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SCSL-04-15-T
(18918 - 18932)

18918

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Hon. Justice Pierre Boutet, Presiding
Hon. Justice Bankole Thompson
Hon. Justice Benjamin Itoe

Registrar: Mr. Lovemore G. Munlo SC

Date filed: 15 May 2006

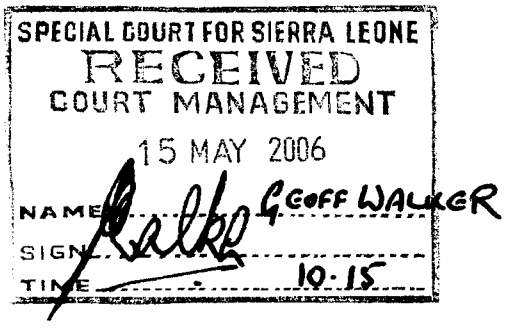
THE PROSECUTOR **Against** **Issa Hassan Sesay**
Morris Kallon
Augustine Gbao

Case No. SCSL-04-15-T

PUBLIC

PROSECUTION RESPONSE TO FIRST ACCUSED'S MOTION DATED 3 MAY 2006

Office of the Prosecutor:
Mr. Desmond de Silva, QC
Mr. Christopher Staker
Mr. Peter Harrison



Defense Counsel for Issa Hassan Sesay
Mr. Wayne Jordash
Ms. Sareta Ashraph
Ms. Chantal Refahi

Defense Counsel for Morris Kallon
Mr. Shekou Touray
Mr. Charles Taku
Mr. Melron Nicol-Wilson

Defense Counsel for Augustine Gbao
Mr. Andreas O'Shea
Mr. John Cammegh

I. INTRODUCTION

1. The Prosecution hereby responds to the motion entitled "Defence Motion to Request the Trial Chamber to Rule that the Prosecution's Moulding of the Evidence is Impermissible and a Breach of Article 17 of the Statute of the Special Court" (the "**Motion**"), filed on behalf of the Accused Issa Hassan Sesay ("**Accused**") on 3 May 2006.[1]
2. For the reasons given below, the Prosecution submits that the Motion should be rejected.
3. The Motion seeks a ruling from the Trial Chamber on whether a certain "practice" said to be engaged in by the Prosecution is improper. This practice is said to consist, essentially, of the Prosecution "re-interviewing"[2] its witnesses before they testify, in order to obtain "supplementary factual allegations"[3] from these witnesses to "bolster"[4] the Prosecution case.

II. ARGUMENT

4. The Defence for Sesay has on numerous previous occasions filed motions seeking the exclusion of certain supplementary statements obtained from Prosecution witnesses during proofing, on the ground that they contain material going beyond their original witness statements. The decisions of the Trial Chamber on these Defence motions have articulated and applied principles for determining the admissibility of supplementary statements of Prosecution witnesses obtained during proofing. In application of these principles, the Trial Chamber has on various occasions rejected Defence motions seeking the exclusion of material contained in such supplemental statements of witnesses on the ground that such material constituted new evidence [5]

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[1] *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-541, "Defence Motion to Request the Trial Chamber to Rule that the Prosecution's Moulding of the Evidence is Impermissible and a Breach of Article 17 of the Statute of the Special Court", 3 May 2006 ("**Motion**").

[2] Motion, para. 2(b).

[3] Motion, para. 2(b).

[4] Motion, para. 4.

[5] See, for instance, *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-211, "Ruling on Oral Application for the Exclusion of 'Additional' Statements for Witnesses TF1-060", 23 July 2004 ("**23 July 2004 Decision**"), rejecting a Defence complaint that a supplemental statement taken from a witness during proofing "cannot, in law, be considered as an addition to or clarification of, the original statement previously disclosed by the Prosecution ... but ... it is in essence a new statement from the witness alleging entirely new facts", at para. 3; SCSL-04-15-T-314, "Ruling on Oral Application for the Exclusion of Statements of Witnesses TF1-141 Dated Respectively 9th October 2004, 19th and 20th October 2004 and 10th January 2005", 3 February 2005 ("**3 February 2005 Decision**"), rejecting a Defence complaint that a supplemental statements taken from a witnesses during proofing "could not be characterised as congruent in material respects with the original statement", at para. 9; SCSL-04-15-T-396, "Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and TF1-122", 1 June 2005 ("**1 June 2005 Decision**"), rejecting a Defence complaint that supplemental statements taken from witnesses

5. The Motion expressly acknowledges that it is acceptable for the Prosecution to investigate throughout the trial, and that it is also acceptable for the Prosecution to "proof" witnesses.[6] The Motion does not appear to challenge the principles articulated in the earlier decisions of the Trial Chamber for determining the admissibility of such supplemental statements obtained from witnesses during proofing. However, the Motion argues that in these previous decisions, the Trial Chamber failed to decide expressly whether "re-interviewing" witnesses during proofing is a permissible practice or not.[7]
6. The Prosecution takes issue with the suggestion that the Trial Chamber has not previously decided this. As the Motion itself acknowledges,[8] this issue has been raised by the Defence in previous Defence motions, which were rejected by the Trial Chamber. In a motion filed on 23 February 2006,[9] the Defence sought the exclusion of certain supplementary witness statements specifically on the ground that the Prosecution was, in the view of the Defence, impermissibly "actively re-interview[ing] ... witnesses ... with the calculated aim of increasing the evidence of the Accused and moulding their case according to their ongoing assessment of the way in which the case has progressed",[10] and was "continuously mould[ing] the case against the Accused".[11] Previously, in a motion filed on 12 January 2006, the Defence sought the exclusion of certain material in supplementary statements of witnesses, arguing that "... Rule 66 ... does not ... *allow* continued investigation into new evidence through existing witnesses".[12] To suggest that

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during proofing "contain[ed] wholly new allegations against Issa Sesay which did not form part of these witnesses' respective original statements", at para. 3; SCSL-04-15-T-496, "Decision on the Defence Motion for the Exclusion of Evidence Arising From the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288", 27 February 2006, ("**27 February 2006 Decision**"), rejecting a Defence complaint that supplemental statements taken from witnesses during proofing "ought to be characterised as new evidence", at para. 3.

[6] Motion, para. 3.

[7] Motion, para. 5.

[8] Motion, para. 6.

[9] *Prosecutor v Sesay, Kallon, Gbao*, SCSL-04-15-T-493, "Defence Motion Requesting the Exclusion of Evidence (As Indicated in Annex A) Arising from the Additional Information Provided by Witness TF1-168 (14th, 21st January and 4th February 2006), TF1-165 (6th/7th February 2006) and TF1-041 (9th, 10th, 13th February 2006)", filed by the Defence for the First Accused on 23 February 2006.

[10] *Ibid.*, para. 1.

[11] *Ibid.*, para. 14.

[12] SCSL-04-15-T-461, "Defence Motion Requesting the Exclusion of paragraphs 1, 2, 3, 11 and 14 of the Additional Information Provided by Witness TF1-117 Dated 25th, 26th, 27th and 28th October 2005", filed by the Defence for the first Accused on 12 January 2006, para. 18.

the Trial Chamber, in rejecting these previous motions,[13] made no finding as to the permissibility of "re-interviewing" witnesses, is disingenuous. The Motion is in reality seeking to relitigate a matter that has previously been decided by the Trial Chamber on more than one occasion.

7. The Prosecution submits that the Motion should be rejected on the ground that a party should not be permitted to relitigate continuously matters that have already been decided by the Trial Chamber.

8. In any event, the Motion must fail on its merits, for the same reasons as the previous Defence motions that have been rejected by the Trial Chamber. The Motion cites no authority in support of its position that "re-interviewing" witnesses during proofing is impermissible. Indeed, the decision in the *Limaj* case cited in the Motion[14] expressly contradicts any such proposition. As the ICTY Trial Chamber said in that decision:

> "... 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."[15]

This quote indicates that a proofing session can address any facts known to the witness that are relevant ***to the charges in the actual Indictment***, and not merely facts that are contained in a witness's previous statement.

9. Footnote 2 of the Motion cites what, according to the Motion, are three authorities for the proposition that it is "unacceptable to mould the case during the trial according to how the

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[13] See SCSL-04-15-T-519, "Decision on Defence Motion Requesting the Exclusion of Evidence Arising from the Supplemental Statements of Witnesses TF1-168, TF1-165 and TF1-041", 20 March 2006. ("**20 March 2006 Decision**").

[14] *Prosecutor v. Limaj*, IT-03-66-T, "Decision on Defence Motion of Prosecution Practice of Proofing Witnesses", Trial Chamber, 10 December 2004 ("Limaj Decision"). Contrary to the applicable practice direction, the Motion failed to annex a copy of this decision. The annex to the Motion states that this decision is "available on ICTY website". In fact it is not; only the French version of the decision is on the ICTY website. Accordingly, the Prosecution has itself obtained a copy of the English version of the decision from the ICTY, which is attached.

[15] *Ibid.*, p. 2 (emphasis added).

evidence unfolds".[16] However, none of these three authorities supports the position taken in the Motion.

10. The first of these authorities is a decision of this Trial Chamber in the pre-joinder case of *Prosecutor v Sesay* dated 13 October 2003.[17] That decision was in no way concerned with the proofing of witnesses, or the admissibility of supplementary statements obtained through "re-interviewing" witnesses. That decision was concerned with defects in the form of an Indictment. The Trial Chamber said that if the wording of an indictment omitted material facts, and contained instead a broad phrase "but not limited to those events", then "the Chamber is entitled to speculate that maybe the omission of the additional material facts was done with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds".[18] In other words, what that decision held was that an indictment cannot be worded vaguely, in order to leave the Prosecution free to formulate its specific case against the accused at the end of the trial in accordance with the evidence as it has unfolded at trial.
11. The Motion in this instance is not a motion alleging defects in the form of the indictment. The preliminary motions in this case have all been dealt with, and this case is proceeding on the basis that there is nothing defective in the present indictment. There is nothing in the 13 October 2003 Decision of this Trial Chamber to suggest that where there is a properly worded indictment, the Prosecution is not entitled to continue to investigate the case during the trial, or to proof witnesses—the Motion itself admits this (see the first sentence of paragraph 5 above). If the Prosecution is entitled to continue to investigate the case during trial, it follows that the Prosecution is also entitled to receive additional information that is relevant to the indictment from witnesses during a proofing session. The only question is whether such material resulting from proofing sessions is admissible in the proceedings, and the earlier decisions of the Trial Chamber referred to above dealt with the principles for determining this latter question.

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[16] Motion, para. 3.
[17] *Prosecutor v Sesay*, SCSL-2003-05-PT-080, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", 13 October 2003, ("**13 October 2003 Decision**").
[18] Ibid., para. 33.

12. The next authority relied upon by the Defence is the *Kupreškić Appeal Judgement.*[19] The ICTY Appeals Chamber said in that judgement:

> It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.

13. This passage is speaking of the same situation with which the Trial Chamber was concerned in its 13 October 2003 Decision—that is, the situation of an indictment that is worded in impermissibly vague language. This passage is not speaking of a situation where the charges are pleaded with sufficient particularity in the indictment, but where some of the evidence relevant to proving those charges is only obtained in the course of the trial. This authority is therefore also of no relevance to the Motion.
14. The third decision relied upon in the Motion is a decision of an ICTY Trial Chamber in the *Brđanin and Talić* case.[20] The relevant passage in this case is addressed to exactly the same situation as the two previous authorities. It has nothing to do with the complaint contained in the Motion, and in no way supports the Defence argument.
15. The Prosecution notes also that in the previous decisions of the Trial Chamber rejecting similar Defence motions, the Trial Chamber itself does not refer to the practice complained of in the Motion as "moulding of the factual allegations" or as "moulding of the evidence". In the context of the proofing of witnesses, this is a terminology that has been devised by the Defence. This terminology is not apt to describe the situation complained of by the Defence, for the reasons given above. The reasons why the Motion (and previous Defence motions) use this terminology in this context is unclear. It may be in order to suggest that the authorities referred in paragraphs 10-14 above are somehow on point, which for the reasons given above they are not. It may be that the Defence is

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[19] *Prosecutor v. Kupreškić,* IT-95-16-A," Judgement", Appeals Chamber, 23 October 2001, para. 92 (footnote omitted) (footnote 4 of the Motion incorrectly cites this paragraph as paragraph 82).

[20] *Prosecutor v. Brđanin and Talić*, IT-99-36, "Decision on Form of Further Amended Indictment and Prosecution Application to Amend", Trial Chamber, 26 June 2001, para. 11 ("This trial has become very complex. That is the inevitable consequence of the very general nature of the case which the prosecution has pleaded. Unfortunately, however, the prosecution appears to have adopted a policy of avoiding a disclosure of as much of that case as possible until as late as possible. The Trial Chamber draws the inference that the prosecution has done so to enable it to mould its case in a substantial way during the trial, according to how its evidence actually turns out. The only alternative explanation for the recalcitrant attitude which the prosecution is exhibiting is that it still does not know what its case is. The Trial Chamber would be hesitant to draw such an inference. Both the Trial Chamber and the accused are entitled to know what the prosecution case is from the outset." (footnote omitted)).

also trying to imply that the Prosecution is seeking to "coach" witnesses, or otherwise to influence their testimony. The Prosecution would call upon the Defence to either confirm that it is making no such suggestion, or else to make such an allegation expressly with supporting evidence. As the ICTY Trial Chamber said in the *Limaj* decision referred to above, "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 are reasons to consider that 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".[21]

16. The Prosecution position is that it is entitled, in proofing witnesses, to cover not only issues that are dealt with in the witness's previous statements, but also other issues that may be within the witness's knowledge and which are pertinent to the case.

III. CONCLUSION

17. The Prosecution therefore submits that the Motion should be rejected, on the ground that it seeks to relitigate matters that have already been decided by the Trial Chamber, and/or on the ground that it is without merit. It is disingenuous of the Motion to suggest, relying on the 13 October 2003 Decision, that a practice of "re-interviewing" witnesses is one "which has been prohibited by the Trial Chamber".[22] The 13 October 2003 Decision never indicated that any such practice was prohibited, and other decisions of the Trial Chamber in this case have dismissed similar Defence complaints made in previous motions.

18. The Prosecution further submits that the Trial Chamber should give consideration to exercising its power under Rule 46(C) of the Rules in relation to this Motion. The Motion seeks no relief from the Trial Chamber, other than an abstract ruling on a point of principle that has been argued by the Defence in previous motions that have been dismissed by the Trial Chamber. In the circumstances, it is submitted that the Motion is frivolous or an abuse of process within the meaning of Rule 46(C).

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[21] *Limaj* Decision, p. 3.
[22] Motion, para. 10.

Done in Freetown,

15 May 2006

For the Prosecution,

Desmond de Silva, QC
Prosecutor

Christopher Staker
Deputy Prosecutor

Index of Authorities

Prosecutor v Sesay, Kallon, Gbao, SCSL-04-15-T-541, "Defence Motion to Request the Trial Chamber to Rule that the Prosecution's Moulding of the Evidence is Impermissible and a Breach of Article 17 of the Statute of the Special Court", 3 May 2006.

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Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T-314, "Ruling on Oral Application for the Exclusion of Statements of Witnesses TF1-141 Dated Respectively 9th October 2004, 19th and 20th October 2004 and 10th January 2005", 3 February 2005.

Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T-396, "Ruling on Application for the Exclusion of Certain Supplemental Statements of Witness TF1-361 and TF1-122", 1 June 2005.

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Prosecutor v Sesay, Kallon, Gbao, SCSL-04-15-T-493, "Defence Motion Requesting the Exclusion of Evidence (As Indicated in Annex A) Arising from the Additional Information Provided by Witness TF1-168 (14th, 21st January and 4th February 2006), TF1-165 (6th/7th February 2006) and TF1-041 (9th, 10th, 13th February 2006)", 23 February 2006.

Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T-461, "Defence Motion Requesting the Exclusion of paragraphs 1, 2, 3, 11 and 14 of the Additional Information Provided by Witness TF1-117 Dated 25th, 26th, 27th and 28th October 2005", 12 January 2006.

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18928

IT-03-66-T
D3041-D3037
10 DECEMBER 2004

3041 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.

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]