SPECIAL COURT FOR SIERRA LEONE

OFFICE OF THE PROSECUTOR

Freetown – Sierra Leone

Before: Justice Pierre Boutet, Presiding Judge
Justice Benjamin Mutanga Itoe
Justice Bankole Thompson

Registrar: Mr. Robin Vincent

Date filed: 27 May 2005

THE PROSECUTOR

Against

ISSA HASSAN SESAY also known as ISSA SESAY

MORRIS KALLON also known as BILAI KARIM

And

AUGUSTINE GBAO also known as AUGUSTINE BAO

CASE NO. SCSL-2004-15-PT

PROSECUTION RESPONSE TO THE GBAO AND SESAY JOINT APPLICATION FOR THE EXCLUSION OF WITNESS TF1-141's TESTIMONY

Office of the Prosecutor:

Luc Côté
Lesley Taylor
Peter Harrison

Defence Counsel:

Wayne Jordash
Sareta Ashraph

Shekou Touray
Charles Taku
Melron Nicol-Wilson

Andreas O'Shea
Girish Thanki
John Cammegh

1. On 17 May 2005 the first accused ("Sesay") and the third accused ("Gbao") filed a "Joint Defence Application for the Exclusion of the Testimony of Witness TF1-141" (the "Application"). The Application alleges a violation of Rule 66 of the *Rules of Procedure and Evidence* and an abuse of process.[1]

2. TF1-141 testified on 11-15, 18 and 19 April 2005. After the testimony was heard counsel for Gbao and Sesay made an oral application on 19 April 2005 to exclude the testimony of TF1-141. The Trial Chamber directed that if counsel wished to pursue the application, it must be done as a written motion.[2]

I. INTRODUCTION

3. Gbao and Sesay say that notes were taken by the prosecution during interviews with witness TF1-141, that those notes were not disclosed to the accused, that the non-disclosure of the notes violates Rule 66 and is an abuse of process, and that they have suffered prejudice by the inability to examine the notes.[3] The remedy they seek is the exclusion of the entirety of TF1-141's testimony.[4]

4. The law is clear. The "*Special Court adheres to the principle of orality*..."[5] [italics and underlining in original]. Further, this "...court has a general power under Rule 89(C) to admit *any* relevant evidence..."[6] [italics in original]. The weight to be given to that evidence is a separate and distinct question, but relevant evidence is admissible.

5. Where hand-written interview notes were taken by investigators, pursuant to a policy, all information of any evidentiary value was transferred to a type-written

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[1] The Application, para. 1.
[2] Transcript of 19 April 2005, at p. 86
[3] The Application, para. 4.
[4] The Application, para. 4.
[5] *Prosecutor v. Norman, Fofana, Kondewa, "Decision on Disclosure of Witness Statements and Cross-Examination*, (Trial Chamber I) 16 July 2004, para. 25.
[6] *Prosecutor v. Norman, Fofana, Kondewa, "Fofana – Decision on Appeal Against 'Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence'"* (Appeals Chamber) 16 May 2005, concurring opinion of Robertson J.A., para. 12

statement, including exculpatory as well as inculpatory evidence, in order to fulfill the disclosure obligation of the Prosecution. Therefore all the evidence with respect to TF1-141 was disclosed. In the event other information is contained in the hand-written notes, such as investigative leads or the interviewer's impressions of the witness, that information is transferred to a typewritten internal memorandum. The Prosecution does not retain the hand-written notes since all of the information has been transferred to the typed format.

6. The witness was cross-examined at length on the disclosed statements, and it is open to the Court to determine if the witness's oral evidence was impeached. The applicants have not cited any authority on point. They are asking the Court to make new law, and new law which would be contrary to existing principles.

II. NO *PRIMA FACIE* PROOF OF A BREACH OF RULE 66

7. In its ruling of 1 October 2004, in *Norman et al*[7] this Trial Chamber ordered the Prosecution to provide copies of all handwritten interview notes taken for or from witness TF2-162.[8] As a result of this ruling the Prosecution filed a further submission where it informed the Court that pursuant to policy the Prosecution did not have any interview notes in its possession or control. A declaration to this effect was attached to the submission.[9]

8. After the Prosecution informed the *Norman* Trial Chamber that the interview notes, in their original format, were no longer in the possession of the prosecution, the Court applied the maxim *nemo tenetur ad impossible* (no one is bound by an impossibility).[10]

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[7] *Prosecutor v. Norman, Fofana, Kondewa, "Ruling on Disclosure of Witness Statements"*, (Trial Chamber I) 1 October 2004.
[8] *Ibid*, p. 8.
[9] *Prosecutor v. Norman et al, "Prosecution Submission Regarding 'Ruling on Disclosure of Witness Statements' Dated 1 October 2004"* (Trial Chamber I) 15 October 2004.
[10] This maxim was applied in *Prosecutor v. Niyitegeka, "Judgement"*, ICTR-96-14-A, 9 July 2004, para. 34.

9. The prosecution has done nothing wrong. A policy was put in place long before the commencement of the trial that is logical, reasonable and fair. Hand-written notes are frequently illegible, and when investigation interviews took place the notes included possible evidence. However, the notes also included such things as potential investigative leads, impressions, and advice on internal matters of concern to the Office of the Prosecutor, none of which is subject to disclosure. The prosecution's policy and practice was simply to ensure that what may be illegible is rendered legible to all and that only information subject to disclosure is included in the disclosed statement.

10. This policy and practice was held to be "reasonable in the circumstances" in a recent decision of Trial Chamber II of this Court.[11] The test applied by Trial Chamber II in this decision was: "The Trial Chamber therefore finds that the Defence has failed to demonstrate or substantiate by *prima facie* proof the allegation of breach by the Prosecution of Rules 66 and 68."[12] In the Application before this Trial Chamber there is no *prima facie* proof of a breach of Rules 66 or 68.

11. The authorities relied on by the applicants do not support their claim. *R. v. Delaney* and *R. v. Absolam* are cases where the police failed to properly record the statement of suspects, contrary to the police Code of Practice.[13] A suspect is in a much different position from a witness and is entitled to a number of procedural rights. *Scott v. R.* and *R. v. Sang* do not tell the Court anything new. This Court already knows that it has a duty to ensure a fair trial.[14]

12. *R. v. Carosella*[15] is a very different case from that before this Trial Chamber. In *Carosella* the notes of a counselor at a sexual assault crisis centre, taken when the complainant went to the centre to seek advice on how to lay charges against the accused, were shredded by the centre. What is important though is that there was no other record

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[11] *Prosecutor v. Brima, Kamara, Kanu, "Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68"*, (Trial Chamber II), 4 May 2005, para. 18.
[12] *Ibid,* para. 19
[13] *R. v. Delaney* 88 Cr App R 338; *R.. v. Absolam* 88 Cr App R 332
[14] *Scott v. R.* [1989] AC 1242; *R. v. Sang* [1980] AC 402 (HL)
[15] *R. v. Carosella*, [1997] 1 SCR 80 (SCC)

of what was in the note and the social worker who conducted the interview had no recollection of the contents of the destroyed notes. This is different from the circumstances involving TF1-141. Notes were taken of all the relevant evidence of witness TF1-141. That evidence was transferred to type-written form and only after the typed version was produced were the hand-written notes destroyed. No information has been lost. The prosecution does not accept that Rule 66 was breached, but if it was, the breach was of such a technical nature that no remedy is justified. The evidence in the notes was transferred to a typed form and disclosed.

13. Precisely because no information has been lost or concealed, there has been no abuse of process. Gbao and Sesay provide no authority to suggest that the destruction of interview notes, after the information has been transferred to a typed document and disclosed, constitutes an abuse of process. The suggestion is in reality completely contrary to two guiding principles of this Court, the principle of orality, and broad admissibility of evidence. Neither principle should be strayed from and there is no basis in law to exclude the evidence of TF1-141.

III. LAWYERS' PROOFING NOTES FALL WITHIN RULE 70(A)

14. Witness TF1-141 was interviewed by investigators of the Office of the Prosecution on 31 January 2003, which interview was continued on 2 February 2003, and on 23 February 2003, 24 February 2003, and 6 April 2003, and statements from these interviews were disclosed.

15. Supplemental statements or proofing notes (together the "proofing notes") taken by legal counsel within the Office of the Prosecution and dated 9, 19 and 20 October 2004 and 10 January 2005, were disclosed. These proofing notes, in most instances, consist of new evidence given for the first time, or amendments or additions to previously disclosed statements. The prosecution knows of its general duty to assist in ensuring trial fairness, and the specific obligation to provide continuous disclosure to the defence, *per* Rule 66. When new information is conveyed by a witness to a prosecution lawyer during

a proofing session, the information is recorded. It is most likely recorded on the same note paper as a great deal of confidential and privileged information which is not subject to disclosure. All information which was not previously disclosed and is relevant is disclosed in the proofing notes.

16. Proofing sessions with witnesses are subject to Rule 70(A) which states:

> (A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions.

17. The purpose of proofing is for counsel to discuss matters, including the witness's proposed evidence, with witnesses. Many of the witnesses have little, if any, experience of appearing before a court. Notes that are made during proofing are lawyer's "work product". In *Blaskic* the ICTY Trial Chamber went further, and with respect to investigators' notes of interviews with a proposed expert witness, held that Rule 70(A) of the ICTY's Rules (the same as Rule 70(A) of the Special Court) governed:

> 40. The Trial Chamber considers that this provision [Rule 70(A)] is applicable to the decision at hand.
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> It therefore finds that the notes of the investigators (stipulated in C1 of the Defence Motion of 26 November 1996) as well as the internal reports at the Office of the Prosecutor from any expert witness (stipulated in C4 of that same Motion) must fall within the scope of Sub-rule 70(A) and not be the subject of any disclosure or exchange. The books, articles, biographies or prior testimony of those same expert witnesses (stipulated in C4 of the Motion) must be considered as public property and need not be disclosed.[16]

18. *Blaskic* was applied by the ICTR in *Ndayambaje* which held:

> 13. The Defence submit that they need disclosure of the *questionnaires* listing the questions asked to the Prosecutor's witnesses during their interview, since the said questions do not appear in the written statements

[16] *Prosecutor v. Blaskic, "Decision on the Production of Discovery Materials"*, IT-95-14-PT, 27 January 1991, para. 39-40.

of said witnesses as collected by the investigators and translated by the interpreters.

14. The Prosecutor submits that the questionnaires are covered by Rule 70(A) of the Rules, according to which "internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under the aforementioned provisions".

15. The Chamber recalls that the ICTY Trial Chamber seized of the Blaskic Case held that "the notes of the investigators (...) must fall within the scope of Sub-rule 70(A) and not be subject of any disclosure or exchange" (See, the Blaskic Decision of 27 January 1887, at para. 40).

16. The Chamber notes that specific questions asked to particular prosecution witnesses at the time of collection of their statement, if any, should the concerned investigators have written them down and kept record thereof, would constitute notes of investigators falling under Rule 70(A) of the Rules. The Defence request is accordingly dismissed.[17]

19. A similar view was taken in *Nahimana et al* where the ICTR stated:

61. Counsel for Nahimana orally requested on 30 August 2001 the disclosure of the Prosecution investigators' notes taken during the interviews of Prosecution Witness ABC for purposes of cross-examination. On the same day, the Chamber denied the application, noting that discrepancies between the testimony and the previous written statements and the inferences to be drawn from such discrepancies would be taken into account by the Chamber in the evaluation of the witness's evidence.[18]

20. Also on point is the *Judgement Decision* in *Niyitegeka*, where again, the ICTR rejected a Defence application that the Defence was entitled to the hand-written notes of Prosecution investigators taken during interviews with witnesses:

41. ... The Chamber ruled that such records are privileged documents that fall within Rule 70 and are not subject to disclosure. As Prosecution witness statements were disclosed to the Defence, the Defence, based on these statements, could raise discrepancies and other issues of credibility of cross-examination for the Chamber's consideration. Finally, the

[17] *Prosecutor v. Ndayambaje, "Decision on the Defence Motion for Disclosure Rules 66, 70(A) and 73 of the Rules"*, ICTR-96-8-T, 25 September 2001, paras. 13-16.
[18] *Prosecutor v. Nahimana, et al, "Judgement and Sentence"*, ICTR-99-52-T, 3 December 2003, para. 61.

> Chamber notes that the Prosecution maintained that it did not have any handwritten notes of the investigators in its possession.
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> ...
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> 105. The Defence complained that it did not have the "first-made records", that is, the handwritten notes, taken by investigators during the Witness HR's interviews with investigators. The Chamber reiterates that investigators' notes and (sic) constitute privileged material, to which the Defence is not entitled pursuant to Rule 70.[19]

21. This Court is entitled to establish jurisprudence based on its governing legislation and it is not bound to follow precedents from any other jurisdiction.[20] The weight of authority from other international criminal courts is that "first-made notes" need not be disclosed, but the evidence must be disclosed pursuant to Rules 66 or 68. That is so whether the evidence is disclosed to an investigator or a prosecution lawyer. The defence is entitled to the evidence, what they are not entitled to is particular pieces of paper on which the evidence was first recorded.

22. In a recent decision the ICTY considered the practice of "proofing" witnesses.[21] The Trial Chamber made the following comments:

> 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.
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> ...
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> 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.

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[19] *Prosecutor v. Niyitegeka, "Judgement and Sentence"*, ICTR-96-14-T, 16 May 2003, paras. 41 and 105
[20] *Prosecutor v. Delalic et al, "Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference"*, IT-96-21-T, 28 May 1997, para. 16
[21] *Prosecutor v. Limaj et al, "Decision on Defence Motion on Prosecution Practice of 'Proofing' Witnesses"*, IT-03-66-T, 10 December 2004.

> 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.[22]

23. The proofing of witnesses is done by both defence and prosecution lawyers. The notes taken by counsel during proofing are that lawyer's work product. It is confidential information gained during the litigation process and the lawyers' proofing notes fall within Rule 70(A) as "reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case...."

IV. CONCLUSION

24. The Application should be dismissed. It says that the evidence of witness of TF1-141 should be excluded because the prosecution has not produced the hand-written notes of the lawyer who met with the witness at proofing sessions. But, it is ill-conceived because Rule 70(A) says that the prosecution does not have to disclose notes from proofing sessions. That being so, there is no basis to ask for the exclusion of TF1-141's evidence.

25. The evidence of TF1-141 is relevant and falls within Rule 89(C), and the principle of orality means that it is the evidence of the witness in Court which is of the greatest significance. There is no *prima facie* proof that Rule 66 was breached and the prosecution did nothing wrong. All material that the prosecution should disclose regarding TF1-141 was disclosed in type-written format. Those documents formed the basis for an extensive the cross-examination. There has been no loss of evidence, no breach of any Rule, and no abuse of process.

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[22] *Ibid,* pp. 2-3 (the paragraphs are not numbered in the decision).

Filed this 26th day of May 2005.

In Freetown

Luc Côté
Chief of Prosecutions

Lesley Taylor
Senior Trial Counsel

Authorities

Prosecutor v. Blaskic, "Decision on the Production of Discovery Materials", IT-95-14-PT, 27 January 1997, paras. 39-40 – Available at http://www.un.org/icty/cases/jugemindex-e.htm

Prosecutor v. Brima, Kamara, Kanu, "Decision on Joint Defence Motion on Disclosure of All Original Witness Statements, Interview Notes and Investigators' Notes Pursuant to Rules 66 and/or 68", (Trial Chamber II), 4 May 2005

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Prosecutor v. Norman, Fofana, Kondewa, "Ruling on Disclosure of Witness Statements", (Trial Chamber I) 1 October 2004

Prosecutor v. Norman et al, "Prosecution Submission Regarding 'Ruling on Disclosure of Witness Statements' Dated 1 October 2004" (Trial Chamber I) 15 October 2004

IT-03-66-T
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10 DECEMBER 2004

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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.

3037

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]