SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

Before: Judge Teresa Doherty, Presiding Judge
Judge Julia Sebutinde
Judge Richard Lussick

Registrar: Mr Robin Vincent

Date filed: 14 April 2005

THE PROSECUTOR

Against

ALEX TAMBA BRIMA
BRIMA BAZZY KAMARA
SANTIGIE BORBOR KANU

CASE NO. SCSL – 2004 – 16 – T

SUBMISSIONS ON OBJECTION TO QUESTION PUT BY DEFENCE IN CROSS-EXAMINATION OF WITNESS TF1-227

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I. Background

1. On 12th April 2005, during cross-examination of Witness TF1-227, counsel for the Accused Brima put the following question:

   "When you met on Thursday, what exactly did you talk about?"[1]

2. The question was put following a series of questions in cross-examination regarding a location to which the witness had referred during his evidence in chief. In the course of questioning the witness stated that he had met with the Prosecution on one occasion in the week before he testified. He said that that meeting was on Thursday (the witness started testifying on Friday 8th April), prompting the following exchange:

   Q [Counsel for the Accused Brima]. On Thursday. Now, on Thursday was within a week of you coming here last Friday, is it not?

   A [Witness]. It is about the – because I met on Thursday and then Friday I was asked to come.

[1] Transcript 12 April 2005, p 18, line 21.

Q. On Thursday. You knew then that it was not Blama but Braima, or Briama?

A. You see, what is important is what really took place at that incident at that particular village. The names – Blama is in Kenema, but people used to call it that particular name, but the original is Blama.

Q. Mr. Witness, can you please answer the question. Leave the important bits for the Court to judge. Now on Thursday, did you say to the person you met that the name – "I made a mistake. It is not Blama, it is Braima"?

A. No, I did not say it to him.

Q. Why not?

A. My mind was not going to that perspective."[2]

3. Earlier in cross-examination, on 11th April, counsel for the Accused Brima had asked the witness about the timing and number of pre-testimony meetings with the Prosecution and, broadly, what those meetings were about, as follows:

"Q. … After February the 18th, 2005, did you meet anybody from the Special Court?

A. After February 18th, 2005?

Q. Yes.

A. Yes, I met with somebody from the Special Court.

Q. How many times?

A. We met about three times.

Q. And what were those meetings about?

A. Still discussing about my statement?

Q. So you were discussing your statement. … The last three meetings that you just told us about, the meetings after February 18th this year, can you recall who you had the meetings with?

A. With my lawyer.

Q. Your lawyer? You have a lawyer?

A. Well, with a member from the Special Court."[3]

[2] Transcript 12 April 2005, p 18, lines 2-20.
[3] Transcript 11 April 2005, p 108.

II. The Objection

4. The Prosecution raises the following objection to the question identified at paragraph 1 above: As a matter of principle, the question goes beyond the scope of what is permissible in cross-examination being a question relating to the substance of a pre-testimony meeting between a Prosecution lawyer and a witness.

5. Questions relating to pre-testimony meetings between a Prosecution lawyer and a witness ought properly to be limited to the number of such meetings, the dates of the meetings, and their duration, save in exceptional circumstances. Examples of such exceptional circumstances are:

   i. Where an allegation of misconduct or *mala fides* on the part of the Prosecution is substantiated: that is, where a *prima facie* case for misconduct or *mala fides* is made out by the Defence.

   ii. Alternatively, where the Defence is aware, whether through the Prosecution or the witness in answer to questions, of any modification of disclosed statements (whether original, supplemental, or interview or proofing notes) made in the course of a pre-testimony meeting.

III. Submissions

6. The Rules of Procedure and Evidence make provision for the questioning of witnesses in chief and in cross-examination as follows:

   By Rule 90 (F):

   "The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to:

   i. Make the interrogation and presentation effective for the ascertainment of truth; and

   ii. Avoid the wasting of time."

7. The Rules of Procedure and Evidence of the Special Court, as distinct from the Rules of Procedure and Evidence of the ICTY and ICTR, do not make specific provision for the scope of cross-examination.

8. It is submitted that cross-examination ought properly be limited to matters which (a) are relevant to the issues in the case; (b) are raised in examination-in-chief or (c) affect the credibility of the witness. This is a matter of general principle, it is submitted, which is supported in the practice of the international ad hoc tribunals, and reflected in the wording of the Rules of Procedure and Evidence of the ICTY and ICTR.

9. Rule 90 (H) of the Rules and Procedure and Evidence of the ICTY is worded as follows:

> "(i) Cross examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.
>
> (ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.
>
> (iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters."[4]

10. In controlling the mode of interrogating witnesses so as to "make the interrogation ... effective for the ascertainment of truth..." the Chamber may be guided by the general principle which is articulated in Rule 90 (H) and Rule 90 (G) of the Rules of the ICTY and ICTR respectively.

11. Cross-examination ought not to be used to support a fishing expedition. Such cross-examination clearly goes beyond questioning which is "effective for the ascertainment of truth" and is liable to be a waste of the court's time.[5]

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[4] ICTY Rules of Procedure and Evidence (as at 11 March 2005). Similarly, Rule 90(G) of the Rules of Procedure and Evidence of the ICTR is worded as follows: "Cross-examination shall be limited to points raised in the examination-in-chief or matters affecting the credibility of the witness. The Trial Chamber may, if it deems it advisable, permit enquiry into additional matters, as if on direct examination." This sub paragraph was added at the ICTR fifth plenary session on 8 June 1998.

[5] See Rule 90(F)(ii).

12. It is submitted that there is a general principle, supported by the jurisprudence of the ICTR and ICTY, which limits the scope of cross-examination on pre-testimony meetings between Prosecution counsel and Prosecution witnesses to those matters set out at paragraph 4 above, because cross-examination going outside these limits will generally be relevant neither to the issues in the case nor to the credibility of a witness.

13. Questions going further - to the substance of pre-testimony meetings between the Prosecution and witnesses - might relate to the witness's credibility, but, if there are additional areas of enquiry which the Defence has legitimate grounds for wanting to pursue, then the Defence ought, it is submitted, to be required to apply for permission to pursue those lines of enquiry upon grounds being shown.

14. It is submitted that the caselaw of the ICTY and ICTR supports a principle that cross-examination in these circumstances is, and ought properly to be, closely circumscribed by the Chamber. Permission to ask questions going beyond the number of preparatory meetings, and their dates and duration ought only to be granted, it is submitted, exceptionally. An example of an exceptional situation would be where allegations of misconduct or *mala fides* on the part of the Prosecutor have been substantiated by the Defence.

15. This proposition is supported by a recent Decision of the Trial Chamber in *Prosecutor v. Augustin Bizimungu* and others (an ICTR case).[6] On an application by the Defence for authorisation to cross-examine Prosecution witnesses on the content of their interview by the Prosecution, the Trial Chamber found as follows:

> "In the instant case, the Chamber notes that the Defence has not specifically alleged any misconduct on the part of Prosecuting Counsel. In the circumstances, the Chamber concludes that questions relating to pre-testimony meetings between the Prosecutor and witnesses, while permissible, must in the absence of any substantiated allegation of

[6] *Prosecutor v. Augustin Bizimungu* and others, Case No. ITCR-00-56-T, "Decision on Bizimungu's Urgent Motion Pursuant to Rule 73 to Deny the Prosecutor's Objection Raised during the 3 March 2005 Hearing", 1 April 2005.

misconduct be limited to the number of such meetings, the dates of the meetings, and their duration."[7]

16. In 1997, in the *Blaskic* case at the ICTY, the Trial Chamber gave the following ruling during cross-examination by Defence counsel:

> Q. [Defence counsel] Is it your testimony you have never had a discussion with Mr. ... (Prosecution counsel) about what questions he would ask and what your answers would be? ...
>
> JUDGE JORDA. ... It is the relationship between the Office of the Prosecutor and its witness. ... To put the question like a policeman, like an investigating judge, to see what happened within the confidential relationship between the Prosecutor and the witness, that is not appropriate. It would be as if the Prosecutor were to ask you, you, Mr. Nobilo, or you, Mr. Hayman, when you have a witness, "what exactly happened in your relationship between the witness that you are offering and yourself?" ... The Trial Chamber will not involve itself with these matters. We will not repeat this again ... The incident is closed."[8]

Presumption of *bona fides*

17. The Prosecution, pursuant to its continuing disclosure obligations, disclosed the following statements in respect of Witness TF1-227: Statements dated 14 March, 17 March, 21 March, 26 March, and 27 March 2003, Interview Notes dated 12 March 2004 and (in one document) 17, 18, 19 February 2005, and "Additional Information provided by the witness" in the course of proofing on 19 February 2005.[9]

18. Witness TF1-227 was questioned at length in cross-examination on alleged inconsistencies between the statements, interview and proofing notes disclosed by the Prosecution, and his evidence in chief. The Defence has not suggested that the Prosecution has failed to comply with its disclosure

[7] Ibid., para. 37.
[8] *Prosecutor v. Blaskic*, Case No. IT-95-14-T. Trial Transcript 21 August 1997, pp 1812-1813. See pages 1811-1813. The Prosecution notes that cross-examination of a Prosecution witness on the contents of discussions in pre-trial meetings was not objected to by the Prosecution in the *Rutaganda* case at the ICTR in what the Chamber found to be "a very exceptional circumstance" (p 24, line 18). In that case, the Prosecutor had disclosed information obtained during discussions with the witness at a pre-trial meeting that appeared inconsistent or contradictory. *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Trial Transcript 8 October 1997, pp 20-31.
[9] Filed with the Chamber and numbered pages 6472 to 6908 inclusive.

obligations either under Rule 66 (A) (ii) or Rule 68 of the Rules of Procedure and Evidence. It is not alleged that any modification of existing disclosed statements was made by the witness when he met with a Prosecution lawyer on the Thursday before he testified, nor is any allegation of impropriety or *mala fides* made against the Prosecution. This position is reinforced by the witness's answers to those questions which have been posed relating to the substance of his pre-testimony meeting. Asked whether he had informed the Prosecution of an alleged inconsistency in the name of a village at which an incident about which he testified took place, he said: "No, I did not say it to him."

19. In giving its ruling on the Defence application in the *Bizimungu* Decision, the Trial Chamber placed emphasis on a "presumption" that exists that "Counsel perform their duties in accordance with the ethical principles that govern the legal profession in their respective countries and that apply, *mutatis mutandis*, before the Tribunal". It held:

> "Unless a party makes a specific allegation of misconduct on the part of Counsel, in which case the allegation must be substantiated, questions that generally tend to probe into the details of communication between a lawyer and a witness during pre-testimony preparations would, if allowed by the Chamber, render the presumption nugatory."[10]

20. In this court, Trial Chamber 1 has, in the *Norman* and others, and in the *Sesay* and others, proceedings, placed similar emphasis upon a presumption of propriety on the part of the Prosecution in its compliance with the rules of disclosure. In its Decision, in the *Norman* case, of 16 July 2004, that Chamber has held:

> "It is evident that the premise underlying the disclosure obligations is that the parties should act *bona fides* at all times. There is authority from the evolving jurisprudence of the International Criminal Tribunals that any allegation by the Defence as to a violation of the disclosure rules by the Prosecution should be substantiated with *prima facie* proof of such a violation."[11]

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[10] *Bizimungu*, supra, para. 35.

[11] *Prosecutor v. Norman* and others, Case No. SCSL-04-14-T, "Decision on Disclosure of Witness Statements and Cross-Examination", 16 July 2004.

21. The Prosecution's practice is to disclose to the Defence any additional information or modifications of existing statements obtained in the course of "proofing" sessions carried out prior to a witness testifying, as well as exculpatory material disclosable under Rule 68. The practice of proofing is an accepted and by now well-established practice of this court, and of the ad hoc Tribunals.[12] It is also a widespread practice in jurisdictions where there is an adversary procedure. In cases such as the present one, where events founding the charges occurred some years ago, the process of human recollection is likely to be assisted by a detailed canvassing during the pre-trial proofing of the relevant recollection of a witness. Very importantly, proofing enables differences in recollection, especially additional recollections, to be identified and notice of them to be given to the Defence, before the evidence is given, thereby reducing the prospect of the Defence being taken entirely by surprise.[13]

22. A recent Decision at the ICTY on the practice of proofing makes the following observation:

> "Also particularly relevant are the cultural differences encountered by most witnesses in this case when brought to The Hague and required to give a detailed account of stressful events, which occurred a long time ago, in a formal setting, and doing so in response to structured precise questions, translated from a different language. Such factors also demand time in preparing a witness to cope adequately with the stress of these proceedings. These matters, in the Chamber's view, are properly the realm of proofing, and are not to be left to the different form of support provided by the Victims and Witnesses Section".[14]

23. That observation, it is submitted, is particularly relevant in the context of this trial. Any submissions seeking to impune the practice of the Prosecution in proofing witnesses are wholly unmeritorious and unjustified.[15]

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[12] See *Prosecutor v. Limaj*, Case No. IT-03-66-T, "Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses", 10 December 2004.
[13] See the *Limaj* Decision, ibid.
[14] Ibid. Registry page reference 3038.
[15] The Prosecution notes the following comments by lead counsel for the Accused Brima, Mr. Metzger: "... Because in our respectful submission, when the Prosecution is obliged by an order of Court and by a rule of Court to serve disclosure on the Defence within 42 days of a witness coming to Court and they seek, as it were, to go around the back door and seed [sic] that witness in preparation before the witness comes to give

24. In cross-examination, the Defence may put to a witness inconsistencies between in court testimony and statements disclosed by the Prosecution. In the event that no disclosure is made in respect of a pre-testimony meeting between a Prosecution lawyer and a Prosecution witness, then the presumption must be that no additional information, or modifications of existing statements, or exculpatory material, has been obtained in the course of that meeting. To allow questioning in cross-examination on the substance of a pre-trial meeting would be to suggest impropriety on the part of the Prosecutor unless - exceptionally - grounds are advanced for pursuing a specific line of enquiry, other than of impropriety, which is either relevant to the issues, or to the credibility of the witness. In the absence of information as to or evidence of a modification of an earlier statement, it is difficult to see what the relevance of questioning of this nature might be.

25. Counsel for the Accused Brima, in her specific questioning of witness TF1-227, has already gone beyond questioning the witness on the date, duration and number of pre-testimony meetings.[16] She has gone, it is submitted, as far as she may properly go. The witness himself proffered the information in cross-examination that he had known of the correct spelling of a village to which he had referred in testimony when he met with the Prosecution prior to testifying. A closed question to the limited extent put (.. did you say to the person you met that the name – "I made a mistake..": lines 14-17) was, in these circumstances, and exceptionally, justified. Any further questioning as to the substance of the pre-testimony meeting will, in all likelihood, amount to a fishing expedition.

26. The Prosecution makes its objection on a matter of principle. It also advances a further and alternative objection to the Defence question, and anticipated further line of questioning of witness TF1-227. This witness has been questioned at length by counsel for the Accused Brima (and counsel for the

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evidence, and then they get up to object to any questions being asked about that, it seems to me that it ill behooves [sic] the course of justice." Transcript 12 April 2005, p 19. lines 17-22.

[16] See the exchange at paragraph 2, above.

Accused Kanu[17]) on the different spellings of a village at which he says an incident occurred.[18] He has also been asked, and given evidence as to what the pre-testimony meetings to which he has testified were "about".[19] Any further questions on either issue are likely to be, it is submitted, repetitious and a waste of this court's time. On this alternative basis, they should be excluded under Rule 90(F)(ii).

IV. Conclusion

27. In the premises, the Prosecution requests that the Chamber :

i. Rule as inadmissible the Defence question as set out at paragraph 1 above.

ii. Rule as inadmissible any further cross-examination on pre-testimony meetings between witness TF1-227 and the Prosecution save insofar as such questioning is limited to the number of such meetings, the dates of the meetings, and their duration.

Dated this 14th day of April 2005

In Freetown,

Sierra Leone

For the Prosecution,

Luc Côté
Chief of Prosecutions

Lesley Taylor
Senior Trial Counsel

[17] Transcript 11 April 2005, pp 74-75, 91.
[18] Transcript 12 April 2005, pp 10-17.
[19] Transcript 11 April 2005, p 108, lines 3-28; paragraph 3, above.

PROSECUTION LIST OF AUTHORITIES

1. *Prosecutor v. Augustin Bizimungu* and others, Case No. ITCR-00-56-T, "Decision on Bizimungu's Urgent Motion Pursuant to Rule 73 to Deny the Prosecutor's Objection Raised during the 3 March 2005 Hearing", 1 April 2005.

   http://www.ictr.org/default.htm

2. *Prosecutor v. Blaskic*, Case No. IT-95-14-T. Trial Transcript 21 August 1997.

   http://www.un.org/icty/transe14/970821it.htm

3. *Prosecutor v. Rutaganda,* Case No. ICTR-96-3-T, Trial Transcript 8th October 1997, pp 20-31.

   Attached.

4. *Prosecutor v. Norman* and others, Case No. SCSL-04-14-T, "Decision on Disclosure of Witness Statements and Cross-Examination", 16 July 2004.

5. See *Prosecutor v. Limaj*, Case No. IT-03-66-T, "Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses", 10 December 2004.

   Attached.

PROSECUTOR -v.- RUTAGANDA, CASE NO. ICTR-96-3-T
TRIAL TRANSCRIPT 8 OCTOBER 1997.

April, are you able to tell me if this incident
occurred on the 4th of April, the 7th of April,
or the 15th of April 1994, Mr. CC?
A. The incident occurred on the 5th. There were
two incidents. There was one on the 5th and
then the one on the 15th.
Q. Okay. Yesterday, in fact, you explained to us
that you clearly told the investigators and the
prosecutors that there were two incidents, is
that not correct?
A. Yes.
Q. Moreover, when I asked you the question
pertaining to the fact that Mr. Rutaganda
allegedly killed two people in your statement
and three people in your testimony, you said
that there were two different events, right?
A. I said that he killed two people and then he
killed one other person.
Q. Fine. And then when I asked you if you had
clearly explained that they were two distinct
events to the investigators and the prosecutor,
you said that, in fact, you had drawn that

difference, is that right?

A What I said was that when they asked me how many people he had killed, I said that he took two

people -- that he had called two people over, took them, they came back, and took other people.

Q. Fine. I would like to ask you the question again. I understand that there is a cassette and transcript of what you said to the Tribunal. Did you not tell me yesterday that you clearly explained to the investigators and the prosecutor that there were two events, one event in which Mr. Rutaganda killed two people, and another event in which he killed one, for a total of three people killed by Mr. Rutaganda?

A. Yes, that's what I said yesterday.

Q. Fine. When you arrived here in Arusha on Monday evening, do you remember having met with Counsel Stewart in the presence of the interpreter sitting next to you and a woman from the office of the prosecutor?

THE INTERPRETER:

The witness is asking, Are you the interpreter?

He's asking the interpreter if it was this interpreter. The interpreter says no.

BY MS. DICKSON:

Q Fine, do you remember if it was another interpreter, then, on Monday evening of your

arrival?

A Yes.

Q Is it not true that during this meeting you told the prosecutor that Mr. Rutaganda during this incident had killed three people and that you had never made the distinction -- that you never said that they were two different incidents, that you said last Monday evening?

MR. PRESIDENT:

Were you there during this meeting? How would you know what was said?

MS. DICKSON:

No, Mr. President. I'm just asking the question, if you would like to have further information.

MR. PRESIDENT:

No, this is not a question. You affirmed that you said during this meeting you said such and such and such. That's not a question. So, I am asking you, were you there during the meeting or not?

MS. DICKSON: No, I was not there, but I had information about it. My colleagues explained to me, out of loyalty they told me about what was discussed.

MR. PRESIDENT:

Now, you should perhaps ask the question in the following manner: What did you say during the meeting? Was it one time or two times? Ask it in a question form that would give less of an impression that you are betraying confidence.

MS. DICKSON:

Fine, Mr. President.

BY MS. DICKSON:

Q Sir, do you remember the meeting that you had with these people on Monday evening?

A Yes.

Q Did you talk to them about two different events, one in which Mr. Rutaganda allegedly killed two people and another in which he allegedly killed one, for a total of three victims?

A A person came here, he killed two of them. And then others came after, and they were killed by his Interahamwe. And the other, he took him away, also. He was the one who was my younger

brother.

MR. PRESIDENT:

Is that what you said to the prosecutor?

THE WITNESS:

Yes.

MR. PRESIDENT:

On last Monday?

THE WITNESS:

I said that Monday.

MR. STEWART:

Mr. President, I must intervene, with your permission. Unfortunatley, this will allow me to -- in the absence of this witness's explanation, I will be able to give you further explanation.

MS. DICKSON:

I would also like to give you some explanations.

MR. PRESIDENT:

Fine. The witness can be shown out. Please close the doors.

(Witness CC escorted from courtroom.)

Prosecutor, you have the floor to explain. This seems to me a very exceptional circumstance.

MR. STEWART:

I think that it would be easier to give you an overview of the situation. There is most likely an explanation for all this, but what I'm going

to tell you are simply the facts. I'm not going to be a witness. I was working with an interpreter who could be a witness, but I'm

trying to avoid that because the interpreters should not become witnesses.

Now, I don't know if you are going to accept what I say or not but I'm going to tell you anyway. I did, in fact, meet with Mr. CC on Monday evening with an interpreter. There was not a woman, it was just the two of us.

We reviewed his testimony. He told me that the accused had killed three people during this incident involving these three people. Yesterday when I went to see him to explain the in camera session and to reassure him and explain we were going to ask certain questions in camera based on the order of the Chamber, I asked him specifically once again if it was, in fact, three people killed by Rutaganda or two, as he had said according to the statement that I had, and he insisted that it was three. And he did not make the difference, he did not draw the

distinction that he did yesterday. Maybe there's an explanation, but those are the facts. And I gave this information -- I felt that it was my duty to give this information to

Counsel Dickson, because the witness had claimed to have made this distinction, which is not the case.

Now, perhaps he thinks he made the difference, but that's not the case. So, that's what I told the defence, and that's why Counsel Dickson asked this question in the way in which she did.

And I, of course, wanted to simply inform you of this. That's the practice that I have always followed. It's maybe difficult, but it's justice that's more important and must prevail.

MR. PRESIDENT:

Fine, Mr. Prosecutor. Counsel Dickson, do you have something to add?

MS. DICKSON:

Mr. President, what I could add in the absence of the witness is that after Counsel Stewart was so kind as to explain this to me, and I am very

pleased that he has done that, we noticed that the witness had given a false answer, not just to one, but to two questions that were put to him. And it would be rare to have an example

where the prosecutor, an officer of the court or member the Tribunal himself, is able to testify to the fact that the witness did not tell the truth.

Now, the issue was raised once yesterday --

MR. PRESIDENT:

That's another issue. We're not going to get into the discussion about the truth or not. The Tribunal will make its assessment. The Tribunal will decide whether he lied, partially lied, or whatever. But that's the Tribunal's decision.

MS. DICKSON:

Fine. Yesterday a question was asked, and it was asked very clearly. The question was asked whether a difference had been made to the prosecutor and the investigators, if this difference had been clearly drawn. And the answer was yes. I asked the question again this morning and five minutes after all this

confusion he said that the answer was still the same.

Unless we were to begin discussing the reasons why there may be this answer, I think that it is

my duty, I'm obliged to note that the prosecutor has intervened out of its duty of loyalty, informing me of the facts, the words. And when the claim has been made that the difference was made to the prosecution, whereas it was not, this type of answer in my opinion can discredit the work of the Tribunal.

MR. PRESIDENT:

Counsel, once again, you are pleading now. I only want to discuss the incident. I don't want to hear any submissions, but you can talk to us only about the witness's testimony. I only wanted to talk about this particular incident. I don't develop a whole argument about whether it was the truth or not. Please allow the Tribunal to determine whether or not there was probative value of this testimony.

Let's be very clear. That's not what we're discussing. We're discussing the substance, and when the time comes it will be up to the

Tribunal to make the assessment. You can do everything you want, of course, to try to discredit the witness, to raise these issues.

The prosecutor has given his explanation that

there were three persons killed.

Now, whether it was three at one time or two plus another on another incident, that's the subject at hand. That's what we're discussing.

If you have any other observations to make on that issue, you may.

MS. DICKSON:

I simply wanted to specify there were not any misunderstandings. I'm, of course, not trying to infringe upon the sovereign power of this Tribunal to determine the probative value of the testimony or not. You indicated that there is legal recourse open to me in these particular cases if I were to use them, and especially in particular Rule 91(b) of the Rules of Procedure and Evidence.

MR. PRESIDENT:

I wasn't referring to anything at all.

MS. DICKSON:

No, but since the witness is not here, with your

permission, I could perhaps make a motion. And if you would refuse, then we will continue with the cross-examination. Of course, you are master of the proceedings here, Mr. President,

but since there is a provision which allows for verbal motions, I would ask your permission to present a motion by virtue of Rule 91(b).

MR. PRESIDENT:

The witness has an obligation to tell the truth with the consequences that flow from false testimony. Paragraph B, if the Chamber has strong grounds for believing that a witness may have knowingly and willfully given false testimony, on the request of a party, which is the case, the Chamber may direct the prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony.

Considering the complexity of the procedure, I think you may have to submit a motion for the Chamber to rule on that. In the meantime, the Chamber will continue the cross-examination.

Could the witness be asked to come in again?

MS. DICKSON:

Thank you.

MR. PRESIDENT:

On the contrary, I think the prosecution -- I do

not think that the prosecution should reveal his weapons to the other party. That would not be part of my strategy. Maybe that is a practice elsewhere, but in passing I would like to mention that I do not consider it proper for the prosecution to reveal his weapons to the other party.

MR. STEWART:

With your permission, Mr. President, I did this for the Chamber, for the Chamber to be in a position to make an assessment.

MR. PRESIDENT:

I think we will not have the opportunity of coming back to such practices. Maybe you have learned something from this incident.

MR. STEWART:

Well, that is what I'm observing. So far, I have never had to do that, and certainly I would not repeat that. I sincerely hope I will not repeat this.

(Witness CC returned to courtroom.)

MR. PRESIDENT:

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D3041-D3037
10 DECEMBER 2004

~~3044~~ AT

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-03-66-T

Date: 10 December 2004

Original: English

TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge Krister Thelin
Judge Christine Van Den Wyngaert

Registrar: **Mr. Hans Holthuis**

Order of: **10 December 2004**

PROSECUTOR

v.

Fatmir LIMAJ
Haradin BALA
Isak MUSLIU

DECISION ON DEFENCE MOTION ON PROSECUTION PRACTICE OF "PROOFING" WITNESSES

The Office of the Prosecutor:

Mr. Andrew Cayley
Mr. Alex Whiting
Mr. Julian Nicholls
Mr. Colin Black

Counsel for the Accused:

Mr. Michael Mansfield Q.C. and Mr. Karim A. A. Khan for Fatmir Limaj
Mr. Gregor Guy-Smith and Mr. Richard Harvey for Haradin Bala
Mr. Michael Topolski Q.C. and Mr. Steven Powles for Isak Musliu

This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, is seised of a motion[1] by defence counsel for all three Accused in this case ("the Defence") pursuant to Rule 73, for an order that the Prosecution cease "proofing" witnesses with immediate effect, or an order that a representative of the Defence be permitted to attend the Prosecution's proofing sessions, or that the Defence be provided with a video or tape-recording of proofing sessions. The Prosecution filed a response on 3 December 2004[2] and a Defence reply was filed on 6 December 2004.[3]

In view of the written submissions filed, the Chamber is not persuaded that further oral submissions are necessary for the due consideration of this motion.

In support it is submitted that it is questionable whether it is necessary at all for the Prosecution to conduct any proofing sessions because witnesses have previously given one or more statements to UNMIK investigators and have been interviewed also by an ICTY investigator. Objection is taken to proofing any more extensive than to clarify what is likely to be a "handful of matters", and specifically to Prosecuting counsel spending a number of hours with a witness before evidence is given.

It is submitted that what is being done may affect the fairness of the trial. Attention is specifically drawn to the possibility that leading questions may be put to the witness by Prosecuting counsel before evidence is given. In oral submission it was made clear that it is not contended that this has occurred, merely that there is a danger that it may do so.

In reply it is further submitted that the practice of proofing extends "far beyond the ambit of witness preparation which is integral to the giving of sensitive testimony". It is contended the practice, especially numerous proofing meetings, are in essence a "re-interview" of witnesses and beyond what is said to be "the traditional understanding" of witness proofing. It is ventured that the practice could be said to be coaching, rather than proofing.

It is further said that Prosecuting counsel's proofing, intimates an attempt to usurp or unnecessarily duplicate the role of the Victims and Witnesses Section of the Tribunal.

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[1] *See* transcript of the proceedings in *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-PT, T. 1147 – 1170.
[2] *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-PT, Prosecution's Response to "Defence Motion on Prosecution Practice of Proofing Witnesses", 3 December 2004.
[3] *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-PT, Defence Reply to "Prosecution's Response to Defence Motion on Prosecution Practice of Proofing Witnesses", 6 December 2004.

The Defence submits it is seeking to avoid rehearsals of testimony that may undermine a witness's ability to give a full and accurate recollection of events.

The Prosecution's response submits that proofing is an accepted and well-established practice of this Tribunal, one which serves several important functions for witnesses and for the judicial process. It is further submitted that there is no prejudice from the present proofing practice and, in essence, that its attributes, to which the Defence point, have not ever been held to warrant interference with, or change to, the existing proofing practice which has prevailed throughout the life of this Tribunal.

The practice of proofing witnesses, by both the Prosecution and Defence, has been in place and accepted since the inception of this Tribunal. It is certainly not unique to this Chamber. It is a widespread practice in jurisdictions where there is an adversary procedure.

It has a number of advantages for the due functioning of the judicial process. Some of them may assist a witness to better cope with the process of giving evidence.

It must be remembered that when a witness is proofed this is directed to identifying fully the facts known to the witness that are relevant to the charges in the actual Indictment. While there have been earlier interviews there was no Indictment at that time. Matters thought relevant and irrelevant during investigation, are likely to require detailed review in light of the precise charges to be tried, and in light of the form of the case which Prosecuting counsel has decided to pursue in support of the charges, and because of differences of professional perception between Prosecuting counsel and earlier investigators.

In cases before this Tribunal, including this case, it is also relevant that the events founding the charges occurred many years ago. Interviews by investigators were also conducted a long time ago. The process of human recollection is likely to be assisted, in these circumstances, by a detailed canvassing during the pre-trial proofing of the relevant recollection of a witness. Proofing will also properly extend to a detailed examination of deficiencies and differences in recollection when compared with each earlier statement of the witness. In particular, such proofing is likely to enable the more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial.

Very importantly, proofing enables differences in recollection, especially additional recollections, to be identified and notice of them to be given to the Defence, before the evidence is given, thereby reducing the prospect of the Defence being taken entirely by surprise.

It is advanced that in this case the number of proofing sessions, of some witnesses, is excessive. This has also given rise to conjecture that improper or undesirable practices may be causing excessive proofing. In the Chamber's view many of the factors identified already in these observations, and the range and nature of the factual and procedural factors to be canvassed, all aggravated in time by the need for translation, serve to explain proofing sessions of the duration mentioned in submissions.

In this respect it is more a matter of the time spent, rather than the number of sessions into which that time happens to be divided, which is relevant.

Also particularly relevant are the cultural differences encountered by most witnesses in this case, when brought to The Hague and required to give a detailed account of stressful events, which occurred a long time ago, in a formal setting, and doing so in response to structured precise questions, translated from a different language. Such factors also demand time in preparing a witness to cope adequately with the stress of these proceedings. These matters, in the Chamber's view, are properly the realm of proofing, and are not to be left to the different form of support provided by the Victims and Witnesses Section.

The other concerns raised by the Defence are really inherent in the established and accepted proofing procedure. There are clear standards of professional conduct which apply to Prosecuting counsel when proofing witnesses. What has been submitted does not persuade the Chamber that there is reason to consider these are not being observed, or that there is such a risk that they may not be, as to warrant some intervention by the Chamber.

The Chamber will not make orders such as those sought.

The submissions also sought to call in aid what are in truth distinct issues. These were late notice of new material, and a failure to provide signed statements of new or changed evidence. In addition, there was a failure to provide notice of new or changed evidence in Albanian, the language of the Accused.

Late notice is an issue which may require measures to overcome resulting difficulties to the Defence. That will depend on the circumstances. Any example raised will be considered on its merits. Except perhaps where the subject of a notice of a new item of evidence, or a change of evidence is extensive, there is not any sufficient reason to require a signed statement. The prosecution has volunteered that it will provide Albanian translations in future. There is no need, therefore, to comment further on this concern.

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For these reasons the motion is dismissed.

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

Judge Parker
Presiding

Dated this tenth day of December 2004
At The Hague,
The Netherlands

[Seal of the Tribunal]