesay et al.* the Defence applied to have the testimony of a witness excluded based on something the witness stated had taken place during a proofing session. The Trial Chamber denied the motion and upheld the practice of proofing witnesses,²³ stating:

¹⁹ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision on Defence Motions to Prohibit Witness Proofing, 15 December 2006, at para. 17.

²⁰ *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007.

²¹ *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, Judgment 7 July 2006, at para. 74.

²² *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR73.8, *supra*, at para. 9; The ICTR Appeals Chamber also made reference in para. 10 to three further ICTR cases which have all implicitly condoned the practice of witness proofing in decisions on evidential matters raised during proofing sessions; *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Decision on the Admissibility of Evidence of Witness KDD, 1 November 2004, at para. 9; *Prosecutor v. Bagosora et al.*, Case No. 98-41-T, Decision on Admissibility of Witness DBQ, 18 November 2003; *Prosecutor v. Rwamakuba*, Case No. ICTR-98-44C-T, Decision on the Defence Motion Regarding Will-Say Statements, 14 July 2005.

²³ Though the Trial Chamber did express reservations at the Prosecution practice of destroying the handwritten notes made during a proofing session by the Prosecution counsel once they had been transcribed into typed form.

"The Chamber finds that proofing witnesses prior to their testimony in court is a legitimate practice that serves the interests of justice. This is especially so given the particular circumstances of many of the witnesses in this trial who are testifying about traumatic events in an environment that can be entirely foreign and intimidating for them."²⁴

(b.) Pre-Trial Interviews in National Jurisdictions

24. The Prosecution submits that the practice of pre-trial interviews is utilised extensively in a number of national jurisdictions where it is recognised as providing benefits to the trial process – these are jurisdictions which are principally adversarial in nature and so where the parties are principally responsible for the questioning of witnesses. These jurisdictions include,²⁵ *inter alia*: Australia,²⁶ Canada,²⁷ England & Wales²⁸ and the United States.²⁹

²⁴ *Prosecutor v. Sesay et al*, Case No. SCSL-04-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005, at para. 33, referring to the advantages enunciated in *Limaj et al*.

²⁵ For general acknowledgement by international tribunals of the extensive use of the practice in national adversarial jurisdictions, *Prosecutor v. Limaj et al*, *supra*, at page 2; *Prosecutor v. Haradinaj et al*, *supra*, at para. 17 and *Prosecutor v. Sesay et al*, *supra*, at para. 30 to 33.

²⁶ See Rule 43 of the New South Wales Barristers' Rules: "A barrister must not suggest or condone another person suggesting in any way to any prospective witness (including a party of the client) the content of any particular evidence which the witness should give at any stage in the proceedings"; Rule 44: "A barrister will not have breached Rule 43 by expressing a general admonition to tell the truth, or by questioning and testing in conference the version of evidence to be given by a prospective witness, including drawing the witness' attention to inconsistencies or other difficulties with the evidence, but must not coach or encourage the witness to give evidence different from the evidence which the witness believes to be true." The New South Wales Barristers' Rules are available at http://www.nswbar.asn.au/docs/professional/legislation/Rules_april2001.pdf.

²⁷ *R v. D'Orazio Excavating Contractors Inc.* (1998), 75 O.T.C. 124 (Gen.Div.) at para.16: "If Crown counsel or Defence counsel could be routinely called as a witness simply because she had previously interviewed one of her own witnesses then no lawyer, Crown or Defence, could ever properly prepare for trial."; See also, Crown Policy Manual – Witnesses, Available at <http://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/default.asp>; See also, Law Society of Upper Canada, Rules of Professional Conduct, Available at <http://www.lsuc.on.ca/regulation/a/profconduct/>, Rules 4.03 and 4.04.

²⁸ *Harmony Shipping Co. SA v. Davis and others*, [1979] 3 All E.R. 177 (C.A.) at 180-81. The Prosecution also observes that the dual feature of the legal profession in England & Wales, namely the split between solicitors and barristers, results in a system in which it is the solicitor who conducts the equivalent of a proofing session with the witness – though it is termed as a "conference". The prepared papers are then provided to the barrister – in fact these documents are labelled the "Proof of Evidence" – who will then act as counsel before the court.

²⁹ *Goldberg v. US*, 425 U.S. 94, 105-106 (1976).

25. The Prosecution acknowledges that the practice is not always referred to by the term “proofing”³⁰ *per se* and that the scope of what can be discussed does sometimes vary. Nonetheless, the Prosecution avers that the practice of a pre-trial meeting with the witness, with the intention of facilitating reliable and efficient testimony, is uniform.
26. The Prosecution also observes that the extensive use of pre-testifying interviews in a number of national jurisdictions has been recognised by the Trial Chambers of a number of international tribunals. In *Limaj et al.* it was held, “It [proofing] is certainly not unique to this Chamber. It is an extensive practice in jurisdictions where there is an adversary procedure.”³¹ In *Sesay et al.* the Trial Chamber of the Special Court for Sierra Leone drew specific reference to this same passage from the *Limaj et al.* decision.³² Furthermore, in *Haradinaj et al.* the Trial Chamber also acknowledged that witness proofing is a common practice in jurisdictions following an adversarial system.³³

(c.) Analysis and Application of the Rome Statute and Subordinate Instruments

27. The Prosecution submits that, while the Statute is silent on the specific concept of witness proofing, a purposive reading of relevant Articles of the Statute and subordinate instruments, leads to the conclusion that the practice of a party interviewing a witness by prior to that witness testifying is generally permissible, subject to statutory proscriptions regarding the intent and effect of that contact,

³⁰ Terms such as “pre-trial interview” and “conference” are also used.

³¹ *Prosecutor v. Limaj et al, supra*, at page 2.

³² *Prosecutor v. Sesay et al, supra*, at para. 30.

³³ *Prosecutor v. Haradinaj et al, supra*, at para. 17.

as well as the Chamber's inherent power to regulate contact on a witness-specific basis.³⁴

28. The Statute regulates witness contact quite explicitly. It does not contain a general prohibition against witness contact but instead regulates such contact through the setting of offences relating to interference with witnesses and evidence. These prohibitions, which cover all interactions with witnesses, are found in the provisions Article 70(1). Article 70 creates offences against the administration of justice, which fall within the jurisdiction of the Court to try, including the offences of corruptly influencing a witness, and obstructing or interfering with the testimony of a witness. From the presence and construct of Article 70(1)(c) this Trial Chamber can necessarily infer that pre-testimony meetings, or proofing, with a witness by a party is not prohibited *ab initio*, rather is regulated to prohibit witness and evidence tampering. Indeed, it does not include a prohibition against pre-testimony witness contact by parties in a trial. Article 70 would have contained a clear averment in that regard.

29. The Prosecution also observes that similar proscribed conduct, with respect to dealing with witnesses, is outlined for most counsel appearing before the Court by the Code of Professional Conduct for counsel in Article 29.³⁵ This Code of Conduct certainly does not prohibit a party's counsel from conducting a pre-trial

³⁴ In the absence of any specific legal provision in the Statute, Rules of Procedure and Evidence or Regulations of the Court either sanctioning or prohibiting the practice of proofing, the authority of the Trial Chamber to prohibit witness proofing may fall within its inherent authority to rule on any issue concerning the conduct of the proceedings pursuant to Rule 134 of the Rules of Procedure and Evidence and to ensure that the trial is conducted in a manner which is "fair and expeditious" pursuant to Article 64(2).

³⁵ The Prosecution acknowledges that the Code of Professional Conduct for counsel does not explicitly apply to counsel for the Office of the Prosecutor. An ICC-OTP Code of Professional Conduct for Prosecution Counsel has been drafted and is in the process of being assessed by Prosecution senior management, but presently, there is no Code governing Prosecution Counsel.

interview of a witness. Indeed, interestingly, this Code seems to only forbid contact with a witness that involves “disproportionate or unnecessary pressure”.³⁶

30. Furthermore, in terms of positive law found in the Statute, the Prosecution also respectfully notes that Article 54(3)(b) specifically confers authority on the Prosecutor to, *inter alia*, request the presence of and question “witnesses”.³⁷ A combined reading of this provision, as well as Article 70’s prohibition against witness tampering, points to the conclusion that not only is there no presumed bar to pre-trial contact of witnesses by the parties, indeed, such contact appears to be contemplated in the Statute, with very strict and clear conditions on the effect of that contact. In other words, it is the Prosecution’s submission that an informed reading of the Statute actually supports the proposition that witness proofing, which does not run afoul of Article 70, ought, absent exceptional circumstances, to be permitted.

The Unique Position of the Prosecution to Conduct Witness Proofing Interviews

31. The Prosecution also submits that it is uniquely and specially situated to conduct proofing interviews of the witnesses it intends to call at trial due to its obligations relating to effective investigation and prosecution of crimes established under Article 54(1)³⁸ and disclosure *viz.* the Defence prior to trial entrenched in Article 67(2) and Rule 77. If, during the course of a witness proofing interview, the

³⁶ See Article 29 (1) of the Code of Professional Conduct for counsel, available at http://www.icc-cpi.int/library/about/officialjournal/ICC-ASP-4-32-Res.1_English.pdf.

³⁷ In this regard, the Prosecution also observes that Rule 76(1) of the Rules of Procedure and Evidence specifically requires the Prosecutor to disclose “copies of any prior statements”[emphasis added] made by witnesses the Prosecutor intends to call at trial, implying that it is envisioned that the Prosecution will have multiple contacts with witnesses prior to the trial.

³⁸ Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence”, 13 October 2006, ICC-01/04-01/06-568, at para 52.

witness corrects, supplements or explains earlier statements or provides new evidence, the Prosecution will discharge its obligations to the extent required under Articles 54(1) and 67(2) and Rule 77 and record and provide such changes to or additions in the evidence to the Defence. In this regard, the conduct of pre-trial interviews by the Prosecution inures to the benefit of an accused. Such a practice enables the defence to prepare effectively for the case to meet, contributes to overall trial fairness and focuses the issues for defence counsel.

Conclusion

32. In conclusion, the Prosecution summarizes its position on the approach to be adopted to witness familiarisation and witness proofing as follows:

- (i) *Witness familiarisation* is separate and distinct from *witness proofing*.
The Prosecution submits that the process of witness familiarisation falls within the mandate of VWU.
- (ii) Witness proofing is a procedure that has been judicially endorsed in other international criminal tribunals as well as being used routinely in many national criminal legal systems. There are many benefits to the trial process that are accrued by permitting a party to conduct trial preparation meetings with a witness and any risks associated with the practice are controlled by threat of sanctions. The Rome Statute and its subservient instruments do not explicitly forbid the practice of witness proofing and, indeed, a purposive review of relevant provisions of the Statute supports the proposal that pre-trial witness interviews by parties to the

proceedings are permissible, within a specified limit of acceptable conduct.

- (iii) That the Prosecutor is best situated to proof witnesses it intends to call at trial and will, when required by Articles 54(1), 67(2) and Rule 77, record and disclose evidence derived from proofing sessions to the Defence.



Luis Moreno-Ocampo
Prosecutor

Dated this 12th day of September 2007
At The Hague, The Netherlands

ANNEX

LIST OF AUTHORITIES

A. JURISPRUDENCE

(a) ICTY

Prosecutor v. Haradinaj et al, Case No. IT-04-84-T, Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, 23 May 2007
<http://www.un.org/icty/cases-e/index-e.htm>

Prosecutor v. Limaj et al, Case No. IT-03-66-T, Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses, 10 December 2004
<http://www.un.org/icty/limaj/trialc/decision-e/041210.pdf>

Prosecutor v. Milutinovic et al, Case No. IT-05-87-T, Decision on Ojdanic Motion to Prohibit Witness Proofing, 12 December 2006
<http://www.un.org/icty/milutino87/trialc/decision-e/061212.pdf>

(b) ICTR

Prosecutor v. Bagosora et al, Case No. 98-41-T, Decision on Admissibility of Witness DBQ, 18 November 2003
<http://69.94.11.53/default.htm>

Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64-A, Judgment 7 July 2006
http://69.94.11.53/ENGLISH/cases/Gacumbitsi/judgement/judgement_appeals_070706.pdf

Prosecutor v. Karemera et al, Case No. ICTR-98-44-T, Decision on Defence Motions to Prohibit Witness Proofing, 15 December 2006
<http://69.94.11.53/ENGLISH/cases/Karemera/decisions/151206b.pdf>

Prosecutor v. Karemera et al, Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007
<http://69.94.11.53/ENGLISH/cases/Karemera/decisions/070511.pdf>

Prosecutor v. Rwamakuba, Case No. ICTR-98-44C-T, Decision on the Defence Motion Regarding Will-Say Statements, 14 July 2005
<http://69.94.11.53/ENGLISH/cases/Rwamakuba/decisions/140705.htm>

Prosecutor v. Simba, Case No. ICTR-01-76-T, Decision on the Admissibility of Evidence of Witness KDD, 1 November 2004
<http://69.94.11.53/ENGLISH/cases/Simba/decisions/011104b.htm>

(c) SCSL

Prosecutor v. Sesay et al, Case No. SCSL-04-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005

<http://www.sc-sl.org/Documents/SCSL-04-15-T-436.pdf>

(d) National Jurisdictions**US**

Goldberg v. US, 425 U.S. 94, 105-106 (1976)

Canada

Harmony Shipping Co. SA v. Davis and others, [1979] 3 All E.R. 177 (C.A.)

R v. D'Orazio Excavating Contractors Inc. (1998), 75 O.T.C. 124 (Gen.Div.)

B. SECONDARY MATERIALS**Canada**

Crown Policy Manual – Witnesses

<http://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/default.asp>

Law Society of Upper Canada, Rules of Professional Conduct

<http://www.lsuc.on.ca/regulation/a/profconduct/>

Australia

The New South Wales Barristers' Rules

http://www.nswbar.asn.au/docs/professional/legislation/Rules_april2001.pdf