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PRE-TRIAL CHAMBER I

Before: **Judge Claude Jorda, Presiding Judge**
Judge Akua Kuenyehia
Judge Sylvia Steiner

Registrar: **Mr Bruno Cathala**

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

Public Document

Decision on the Practices of Witness Familiarisation and Witness Proofing

The Office of the Prosecutor
Mr Luis Moreno Ocampo
Ms Fatou Bensouda
Mr Ekkehard Withopf

Legal Representatives of the Victims a/0001/06 to a/0003/06 and a/0105/06
Mr Luc Walleyn
Mr Franch Mulenda
Ms Carine Bapita Buyangandu

Counsel for the Defence
Mr Jean Flamme
Ms Véronique Pandanzyla

Office of Public Counsel for the Defence
Ms Melinda Taylor

PRE-TRIAL CHAMBER I of the International Criminal Court ("the Chamber" and "the Court" respectively), subsequent to the filing of the Prosecution and Defence Submissions in relation to the practice of witness proofing in relation to the only witness currently scheduled to testify at the confirmation hearing in the case of *The Prosecution vs Thomas Lubanga Dyilo*

RENDERS THE FOLLOWING DECISION:

I. Procedural Background

1. At the status conference of 26 October 2006, the Prosecution, in addressing "a whole series of matters",[1] elaborated on the important issue of witness proofing by merely informing the Chamber that "the Prosecution has invited the witness for what is commonly referred to as 'proofing' for next week, and the Prosecution intends to have proofing sessions with that witness for a number of days next week."[2]

2. On 30 October 2006, the single judge issued the "Decision concerning the Prosecution Information on the Proofing of a Witness" ("the Decision"),[3] in which the Prosecution is requested:

   i. to elaborate on the content of what the Prosecution means by the expression 'proofing of the witness' and the specific conditions under which the Prosecution wishes to carry out the proofing of the witness; and

   ii. not to undertake any proofing session until the matter is ruled on by the Chamber.[4]

3. On 31 October 2006, the Prosecution filed the "Prosecution's Request for a Hearing on an Expedited Basis on the Proofing of a Witness",[5] in which the

[1] Trasncript of the 26 October 2006 hearing , p. 11.
[2] Trasncript of the 26 October 2006 hearing , p. 11.
[3] ICC-01/04-01/06- 630-Conf-Corr.
[4] ICC-01/04-01/06-Conf-Corr, pp. 3 and 4.
[5] ICC-01/04-01/06-632-Conf.

Prosecution "requests the Single Judge to convene a Court hearing on an expedited basis, preferably before the full Pre-Trial Chamber;"[6]

4. On 1 November 2006, the Prosecution filed the "Prosecution's Information on the Proofing of a Witness" ('the Prosecution Information"),[7] in which the Prosecution:

(i) asserts that the practice of witness proofing is "a widely accepted practice in international criminal law"[8];

(ii) explains what the Prosecution means by the expression "proofing of a witness";[9]

(iii) elaborates on the reasons why the practice of witness proofing "is beneficial to the testimony of a witness and thus to the Court's statutory duty to establish the truth;"[10]

(iv) undertakes to comply with the principles provided for in article 705 of the Code of Conduct of the Bar Council of England and Wales;[11] and

(v) requests the Chamber to allow the Prosecution to conduct proofing sessions with the witness within the scope and the limits detailed in paragraphs 16, 17 and 19 of the Prosecution Information.[12]

5. On 2 November 2006, the single judge issued the "Decision convening a hearing on Friday 3 November 2006", in which the single judge *inter alia*

[6] ICC-01/04-01/06-632-Conf., para. 10.
[7] ICC-01/04-01/06-638-Conf.
[8] ICC-01/04-01/06-638-Conf., para. 14.
[9] ICC-01/04-01/06-638-Conf., para. 16.
[10] ICC-01/04-01/06-638-Conf., para. 17.
[11] ICC-01/04-01/06-638-Conf., para. 19.
[12] ICC-01/04-01/06-638-Conf., para. 20.

rejected the Prosecution's request for an urgent hearing on the issue of witness proofing.

6. On 3 November 2006, the Defence filed the "Response to Prosecution Information on Witness Proofing" ("the Defence Response"),[13] in which the Defence:

i. Requests the Chamber:

a. to reject the request of the Prosecution to proof the witness prior to her testimony; and

b. in the alternative, to order the Prosecutor to disclose records of any proofing session as a prior statement under Rule 76;[14]

ii. Reserves its right to seek to interview the witness prior to any proofing session.[15]

II. Brief Discussion of Article 21 of the Statute

7. At the outset, the Chamber recalls the Decision in which it expressly stated that the issue at stake, that is to say whether the practice of witness proofing is admissible under the applicable law of the Court and, if so, under which conditions, shall be settled in light of article 21 of the Rome Statute ("the Statute").[16]

8. According to article 21 (1) (a) of the Statute, the Chamber shall apply "in the first place, this Statute, Elements of Crimes and its Rules of Procedure

[13] ICC-01/04-01/06-653-Conf.
[14] ICC-01/04-01/06-653-Conf, paras. 32 and 33.
[15] ICC-01/04-01/06-653-Conf, para 33.
[16] ICC-01/04-01/06-Conf-Corr, p. 3.

and Evidence." As this Chamber has already stated,[17] in determining the contours of such a framework, the Chamber must look at the general principles of interpretation as set out in article 31 (1) of the Vienna Convention on the Law of Treaties, according to which "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose".

9. Article 21 (1) (b) of the Statute provides that the Chamber shall apply "in the second place where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict". Moreover, failing that, the Chamber shall apply pursuant to article 21 (1) (c) of the Statute, "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of the States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and international recognized norms and standards."

10. Moreover, the Chamber recalls the general principle of interpretation set out in article 21 (3) of the Statute, according to which "the application and the interpretation of law pursuant to this article must be consistent with internationally recognized human rights". In this regard, the Chamber considers that prior to undertaking the analysis required by article 21 (3) of the Statute, the Chamber must find a provision, rule or principle that, under article 21 (1) (a) to (c) of the Statute, could be applicable to the issue at hand.

[17] See for instance "the Decision on the Final System of Disclosure and the Establishment of a Timetable", issued by the single judge on 15 May 2006 (ICC-01/04-01/06-102), Annex I, para. 1.

III. The two components of the practice of witness proofing in light of the definition of such practice in the Prosecution Information

11. At the outset, the Chamber finds that the expression "proofing of a witness" cannot be found in the Rome Statute, the Rules of Procedure and Evidence ("the Rules") or the Regulations of the Court ("the Regulations").

12. The Chamber also observes that there are a number of expressions, including *inter alia* those of "preparation of a witness", "proofing of a witness", "training of a witness", "coaching of a witness" or "tampering with the evidence of a witness", which are used in different jurisdictions in connection with those practices followed to prepare a witness to give oral testimony before a court. Moreover, the meaning of such expressions and the delimitation of what is lawful (or at least what is required as professional good practice), what is contrary to the professional code of ethics, and what could even constitute a criminal offence, greatly differs from jurisdiction to jurisdiction.

13. For these reasons, before ruling on whether the practice of witness proofing is admissible in light of article 21 of the Statute, it is necessary to address what, according to the Prosecution, is the content of such a practice in the context of proceedings before the International Criminal Court. In this regard, the Chamber observes that the definition given in the Prosecution Information is two-fold insofar as it describes both the goals and the specific measures of the practice of witness proofing.

14. In the view of the Chamber, the goals and measures encompassed by the Prosecution definition of witness proofing can be divided in two groups. On the one hand, the Prosecution explains that the practice of witness

proofing "allows assisting the witness testifying with the full comprehension of the Court proceedings, its participants and their respective roles, freely and without fear"[18]. This goal is accomplished through the following measures which, according to the Prosecution, are part of the practice of witness proofing:

> i. "To provide the witness with an opportunity to acquaint him/herself with the Prosecution's Trial Lawyer and other whom may examine the witness in Court;
>
> ii. To familiarise the witness with the Courtroom, the Participants to the Court proceedings and the Court proceedings;
>
> iii. To reassure the witness about his/her role in the Court proceedings;
>
> iv. To discuss matters that are related to the security and safety of the witness, in order to determine the necessity of applications for protective measures before the Court;
>
> v. To reinforce to the witness that he/she is under a strict legal obligation to tell the truth when testifying;
>
> vi. To explain the process of examination-in-chief, cross-examination and re-examination;" [19]

15. In the view of the Chamber, this first component of the definition of the practice of witness proofing advanced by the Prosecution aims at preparing the witness to give oral evidence before the Court in order to prevent being taken by surprise or being placed at a disadvantage due to ignorance of the Court's proceedings. The Chamber observes that this first component consists basically of a series of arrangements to familiarise the witnesses with the layout of the Court, the sequence of events that is likely to take place when the witness is giving testimony, and the different responsibilities of the various participants at the hearing.

16. In the view of the Chamber, the second component of the definition of the practice of witness proofing advanced by the Prosecution aims at

[18] ICC-01/04-01/06-638-Conf, para. 17 (i).
[19] ICC-01/04-01/06-638-Conf, para. 16 (i) to (vi).

achieving the following goals, as highlighted in the Prosecution Information:

> i. "Proofing" allows assisting the process of human recollection. Differences in recollection and additional recollections can be identified and addressed prior to the witness' testimony;
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> ii. "Proofing", by comparing the statements made by a witness during the proofing with the content of an earlier statement of the witness, allows detecting deficiencies and differences in recollection of the witness. As a consequence, in addressing such deficiencies and differences prior to witness' testimony, "proofing" is likely to allow the witness to present the evidence in a more accurate, complete, structured and efficient manner;
>
> iii. "Proofing" allows the Prosecution to disclose to the Defence both additional information and/or evidence of incriminatory or exculpatory nature in sufficient time prior to the witness' testimony, thereby reducing the prospect of the Defence being taken by surprise during the witness testimony;"[20]

17. These goals are accomplished through three remaining measures which, according to the Prosecution, are also encompassed by the definition of the practice of witness proofing:

> i. To allow a witness to read his/her statement and refresh his/her memory in respect of the evidence he/she will give;
>
> ii. Relying on the witness' statement, the Prosecution's Trial Lawyer puts to the witness the questions he/she intends to ask the witness during the witness' testimony, and in the order as anticipated;
>
> iii. To inquire about possible additional information of both, potentially incriminatory and potentially exculpatory nature;"[21]

IV. Admissibility of the first component of the practice of witness proofing as defined in the Prosecution Information in light of Article 21 of the Statute

18. Regarding the first component of the definition of the practice of witness proofing advanced by the Prosecution, the Chamber observes that those arrangements referred to in paragraphs 16 (i) to (vi) and 17 (i) of the

[20] ICC-01/04-01/06-638-Conf, para. 117.
[21] ICC-01/04-01/06-638-Conf, para. 16 (vii), (viii) and (ix).

Prosecution Information are generally referred to as "witness preparation" for giving oral testimony or "witness familiarisation" with the Court proceedings as opposed to "witness proofing".

19. The rationale behind the practice of witness preparation or familiarisation has been thoroughly explained by the Court of Appeal in R. v. Momodou [2005] EWCA Crim 177 (England and Wales) as follows:

> This principle does not preclude pre-trial arrangements to familiarise witnesses with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balance appraisal of the different responsibilities of the various participants. Indeed such arrangements, usually in the form of a pre-trial visit to the court, are generally to be welcome. Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works. None of this however involves discussions about proposed or intended evidence. Sensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible. Such experience can also be provided by out of court familiarisation techniques. The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process. Nevertheless the evidence remains the witness's own uncontaminated evidence [...]."[22]

20. In the view of the Chamber, there are several provisions of the Statute and Rules which, without being referred to as "witness preparation", "witness familiarisation" or "witness proofing", encompass the measures contained in paragraphs 16 (i) to (vi) of the Prosecution Information in order to assist the witness in the experience of giving oral evidence before the Court so as to prevent the witness from finding himself or herself in a disadvantageous position, or from being taken by surprise as a result of his or her ignorance of the process of giving oral testimony before the Court.

21. In this regard, the Chamber is particularly mindful of:

[22] R v. Momodou [2005] EWCA Crim 177, para. 62.

i. article 57 (3)(c) of the Statute, which imposes on the Chamber the duty to provide, where necessary, for the protection of victims and witnesses;

ii. article 68 (1) of the Statute which imposes upon the different organs of the Court within the scope of their competency, including the Chamber, the duty to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses;

iii. rules 87 and 88 of the Rules, which provide for a series of measures for the protection of the safety, physical and psychological well-being, dignity and privacy of the witnesses, including measures to facilitate their testimony;

22. Moreover, the Chamber observes that article 43 (6) of the Statute imposes upon the Registrar the duty to set up a Victims and Witnesses Unit (" the VWU") within the Registry, which in consultation with the Office of the Prosecution, shall provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses. Furthermore, rules 16 (2) and 17 (2) (b) of the Rules, when elaborating on the functions of the VWU, expressly state that, in accordance with the Statute and the Rules, and in consultation when appropriate with the Chamber, the Prosecution and the Defence, the said unit shall perform *inter alia* the following functions in relation to witnesses:

i. Assisting witnesses when they are called to testify before the Court;[23]

ii. Taking gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings;[24]

[23] Rule 17 (2) (b) (ii) of the Rules.

iii. Informing witnesses of their rights under the Statute and the Rules;[25]

iv. Advising witnesses where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony;[26]

v. Assisting witnesses in obtaining medical, psychological and other appropriate assistance;[27] and

vi. Providing witnesses with adequate protective and security measures and formulating long-term and short-term plans for their protection;[28]

23. Hence, the Chamber considers that those measures included in paragraph 16 (i) to (vi) of the Prosecution Information are not only admissible in light of the above-mentioned provisions of the Statute and the Rules, but are mandatory according to such provisions. Moreover, it is the view of the Chamber that labelling this practice as "witness proofing" is not suitable for the content of this practice, and that the expression "witness familiarisation" is more appropriate in this context.

24. Moreover, the Chamber finds that, according to article 43 (6) of the Statute and Rules 16 and 17 of the Rules, the VWU, in consultation with the party that proposes the relevant witness, is the organ of the Court competent to carry out the practice of witness familiarisation from the moment the witness arrives at the seat of the Court to give oral testimony.

25. The Chamber considers that this approach, in addition to being supported by the literal interpretation of the relevant provisions of the Statute and the

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[24] Rule 17 (2) (b) (iii) of the Rules.
[25] Rule 16 (2) (a) of the Rules.
[26] Rule 17 (2) (b) (i) of the Rules.
[27] Rule 17 (2) (a) (iii) of the Rules.
[28] Rules 17 (2) (a) (i) of the Rules.

Rules, is also warranted by the systematic and teleological interpretation of such provisions.

26. From a systematic perspective, the attribution of the practice of witness familiarisation to the VWU is consistent with the principle that witnesses to a crime are the property neither of the Prosecution nor of the Defence and that they should therefore not be considered as witnesses of either party, but as witnesses of the Court. In this regard, the Chamber recalls that this principle underpins several decisions taken by the Chamber in the proceedings leading to the confirmation hearing in the present case.[29]

27. Finally, from a teleological perspective, the Chamber considers that this approach will contribute to the full achievement of the object and purpose of the above-mentioned provisions, which is to ensure that the practice of "witness familiarisation" provides a thorough and objective preparation of witnesses for giving oral evidence before the Court. In the view of the Chamber, this would avoid from the outset any risk that witnesses may be confronted with one-side interpretations of the Statute and the Rules[30] and would make moot any allegation that the practice of "witness familiarisation" might be used to influence the testimony of the witnesses in some way.

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[29] See, for instance, the system according to which the Prosecution and the Defence may contact, prior to the confirmation hearing, the witnesses on which the other party intends to rely at the hearing. This system was established in the "Decision on a General Framework concerning Protective Measures for Prosecution and Defence Witnesses", issued by the single judge on 19 September 2006 (ICC-01/04-01/06-447).

[30] For instance, the Chamber finds that rule 140 of the Rules does not use the expressions "examination-in-chief", "cross-examination" and "re-examination", which have a very technical and specific meaning in a number of national jurisdictions, and instead uses expressions such as "question the witness" or "examine the witness". Therefore, within the process of witness familiarisation, the VWU shall inform the witness of the process of its examination by the Prosecution and the Defence, as opposed to the process of "examination-in-chief", "cross-examination" and "re-examination" referred to by the Prosecution in paragraph 16 (vi) of the Prosecution Information.

V. Inadmissibility of the second component of the practice of witness proofing as defined in the Prosecution Information in light of Article 21 of the Statute

28. Unlike the first component of the definition of the practice of witness proofing advanced by the Prosecution, the Chamber observes that the goals and measures encompassed by the second component of such a definition are not covered by any provision of the Statute, the Rules or the Regulations. Therefore, the Chamber, prior to undertaking any analysis under article 21 (3) of the Statute, shall first analyse whether this second component is embraced by any provision, rule or principle which could be considered as part of the applicable law of the Court pursuant to article 21 (1) (b) and (c) of the Statute.

29. The Prosecution asserts that the practice of witness proofing as defined by the Prosecution "is a widely accepted practice in international criminal law"[31] and therefore the Prosecution implies that it should be considered as part of the applicable law of the Court pursuant to article 21 (1) (b) of the Statute.

30. In support of this submission, the Prosecution cites (i) two Trial Chamber decisions of the International Criminal Tribunal for the former Yugoslavia ("the ICTY");[32] (ii) one Trial Chamber decision of the Sierra Leone Special Court ("the SLSC");[33] and (iii) the statement of Justice Hassan B. Jallow, Prosecutor of the International Criminal Tribunal for Rwanda ("the ICTR"), to the UN Security Council on 29 June 2004.[34]

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[31] Prosecution Information, para. 14.

[32] *The Prosecutor vs Goran Jelisić*, Case No. IT-95-10, Decision on Communication between Parties and Witnesses, 11 December 1998; *The Prosecution vs Limaj et al.*, Case No IT-03-66-T, Decision on the Defence Motion on Prosecution Practice of 'Proofing Witnesses', 10 December 2004.

[33] *The Prosecutor vs Sesay*, case No. SCSL-2004-15-T, Decision on the Defence Motion for the Exclusion of Certain Portions of Supplemental Statements of Witness TF1-117, 27 February 2006.

[34] See footnote 15 of the Prosecution Information.

31. Firstly, the Chamber observes that the Prosecution has not put forward any jurisprudence from the ICTR authorising the practice of witness proofing as defined by the Prosecution. The Chamber also observes that the precedent from the SLSC relied on by the Prosecution does not deal with the practice of witness proofing but addresses "the related legal issues of the exclusion of supplemental statements of prosecution witnesses on the grounds that they contain or introduce new allegations against the Accused persons, and whether, if the allegations are new, there has been a breach of Rule 66 of the Rules on the part of the Prosecution."[35] Moreover, the Chamber finds that out of the two ICTY Trial Chamber decisions cited by the Prosecution, the decision in the *Jelisić* case does not refer to the practice of witness proofing prior to the witness testimony because it is confined to the issue of contact with a witness once the witness has taken the stand and made the solemn undertaking.[36]

32. Hence, the only decision identified by the Prosecution in which the practice of witness proofing is expressly authorised is the 10 December 2004 decision of Pre-Trial Chamber II of the ICTY in the *Limaj* case.[37] Moreover, such a decision, despite authorising the practice of witness proofing, does not regulate in detail the content of such a practice.

33. Under these circumstances the Chamber finds that the Prosecution assertion that the practice of witness proofing as defined by the

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[35] *The Prosecutor vs Sesay*, case No. SCSL-2004-15-T, Decision on the Defence Motion for the Exclusion of Certain Portions of Supplemental Statements of Witness TF1-117, 27 February 2006, para. 3.

[36] *The Prosecutor vs Goran Jelisić*, Case No. IT-95-10, Decision on Communication between Parties and Witnesses, 11 December 1998. In this regard, the Chamber observes that in foonote 19 of the Prosecution Information, the Prosecution undertakes not to contact the witness once the witness has made the solemn undertaking pursuant to rule 66 of the Rules.

[37] *The Prosecution vs Limaj et al*, Case No. IT-03-66-T, Decision on the Defence Motion on Prosecution Practice of 'Proofing Witnesses', 10 December 2004 (The Judgement of the Trial Chamber in this case, which was issued on 30 November 2006, summarizes the 10 December 2004 decision in para. 766).

Prosecution in the Prosecution Information "is a widely accepted practice in international criminal law", is unsupported.

34. Likewise, the Chamber considers that the Prosecution's submission that the practice of witness proofing as defined in the Prosecution Information is a special feature of proceedings carried out before international adjudicatory bodies due to the particular character of the crimes over which such bodies have jurisdiction is also unsupported.[38] Indeed, the Chamber is of the view that the following reasons advanced by the Defence to explain why the practice of witness proofing has been accepted at times, particularly before the ICTY, cannot be fully disregarded:

> "The position of the Defence is that the system of proofing a witness is peculiar to a limited number of common law countries in which the role of the Prosecution is markedly different than that which is attributed to the ICC prosecutor. In this connection, the prevalence of the practice of proofing should be more accurately attributed to the geographical makeup and hierarchy of the Prosecution sections of the ICTY (*inter alia*), than the assertion that it is a "widely accepted practice in international criminal law."[39]

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[38] According to the Prosecution, the alleged wide acceptance of the practice of witness proofing as defined in the Prosecution Information is "due to its significant added value to the proceedings in Courts that have jurisdiction over crimes such as, *inter alia* , war crimes and crimes against humanity"[38] because such proceedings " typically cover a long period of time and witnesses may be called upon to testify about multiple events that took place years prior to their respective testimonies" (Prosecution Information, para. 15). In this regard, the Chamber recalls that the principle of complementarity, which is one of the cornerstones of the Statute, provides that the Court shall only exercise jurisdiction over the crimes provided for in the Statute if the States concerned are not taking, or have not taken, action with regard to the said crimes, or are unwilling or unable to carry out their own national proceedings. The principle of complementarity of the Court *vis-a-vis* national jurisdictions is based on the premise that the investigation and prosecution of the crimes provided for in the Statute lies primarily with national jurisdictions. As a result, since the approval of the Statute on 17 July 1998, a number of national implementing legislations have been passed in order to ensure that States Parties have jurisdiction over the crimes contained in the Statute. The Chamber observes that the approval of national implementing legislations with regard to the crimes provided for in the Statute has not brought about a change in the approach taken by national jurisdictions *vis-à-vis* the practice of witness proofing. Therefore, contrary to what the Prosecution submits, the alleged "significant added value to the proceedings in Court that have jurisdiction over crimes such as, *inter alia* , war crimes and crimes against humanity" has not justified a change of approach by national jurisdictions in the practice of witness proofing as defined in the Prosecution Information. As a result, in a number of national jurisdictions which have jurisdiction over crimes included in the Statute, which may very well cover a long period of time, and in relation to which witnesses may be called upon to testify about multiple events that took place years prior to their respective testimonies, the practice of witness proofing as defined in the Prosecution Information continues to be unethical or unlawful. This is also the case for national jurisdictions, such as *inter alia* Spain, Belgium or Germany, in which, as a result of initiating proceedings over crimes within the jurisdiction of the Court on the basis of the principle of universal jurisdiction, translation issues and problems related to the gathering of evidence in the territory of third States often arise.

[39] Defence Response, para. 10.

35. With regard to the question of whether the second component of the definition of the practice of witness proofing advanced by the Prosecution can be encompassed, pursuant to article 21 (1) (c) of the Statute, by a general principle of law derived by the Court from national laws of the legal systems of the world including, as appropriate, the national laws of the Democratic Republic of the Congo ("the DRC"), the Chamber first observes that the Prosecution does not submit that such a practice is consistent with the DRC criminal procedure.

36. The Chamber also notices that the approach of different national jurisdictions to this second component varies widely. This variety of approaches became particularly clear when in 1994 the ICTY Office of the Prosecutor was in the process of establishing standard practices within its office. As it has been pointed out:

> "On the second day at the OTP, several colleagues were discussing the content of prospective witness statements and the ways in which they might be used on cross-examination to discredit witnesses, in the event of discrepancies with trial testimony. This author, saying that discrepancies were inevitable, and that witnesses could be prepared to explain them on cross-examination, described how witnesses are prepared for trial testimony in the United States. A colleague from Scotland responded that, in his jurisdiction, such preparation methods would constitute a crime, and one that definitively would be prosecuted, as witnesses are considered to 'belong' to the state and not to any party to the proceedings. A colleague from Australia responded that such preparation would not be unlawful, but it would be unethical, and he would not do it. This author replied that, in the United States, failure to conduct such preparation would constitute malpractice. To this author's best knowledge, this particular national difference has never been fully resolved by the OTP. Different trial Attorneys use different methods to prepare witnesses for trial {...}."[40]

[40] Schrag, M. (Senior Trial Attorney at the ICTY Office of the Prosecution between 1994 and 1995), *Lessons Learned from ICTY Experience*, in 2 J. Int'l Crim Just. 427, p. 432, footnote 9. The different approaches to the issue of witness proofing is also mentioned by other authors when explaining the phenomenon of cultural relativism in criminal procedure. See, for instance, Guariglia, F., *El Proceso Acusatorio ante la Corte Penal Internacional*, in IberoAmérica y la Corte Penal Internacional: Debates, Reflexions y Preguntas (2006), pp. 44-50, p. 45. It is against this backdrop that the following submission in footnote 2 of the Defence Response must be read: "The Defence notes that this practice, whilst prevalent in the United States, is not practiced in many common law jurisdictions in order to avoid the appearances of 'coaching' a witness. Thus, the *Limaj* decision cited by the Prosecution arose from the fact that the predominantly English Defence counsel were contesting a practice utilised by the predominantly American Prosecution team."

37. In this regard, the Chamber observes that the differences in approach by national jurisdictions with regard to the second component of the definition of the practice of witness proofing advanced by the Prosecution have nothing to do with their legal tradition. Indeed, the Chamber notices that this second component would be either unethical or unlawful in jurisdictions as different as Brazil, Spain, France, Belgium, Germany, Scotland, Ghana, England and Wales and Australia, to give just a few examples,[41] whereas in other national jurisdictions, particularly in the United States of America, the practice of witness proofing along the lines advanced by the Prosecution is well accepted, and at times even considered professional good practice.[42]

38. In this context, the Chamber considers that particular attention must be given to the treatment of the practice of witness proofing in England and Wales insofar as the Prosecution has expressly undertaken to comply with the principles provided for in article 705 of the Code of Conduct of the Bar Council of England and Wales,[43] which states the following in relation to contact between a barrister and a witness:

> "A barrister must not: (a) rehearse practise or coach a witness in relation to his evidence; (b) encourage a witness to give evidence which is untruthful or which

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[41] Among the reasons that have been put forward to justify the unethical or unlawful character of this second component of the definition of the practice of witness proofing advanced by the Prosecution are *inter alia* the following: (i) witnesses may realise that certain aspects of their evidence are not quite consistent, or are not required to be mentioned, and, as a result, they may alter the emphasis of their evidence; (ii) the evidence given by witnesses may deliberately or inadvertently be confused with information given during the proofing sessions, which will no longer serve the ultimate goal of ascertaining the truth; (iii) witnesses typically perceive only parts of events, which leads to gaps that witnesses will unconsciously try to fill with logical inferences from the proofing sessions; (iv) witness proofing may inappropriately enhance the credibility of witnesses because the more the witnesses practice, the more confident and detailed their recollection becomes; and (v) witness proofing, and particularly providing witnesses with the questions that they will be asked during their testimony, creates the risk of depriving court-room testimony of all its spontaneity and of giving the impression of being 'canned'.

[42] Among the reasons that have been put forward to justify the characterisation of this second component of the definition of the practice of witness proofing advanced by the Prosecution as good professional practice are *inter alia* the following. (i) witness proofing enables the identification of differences and deficiencies in recollection prior to the testimony of witnesses in the courtroom; (ii) witness proofing enables the differences and deficiencies in recollection identified in the proofing sessions to be addressed prior to the testimony of the witnesses in the courtroom; and (iii) witness proofing is likely to allow witnesses to present their evidence in a more accurate, structured and exhaustive manner.

[43] Prosecution Informaton , para. 19.

> is not the whole truth; and (c) except with the consent of the representative for the opposing side or of the Court, communicate directly or indirectly about a case with any witness, whether or not the witness is his lay client, once that witness has begun to give evidence until the evidence of that witness has been concluded."

39. As explained by the Bar Council of England and Wales in the most recent version of its "Guidance on witness preparation",[44] this provision cannot be read in isolation but must be read in light of the 2005 decision of the Court of Appeal in R v. Momodou, in which the Court of Appeal addressed at length the distinction between "witness coaching" and "witness familiarization". According to the Court of Appeal:

> "There is a dramatic distinction between witness training or coaching and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted [...] Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be improved [...].[45]

40. The Chamber recalls that, as seen above, the second component of the notion of witness proofing advanced by the Prosecution aims *inter alia* at detecting and addressing differences and deficiencies in the recollection of the witness prior to the testimony of the witness by *inter alia* (i) allowing the witness to read his or her statement, (ii) refreshing his or her memory in respect of the evidence that he or she will give at the confirmation hearing, and (iii) putting to the witness the very same questions and in the very same order as they will be asked during the testimony of the witness. In the view of the Chamber, this practice would be a direct breach of the very same standards, included in article 705 of the Code of Conduct of the

[44] http://www.barcouncil.org.uk/document.asp?languageid=1&documentid=3386#ParaLink, para. 1.

[45] R v Momodou [2005] EWCA Crim 177, para. 61.

Bar Council of England and Wales, that the Prosecution has expressly undertaken to be bound by.

41. As a result, the Chamber would like to emphasize that granting authorisation to proceed with the second component of the definition of the practice of witness proofing advanced by the Prosecution would amount to authorising a practice which is currently unethical or unlawful in numerous national jurisdictions, including the one - England and Wales - whose standards the Prosecution has expressly undertaken to comply with.

42. Hence, the Chamber finds that the second component of the definition of the practice of witness proofing advanced by the Prosecution is not embraced by any general principle of law that can be derived from the national laws of the legal systems of the world. On the contrary, if any general principle of law were to be derived from the national laws of the legal systems of the world on this particular matter, it would be the duty of the Prosecution to refrain from undertaking the practice of witness proofing as defined in paragraphs 16 (vii), (viii) and (ix) and 17 (ii), (iii) and (iv) of the Prosecution Information.

FOR THESE REASONS

ORDERS the Victims and Witnesses Unit to proceed with the practice of witness familiarisation for the only witness currently scheduled to testify at the confirmation hearing by adopting *inter alia* the following measures in the two days prior to her testimony before the Chamber:

i. assisting the witness to fully understand the Court proceedings, its participants and their respective roles;

ii. reassuring the witness about her role in proceedings before the Court;

iii. ensuring that the witness clearly understands that she is under a strict legal obligation to tell the truth when testifying;

iv. explaining to the witness the process of examination first by the Prosecution and subsequently by the Defence;

v. discussing matters that are related to the security and safety of the witness in order to determine the necessity of applications for protective measures before the Court; and

vi. making arrangements with the Prosecution in order to provide the witness with an opportunity to acquaint herself with the Prosecution's Trial Lawyer and others who may examine the witness in Court;

ORDERS the Prosecution not to undertake the practice of witness proofing as defined in paragraphs 16 (vii), (viii) and (ix) and 17 (ii), (iii) and (iv) of the Prosecution Information.

ORDERS the Prosecution to refrain from all contact with the witness outside the courtroom from the moment the witness takes the stand and makes the solemn undertaking provided for in rule 66 of the Rules.

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

Judge Claude Jorda
Presiding Judge

Judge Akua Kuenyehia

Judge Sylvia Steiner

Dated this Wednesday 8 November 2006

At The Hague

The Netherlands