

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/04-01/06

Date: 30 November 2007

**TRIAL CHAMBER I**

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

**Registrar:** Mr Bruno Cathala

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

**Public**

**Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for  
Giving Testimony at Trial**

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a/0001/06 to a/0003/06, a/0105/06

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**TRIAL CHAMBER I** (“Trial Chamber”) of the International Criminal Court (“Court”), in the case of Mr Thomas Lubanga Dyilo, following the Status Conference of 29 and 30 October 2007, renders the following decision based on the reasoning found herein, with regard to the procedure to be used in preparing witnesses to give testimony before the Chamber in Court:

**I) Procedural Background**

1. The subject of witness preparation was first raised in the case of Mr Thomas Lubanga Dyilo at a status conference before the Pre-Trial Chamber on 26 October 2006. The Office of the Prosecutor (“prosecution”) informed the Pre-Trial Chamber of its intention to conduct “proofing sessions” with particular witnesses.<sup>1</sup>
2. On 30 October 2006, the single judge of Pre-Trial Chamber I issued a decision requesting the prosecution to give further detail of its intended activities in relation to witness preparation or “proofing”, and instructing it not to undertake any of these sessions until a definite ruling was delivered by the Pre-Trial Chamber.<sup>2</sup>
3. Following submissions by both the prosecution<sup>3</sup> and defence<sup>4</sup> on the subject, the Pre-Trial Chamber issued its decision on 8 November 2006 in which it permitted the Victims and Witnesses Unit to proceed with witness familiarisation while prohibiting the practice of “witness proofing”.<sup>5</sup>

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<sup>1</sup> Transcript of hearing on 26 October 2006, ICC -01/04-01/06-T-26-ENG, page 11, lines 1-6.

<sup>2</sup> Corrigendum to the Decision concerning the Prosecution’s Information on the Proofing of a Witness, ICC-01-04-01-06-630-Conf-Corr, pages 3-4.

<sup>3</sup> Prosecution’s Information on the Proofing of a Witness, 1 November 2006, ICC-01-04-01-06-638-Conf.

<sup>4</sup> Response to Prosecution Information on Witness Proofing, 3 November 2006, ICC-01-04-01-06-653-Conf.

<sup>5</sup> Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01-04-01-06-679.

4. The issue was again raised by the prosecution – this time before Trial Chamber I - in its submissions of 29 March 2007.<sup>6</sup> Noting the importance of the issue, the prosecution requested permission to make submissions on the matter early in the proceedings before the Trial Chamber. In consequence, the parties and participants were asked to make submissions on the subject.<sup>7</sup> Oral submissions were heard at the Status Conference of 30 October 2007, which elaborated upon the written submissions of the parties and participants.<sup>8</sup>

**II) The relevant provisions from the Statute, the Rules of Procedure and Evidence and the Regulations of the Registry**

5. The Rome Statute (“Statute”), Rules of Procedure and Evidence (“Rules”) and Regulations of the Registry contain the following relevant provisions:

**Article 21**

**Applicable law**

1. The Court shall apply:
  - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
  - (b) 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;
  - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language,

<sup>6</sup> Prosecution’s Submission in Anticipation of a Status Conference, 29 March 2007, ICC-01-04-01-06-853, paragraphs 22-25.

<sup>7</sup> Order setting out schedule for submissions and hearings regarding the subjects that require early determination, 5 September 2007, ICC-01-04-01-06-947.

<sup>8</sup> Transcript of hearing on 30 October 2007, ICC-01/04-01/06-T-58-ENG, pages 54-77

religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

#### **Article 43(6)**

##### **The Registry**

The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

#### **Article 54**

##### **Duties and powers of the Prosecutor with respect to investigations**

- 1 The Prosecutor shall:
  - (a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;
  - (b) Take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children; and
  - (c) Fully respect the rights of persons arising under this Statute.

[ . ]

3. The Prosecutor may:
  - (a) Collect and examine evidence;
  - (b) Request the presence of and question persons being investigated, victims and witnesses.

#### **Article 68**

##### **Protection of the victims and witnesses and their participation in the proceedings**

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. The Prosecutor shall take such measures particularly during the investigation of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

[...]

4. The Victims and Witnesses Unit may advise the Prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance as referred to in article 43, paragraph 6

#### Article 70(1)

##### Offences against the administration of justice

1. The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:
  - (a) Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;
  - (b) Presenting evidence that the party knows is false or forged;
  - (c) Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;
  - (d) Impeding, intimidating or corruptly influencing an official of the Court for the purpose of forcing or persuading the official not to perform, or to perform improperly, his or her duties;
  - (e) Retaliating against an official of the Court on account of duties performed by that or another official;
  - (f) Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.

[...]

#### Rule 17

##### Functions of the Unit

[..]

2. The Victims and Witnesses Unit shall, *inter alia*, perform the following functions, in accordance with the Statute and the Rules, and in consultation with the Chamber, the Prosecutor and the defence, as appropriate:

[...]

- (b) With respect to witnesses:
  - (i) Advising them where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony;
  - (ii) Assisting them when they are called to testify before the Court;
  - (iii) Taking gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings

[. ]

#### Rule 18

##### Responsibilities of the Unit

For the efficient and effective performance of its work, the Victims and Witnesses Unit shall:

[.. ]

- (b) While recognizing the specific interests of the Office of the Prosecutor, the defence and the witnesses, respect the interests of the witness, including, where necessary, by maintaining

an appropriate separation of the services provided to the prosecution and defence witnesses, and act impartially when cooperating with all parties and in accordance with the rulings and decisions of the Chambers;

- (c) Have administrative and technical assistance available for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses, during all stages of the proceedings and thereafter, as reasonably appropriate;

[...]

#### **Rule 88**

##### **Special Measures**

1. Upon the motion of the Prosecutor or the defence, or upon the request of a witness or a victim or his or her legal representative, if any, or on its own motion, and after having consulted with the Victims and Witnesses Unit, as appropriate, a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to article 68, paragraphs 1 and 2. The Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the special measure is sought prior to ordering that measure.

#### **Regulation 83 of the Registry**

##### **Support programme**

[...]

2. In addition, the support programme shall provide, where appropriate, and for the duration of the stay at the seat of the Court, or where proceedings are held, round-the-clock assistance to the victims who appear before the Court, witnesses and accompanying persons.

### **III) Submissions of the parties and participants**

#### *Prosecution*

6. The prosecution submitted that, in accordance with Article 16(2) and 17(2) of the Statute, it is the role of the Victims and Witnesses Unit, in consultation with the Office of the Prosecutor to undertake the practice of witness familiarisation.<sup>9</sup> This practice would encompass assisting the witnesses to understand fully the court proceedings and the roles that they and the participants play in them, while underscoring their legal obligation to state the truth in their testimony. The practice would also involve explaining the process of examination and cross-

<sup>9</sup>ICC-01/04-01/06-T-58-ENG, page 50, lines 1-7; Prosecution's submissions regarding the subjects that require early determination procedures to be adopted for instructing expert witnesses, witness familiarization and witness proofing, 12 September 2007, ICC-01/04-01/06-952, paragraph 13.

examination and resolving issues relating to their security and protection.<sup>10</sup> In order to ensure that the prosecution's views on these areas are being taken into account, it initiated consultations with the Victims and Witnesses Unit.<sup>11</sup>

7. As to the practice of "witness proofing", the prosecution – following the case law of the International Criminal Tribunal for the Former Yugoslavia – defined it as the "practice whereby a meeting is held between a party to the proceedings and a witness, before the witness is due to testify in Court, the purpose of which is to re-examine the witness's evidence to enable more accurate, complete and efficient testimony."<sup>12</sup>
  
8. In its oral submissions the prosecution referred with concern to the decision of Pre-Trial Chamber I of 8 November 2006,<sup>13</sup> which ordered the prosecution to refrain from engaging in "witness proofing" with the sole prosecution witness called at the Confirmation Hearing.<sup>14</sup> The prosecution maintained that witness proofing prior to giving evidence is a well-established practice before the ad-hoc tribunals.<sup>15</sup> Further, the prosecution noted that the Pre-Trial Chamber's decision has not been followed by the ad-hoc tribunals, later decisions of which have confirmed the legitimacy of the practice of witness proofing.<sup>16</sup>
  
9. It was asserted by the prosecution that the practice of witness proofing may also be found in the national legal systems of such countries as Australia, Canada, England and Wales and the United States. Nevertheless, it conceded that the

<sup>10</sup>ICC-01/04-01/06-T-58-ENG, page 50, lines 8-22; ICC-01/04-01/06-952, paragraph 12.

<sup>11</sup>ICC-01/04-01/06-T-58-ENG, page 51, lines 1-17.

<sup>12</sup>ICC-01/04-01/06-952, paragraph 15.

<sup>13</sup>ICC-01/04-01/06-T-58-ENG, page 51, lines 20-24.

<sup>14</sup>*Ibid.*, page 51, lines 3-5

<sup>15</sup>ICC-01/04-01/06-952, paragraph 18; ICC-01/04-01/06-T-58-ENG, page 54, lines 1-5.

<sup>16</sup>Cases referred to are the *Milutinovic et al* decision of the International Criminal Tribunal for the Former Yugoslavia and the *Karemura* decision at the International Criminal Tribunal for Rwanda, see footnote 52. ICC-01/04-01/06-1-58-ENG, pages 54-77; ICC-01/04-01/06-952, paragraphs 18, 20-23.

practice is not always referred to as “proofing” and the scope of what it includes varies between the jurisdictions.<sup>17</sup>

10. In previous submissions, the prosecution undertook to comply with Article 705 of the Code of Conduct of the Bar Council of England and Wales,<sup>18</sup> which expressly prohibits witness practising or coaching. However, it clarified in its oral submissions that when applying this obligation it understood that the practice of witness proofing was permitted by English and Welsh law.<sup>19</sup>
11. The prosecution suggested the fact that the ICC’s Statute and Rules do not mention the term “witness proofing” does not preclude the Chamber from approving these practices. Moreover, the prosecution indicated that whilst at the ad hoc tribunals, the relevant statutes do not provide for the practice, nonetheless witness proofing is undertaken.<sup>20</sup> Furthermore, the prosecution noted that the practice of witness proofing is not included in the list of offences against the administration of justice in Article 70(1) of the Statute,<sup>21</sup> nor does it infringe Article 29 of the Code of Professional Conduct for Counsel.<sup>22</sup> The prosecution relied on a combined reading of Articles 70 and 54(3)(b) of the Statute as the legal basis for its authority to question and request the presence of witnesses. Article 54(3)(b) grants the prosecution the authority to request the presence of witnesses and to question them. When read in conjunction with Article 70, which prohibits witness tampering, the prosecution submitted a ban on contacting witnesses by the parties could not be presumed. On the contrary, the prosecution considered that this contact, which may include witness proofing, is therefore envisaged by the Statute.<sup>23</sup>

<sup>17</sup> ICC-01/04-01/06-952, paragraphs 24 and 25.

<sup>18</sup> ICC-01/04-01/06-638-Conf, paragraph 19.

<sup>19</sup> ICC-01/04-01/06-T-58-ENG, page 72, lines 1-22

<sup>20</sup> *Ibid*, pages 68, lines 13-20.

<sup>21</sup> *Ibid*, page 69, lines 1-6; ICC-01/04-01/06-952, paragraph 28.

<sup>22</sup> ICC-01/04-01/06-952, paragraph 29.

<sup>23</sup> *Ibid*, paragraph 30.



12. The prosecution argued that the practice of witness proofing can assist the Chamber in establishing the truth<sup>24</sup> and can be engaged in by prosecution and defence alike.<sup>25</sup> Witness proofing would encompass: (i) providing the witness with their statement a few days prior to the proofing session in order to allow the witness to refresh their memory; (ii) meeting with the witness a few days before they are to give evidence to remind the witness of their role and their duty to tell the truth; (iii) discussing issues that could lead to a request for protective measures for the witness and (iv) addressing any areas within the witness statement that may be addressed in court.<sup>26</sup> The witness may be shown potential exhibits and asked to comment on them.<sup>27</sup> The prosecution also stated that it would enquire about potentially incriminatory and exculpatory information, which would be shared with the defence.<sup>28</sup>

13. In support of witness proofing, the prosecution argued that it: (i) allows for a relevant, accurate, complete, orderly and efficient presentation of evidence; and (ii) enables the defence or other party to have notice of any different recollection of the witness, preventing undue surprise.<sup>29</sup>

14. It was further stressed that the questioning of the witness in the proofing session would not constitute a rehearsal of the questions that would be asked in court,<sup>30</sup> although the prosecution admitted that these sets of questions have the potential to overlap. It claimed that, in order to prevent this from occurring, no feedback would be given to the witnesses on the replies they provided during a proofing session, and therefore the witnesses would not know whether or not they are supporting the prosecution's case.<sup>31</sup> The purpose served by this exercise would be to refresh the witness' memory about events that may have taken place up to

<sup>24</sup> ICC-01/04-01/06-T-58-ENG, page 55, lines 8-11

<sup>25</sup> *Ibid*, page 54, lines 9-11.

<sup>26</sup> *Ibid*, pages 56-59.

<sup>27</sup> *Ibid*

<sup>28</sup> *Ibid.*, page 64, lines 17-25.

<sup>29</sup> *Ibid*, page 65, lines 13-15 and page 67, lines 1-11; ICC-01/04-01/06-952, paragraph 16.

<sup>30</sup> ICC-01/04-01/06-T-58-ENG, page 57, lines 23-26, page 55, line 1 and page 59, lines 4-15

<sup>31</sup> *Ibid*, page 61, lines 12-26

four years in the past, and also to establish whether the witness is still able to provide relevant evidence during the trial.<sup>32</sup>

15. The prosecution- in response to the defence's argument set out in their written and oral submissions, explained *infra* – contended that the Court should not set a date for it to cease contact with the witnesses, because it would be prevented from reacting to the evolving nature of the proceedings and would therefore be unable to address the different matters that may arise at trial.<sup>33</sup>
16. As for the danger of re-traumatisation of witnesses during witness proofing sessions, it would seek the assistance of the prosecution's Children and Gender Unit in order to prevent this.<sup>34</sup>

#### *Defence*

17. The defence agreed with the Pre-Trial Chamber's decision of 8 November 2006<sup>35</sup> allowing witness familiarisation to be performed by the Victims and Witnesses Unit in consultation with the prosecution and defence.<sup>36</sup>
18. The defence submitted that there should be no proofing of witnesses. It disputed the prosecution's contention that this was a regular practice engaged in at the ad hoc tribunals and that all parties there were allowed to proof witnesses.<sup>37</sup>
19. The defence argued that the statements disclosed by the prosecution show examples of witnesses having provided statements between five and fifteen times

<sup>32</sup> *Ibid.*, page 61, lines 12-26 and page 62, lines 1-5.

<sup>33</sup> *Ibid.*, page 77, lines 10-22.

<sup>34</sup> *Ibid.*, page 71, lines 4-26.

<sup>35</sup> ICC-01/04-01/06-679.

<sup>36</sup> Argumentation de la Défense sur des questions devant être tranchées à un stade précoce de la procédure : le rôle des victimes avant et pendant le procès, les procédures adoptées aux fins de donner des instructions aux témoins experts et la préparation des témoins aux audiences, 18 October 2007, ICC-01/04-01/06-991, paragraph 77

<sup>37</sup> ICC-01/04-01/06-T-58-ENG, page 73, lines 1-9.

(although this assertion was denied by the prosecution, which contended that while one single statement-taking process may have taken several days, this is not the equivalent of taking separate statements).<sup>38</sup> The defence submitted this process should be enough to permit the prosecution to gauge the sincerity and reliability of the witnesses. Therefore, for the defence, and in light of this information, the prosecution would have no reason to revisit the content of these statements with the witnesses before they testify.<sup>39</sup>

20. The defence suggested, as a matter of good administration of justice, that once a witness has completed their statement, the prosecution should not be able to go over the substance of this testimony with the witness. The defence accepted the prosecution should be permitted to see the witness and remind him or her of certain critical points, but it proposed that the Chamber should set a cut-off date after which the prosecution can no longer raise the substance of the testimony of the witness.<sup>40</sup> This argument was further buttressed by the defence's suggestion that the prosecution presumably has ample means and opportunity to travel to the Democratic Republic of the Congo to meet with the witnesses, which reinforces the importance of a cut-off date.<sup>41</sup> In its written submissions the defence proposed that the witness proofing activities – as described by the Pre-Trial Chamber's decision of 8 November 2006<sup>42</sup> – should cease and be prohibited from the moment one party notifies the other of its intention to call the witness to testify, e.g. by placing the name of the witness on the witness list.<sup>43</sup>

21. The defence considered it appropriate for help to be given to the witnesses in order to gain familiarity with the systems in the Court, and refresh their memory. It does not, however, consider it proper for the prosecution to discuss and compare statements with the witnesses to regulate inconsistencies. Nonetheless,

<sup>38</sup> *Ibid.*, page 73, lines 21-26, page 76, lines 15-26 and page 77, lines 1-4

<sup>39</sup> *Ibid.*, page 73, lines 21-26 and page 74, lines 1-5.

<sup>40</sup> *Ibid.*, page 74, lines 6-15.

<sup>41</sup> *Ibid.*, page 74, lines 19-26 and page 75, lines 1-2

<sup>42</sup> ICC-01/04-01/06-679.

<sup>43</sup> ICC-01/04-01/06-991, paragraph 79.

the defence expressed its difficulty in understanding how witnesses could gain familiarity with the systems of the Court and have their memory refreshed without comparing witness statements for inconsistencies.<sup>44</sup>

### *Victims*

22. In dealing with victims, and in particular child victims, who are witnesses, the victims' representatives agreed with the Pre-Trial Chamber's decision of 8 November 2006<sup>45</sup> that the familiarisation of witnesses be engaged in by the Victims and Witnesses Unit and that these witnesses should not be subjected to a process that would prove traumatising.<sup>46</sup>
23. The victims' representatives suggested that preliminary contacts between the parties and the witnesses they intend to call to testify are legitimate, as long as the contact takes place before the witness is called to give his or her testimony.<sup>47</sup>
24. If a witness is also a victim – and especially when this person is also a child – they should be informed of their right to request special measures pursuant to Rule 88 of the Rules, and particularly, to have legal counsel, a representative, a psychologist or a member of their family present during their testimony.<sup>48</sup>
25. The Victims Representatives stressed that the provisions of the Rules explicitly prohibit any threats to the witnesses' and victims' privacy. In this respect the Trial Chamber has the duty under Rule 88(5) to be vigilant in controlling how the questioning of victims and witnesses takes place, in order to avoid any harassment or intimidation.<sup>49</sup>

<sup>44</sup> ICC-01/04-01/06-T-58-ENG, page 75, lines 11 -17.

<sup>45</sup> ICC-01/04-01/06-679.

<sup>46</sup> ICC-01/04-01/06-T-58-ENG, page 76, lines 5-13.

<sup>47</sup> Conclusions des Victimes a/0001/06 à a/0003/06 en vue de l'audience du 29.10.2007, 19 October 2007, ICC-01/04-01/06-992, paragraph 11.

<sup>48</sup> ICC-01/04-01/06-992, paragraph 12.

<sup>49</sup> ICC-01/04-01/06-992, paragraph 13.

*Registry*

26. The Registry expressed its concern at the possibility that, if witness proofing is allowed, a situation could arise in which, notwithstanding the presence of the witness in The Hague to give evidence, as a result of the proofing procedure he might not be called to testify. The answers provided by the witness during the question and answer session could – for any number of reasons – persuade the party calling the witness that their testimony was not needed in the trial itself. This scenario, it was claimed, is undesirable because it exposes the individuals concerned, having been brought to the seat of the Court, to personal risk, as well as considerable inconvenience. Furthermore, it would take away their role at a late stage.<sup>50</sup>

27. From a practical standpoint, the Registry observed that the practice of witness proofing may involve having witnesses extend their stay in The Netherlands, in which case it requested that the proofing be scheduled carefully in advance in order to minimise the inconvenience.<sup>51</sup>

**IV) Analysis**

28. The Trial Chamber believes it appropriate to separate, as the Pre-Trial Chamber has done, a review of the process undertaken to familiarise witnesses with courtroom procedure from that of preparing a witness in a substantive way for their testimony at trial. Thus, this decision will first address the practice of witness familiarisation and subsequently the practice of substantive preparation of a witness for their in-court testimony.

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<sup>50</sup> ICC-01/04-01/06-1-58-ENG, page 80, lines 10-26 and page 81, lines 1-5.

<sup>51</sup> *Ibid*

### *Witness Familiarisation*

29. The practice of familiarising witnesses with the courtroom and the procedures which they will encounter is not particularly contentious amongst the parties and participants, and it is documented in many national and international contexts.<sup>52</sup> This practice was also found to be appropriate by the Pre-Trial Chamber in its decision of 8 November 2006.<sup>53</sup> Within its decision, the Pre-Trial Chamber considered the following functions would fall within the category of witness familiarisation:

- a. Assisting the witness to understand fully the Court proceedings, its participants and their respective roles;
- b. Reassuring the witness about her role in proceedings before the Court;
- c. Ensuring that the witness clearly understands she is under a strict legal obligation to tell the truth when testifying;
- d. Explaining to the witness the process of examination first by the Prosecution and subsequently by the Defence;
- e. 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
- f. 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.<sup>54</sup>

<sup>52</sup> ICC-01/04-01/06-T-58-ENG, page 50, lines 1-7; ICC-01/04-01/06-952, paragraph 13; ICC-01/04-01/06-991, paragraph 77; ICC-01/04-01/06-T-58-ENG, page 50, lines 2-7; See also *The Prosecutor v Karemera et al*, ICTR-98-44-T, Decision on Defence Motions to Prohibit Witness Proofing, 15 December 2006, paragraph 10; *The Prosecutor v Milan Milutinovic et al*, IT-05-87-T, Decision on Ojdanic Motion to Prohibit Witness Proofing, 12 December 2006, paragraph 10; *The Prosecutor v Limaj et al*, IT-03-66-T, Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses, 10 December 2004, page 3; Australia-New South Wales Office of the Director of Public Prosecutions – Witness Assistance Service Manual, available at <http://www.odpp.nsw.gov.au/was/was.html>; United States – Los Angeles County District Attorney's Office, Victim-Witness Assistance Program, available at <http://da.co.la.us/vwap/vwap.htm#services>; Chile – Ministerio Público, Preperación para juicio oral – available at <http://www.ministeriopublico.cl/index.asp>; England and Wales - R v Momodou [2005] EWCA Crim 1777, paragraph 62.

<sup>53</sup> ICC-01/04-01/06-679, paragraphs 18-27.

<sup>54</sup> *Ibid*

30. The Trial Chamber agrees with the Pre-Trial Chamber that these tasks appropriately form part of a witness familiarisation process, noting that they are an elaboration of the requirements under Rules 16(2) and 17(2) of the Rules. The Chamber finds it useful to expand on the first of these functions listed by the Pre-Trial Chamber: that of assisting witnesses to understand fully the court proceedings, in order to clarify what will happen.
31. Many of the witnesses who will be called to testify at the Court may never have been in a courtroom before. Thus, it may be that aspects of the layout of a courtroom, and the procedures and technology used in court proceedings will be wholly unfamiliar to them. Therefore, a visit to the courtroom and a “walk through” of the particular features the witness will encounter during their testimony is necessary, partly to provide as comfortable an environment as possible for the witness and partly to allow for the efficient presentation of their evidence.
32. The Trial Chamber also draws special attention to the vulnerability of some of the people who may be called to testify. There must be awareness of the particular characteristics of a witness which may cause the court environment to be particularly foreign and uncomfortable. In the context of the present case, for example, particular attention should be paid to any children who are called as witnesses to ensure that their psychological well-being is considered as a matter of paramount importance, pursuant to Article 68 of the Statute and Rule 88 of the Rules.
33. As regards the appropriate person or body to perform these functions, the parties and participants agreed that the Victims and Witnesses Unit should be responsible for undertaking the process of familiarising the witness with

courtroom procedures.<sup>55</sup> The Trial Chamber concurs with this approach and notes that it coincides with the approach of the Pre-Trial Chamber. That Chamber specifically discussed the validity of giving the practice of witness familiarisation to the Victims and Witnesses Unit stating:

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.<sup>56</sup>

34. The Trial Chamber agrees with the conclusion that witnesses are not attributable to parties, but rather are witnesses of the Court. However, the Trial Chamber recognises that the party which is intending to call a particular witness will be likely to have greater insight into the background and particular facets of the witness, which may assist the Victims and Witnesses Unit in discharging their role during the witness familiarisation process. To that end, the Trial Chamber will allow the Victims and Witnesses Unit to work in consultation with the party calling the witness, in order to undertake the practice of witness familiarisation in the most appropriate way.

*Substantive preparation of witnesses by parties for giving testimony before the Court*

35. The Pre-Trial Chamber in its decision of 8 November 2006 stated that the concept of “witness proofing” as advanced by the prosecution could not be found within the Statute or Rules.<sup>57</sup>

36. As described above, the prosecution advanced a textual argument based on reading Article 54(3)(b) of the Statute in conjunction with Article 70 to demonstrate that the substantive preparation of witnesses for trial is envisaged by

<sup>55</sup> See references in footnote 52.

<sup>56</sup> ICC-01-04-01-06-679, paragraph 26

<sup>57</sup> *Ibid*, paragraph 28.



the Statute.<sup>58</sup> However, the Trial Chamber considers this argument to be untenable. While Article 54(3)(b) allows the Prosecutor to question witnesses, nothing in the text supports the proposition that a preparation session directly prior to giving evidence is permitted. This is, in the opinion of the Chamber, to misread the Statute. Further, the mere fact that Article 70 does not expressly list a court preparation session between a witness and a party as an offence against the administration of justice does not necessarily mean the practice is permissible. Therefore, the Trial Chamber agrees with Pre-Trial Chamber I's conclusion that the ICC Statute and Rules do not expressly provide for the possibility of parties preparing witnesses for testimony, and further finds no provision in the texts to justify the practice.

37. To further its argument that "witness proofing" should be allowed, the prosecution, in written submission, provided a section specifically citing jurisprudence from national and international courts, which it claimed endorse a well established practice of witness proofing.<sup>59</sup>

38. In beginning its analysis of this area, the Trial Chamber draws particular attention to the Pre-Trial Chamber's discussion of Article 21 of the Statute in its decision of 8 October 2006. This Chamber fully recognises that the present matter must be settled by reference to the sources of applicable law laid out in that provision.

39. Turning first to the national jurisprudence relied upon by the prosecution, the Trial Chamber notes that the various terms and definitions used nationally, as well as the lack of any coherent jurisprudence, render it difficult to determine the extent to which witness proofing can be considered an established practice in this sense.

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<sup>58</sup> ICC-01/04-01/06-952, paragraph 30

<sup>59</sup> *Ibid*, paragraphs 18-26.

40. In general, the prosecution's citations of national practice do provide some examples of the permissibility of contact between counsel and witnesses before trial. However, most do not directly deal with the substance of what that contact should entail. The Chamber observes, following consideration of the authorities provided, that the 'New South Wales Barrister's Rules' from Australia, and the 'Crown Policy Manual – Witness' from Canada do seem to provide support for the practice of engaging in some kind of question and answer session with the witness directly prior to their evidence in court, although coaching witnesses or putting suggestions to them would not be permissible.<sup>60</sup>

41. However, the Trial Chamber does not consider that a general principle of law allowing the substantive preparation of witnesses prior to testimony can be derived from national legal systems worldwide, pursuant to Article 21(1)(c) of the Statute. Although this practice is accepted to an extent in two legal systems, both of which are founded upon common law traditions, this does not provide a sufficient basis for any conclusion that a general principle based on established practice of national legal systems exists. The Trial Chamber notes that the prosecution's submissions with regard to national jurisprudence did not include any citations from the Romano-Germanic legal system.<sup>61</sup>

42. A further clarification may be necessary in light of previous submissions by the prosecution that it intended to follow the law of England and Wales closely on this subject and the Pre-Trial Chamber's assertion that the law of England and Wales prohibited the practice of witness proofing. In the Trial Chamber's view, whilst the accepted practice in England and Wales allows a witness, for the sole purpose of refreshing his memory, to read his witness statement prior to giving evidence, it permits neither substantive conversations between the prosecution or

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<sup>60</sup> ICC-01/04-01/06-952, paragraph 24.

<sup>61</sup> *Ibid*

the defence and a witness nor any type of question and answer session to take place prior to the witness giving evidence.<sup>62</sup>

43. Turning to the practices of international criminal tribunals and courts, the prosecution submitted that the practice of witness proofing is here permissible, endorsed and well established.<sup>63</sup> The Trial Chamber notes, as has been established by recent jurisprudence from the International Criminal Tribunals of the former Yugoslavia and Rwanda, that witness proofing, in the sense advocated by the prosecution in the present case, is being commonly utilized at the ad hoc Tribunals.

44. However, this precedent is in no sense binding on the Trial Chamber at this Court. Article 21 of the Statute requires the Chamber to apply first the Statute, Elements of Crimes and Rules of the ICC. Thereafter, if ICC legislation is not definitive on the issue, the Trial Chamber should apply, *where appropriate*, principles and rules of international law. In the instant case, the issue before the Chamber is procedural in nature. While this would not, *ipso facto*, prevent all procedural issues from scrutiny under Article 21(1)(b), the Chamber does not consider the procedural rules and jurisprudence of the ad hoc Tribunals to be automatically applicable to the ICC without detailed analysis.

45. The ICC Statute has, through important advances, created a procedural framework which differs markedly from the ad hoc tribunals, such as, for example, in the requirement in the Statute that the prosecution should investigate exculpatory as well as incriminatory evidence,<sup>64</sup> for which the Statute and Rules of the ad hoc tribunals do not provide. Also, the Statute seemingly permits

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<sup>62</sup> R. v Momodou (Henry), (CA (Crim Div)) Court of Appeal (Criminal Division), 2 February 2005, [2005] 1 W.L.R.3442; R. v Richardson (David Ernest), (CA (Crim Div)) Court of Appeal (Criminal Division), 16 February 1971; Lau Pak Ngam v Queen, The, (CA (HK)) Court of Appeal (Hong Kong), 11 March 1966; R. v Webb, (Crown Ct (Maidstone)) Crown Court (Maidstone), c.1975; R. v Da Silva (Michael Reginald), (CA (Crim Div)) Court of Appeal (Criminal Division), 20 July 1989, (1990) 90 Cr. App.R.233; Worley v Bentley (1976) 62 Cr App R 239, R v Westwell (1976) 62 Cr App R 251.

<sup>63</sup> ICC-01/04-01/06-952, paragraph 18.

<sup>64</sup> Statute, Article 54(1)(a).

greater intervention by the Bench, as well as introducing the unique element of victim participation. Therefore, the Statute moves away from the procedural regime of the ad hoc tribunals, introducing additional and novel elements to aid the process of establishing the truth. Thus, the procedure of preparation of witnesses before trial is not easily transferable into the system of law created by the ICC Statute and Rules. Therefore, while acknowledging the importance of considering the practice and jurisprudence at the ad hoc tribunals, the Chamber is not persuaded that the application of ad hoc procedures, in the context of preparation of witnesses for trial, is appropriate.

46. A final argument advanced by the prosecution in support of its position was that the practice of witness proofing helps the Trial Chamber to establish the truth by furnishing all involved in the trial with a complete picture of the case and it enables a more accurate and efficient presentation of evidence.<sup>65</sup>
47. Since one of the principal goals of the work of the Court is to establish the truth,<sup>66</sup> any available means should be considered. However, whilst some aspects of a proofing session could potentially help the Court arrive at the truth in an efficient manner, many others may well prove detrimental.
48. The prosecution submitted that “witness proofing” would involve providing written statements to a witness a few days prior to their testimony; meeting with the witness at that time to remind the witness of their duty to tell the truth; discussing with the witness during this meeting information which may inform a decision about the protection of the witness; addressing the area of the witness statement that will be dealt with in Court; and showing the witness any potential exhibits for his comment prior to testimony.<sup>67</sup>

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<sup>65</sup> ICC-01/04-01/06-T-58-ENG, page 65, lines 13-15 and page 67, lines 1-11, ICC-01/04-01/06-952, paragraph 16.

<sup>66</sup> Statute, Articles 54(1)(a), 69(3).

<sup>67</sup> ICC-01/04-01/06-T-58-ENG, pages 54-59.

49. Addressing the particular elements, the Trial Chamber considers that during the witness familiarisation process the Victims and Witnesses Unit are under an obligation to remind witnesses of their duty to tell the truth and to implement any protective measures which may be necessary. Thus, the elements left for consideration under the topic of "witness proofing" include providing a witness with his written statements, and any discussions with the witness on the content of their statements to the extent that they may be addressed in court, as well as any potential exhibits which may be provided during the witness' testimony.

50. The Trial Chamber considers that allowing a witness to read his past statements will aid the efficient presentation of the evidence and help the Trial Chamber to establish the truth. Witnesses may well have given their original statements a year or more in advance of their in-court testimony. The Trial Chamber is aware that it can be difficult to remember events in their exact detail and the order in which they occurred, particularly when those events were traumatic. Thus, greater efficiency may be achieved by providing past statements to a witness in advance to assist that witness with his recollection. Overall, this process will clarify for the witness events that occurred some time previously.

51. However, with regard to any discussion on the topics to be dealt with in court or any exhibits which may be shown to a witness in court, the Trial Chamber is not convinced that either greater efficiency or the establishment of the truth will be achieved by these measures. Rather, it is the opinion of the Chamber that this could lead to a distortion of the truth and may come dangerously close to constituting a rehearsal of in-court testimony. While the Trial Chamber notes the prosecution's undertaking that it will take all steps to limit any pre-trial rehearsal during a "proofing session",<sup>68</sup> it is not persuaded that this is practically achievable. A rehearsed witness may not provide the entirety or the true extent

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<sup>68</sup> *Ibid.*, page 61, lines 12-26.

of his memory or knowledge of a subject, and the Trial Chamber would wish to hear the totality of an individual's recollection.

52. Finally, the Trial Chamber is of the opinion that the preparation of witness testimony by parties prior to trial may diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness. The spontaneous nature of testimony can be of paramount importance to the Court's ability to find the truth, and the Trial Chamber is not willing to lose such an important element in the proceedings. The pro-active role of judges under the Statute and Rules will help to ensure that witnesses are not "revictimized" by their testimony, whilst also preventing any improper influence being applied to the witness.

#### **V) Decision of the Trial Chamber**

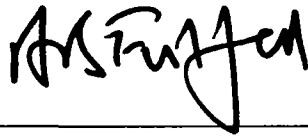
53. The Trial Chamber therefore orders the Victims and Witnesses Unit to undertake the process of witness familiarisation in consultation with the party introducing the witness before the Court previous to their testimony being given. This process shall include:

- a. Assisting the witness to understand fully the Court's proceedings, its participants and their respective roles;
- b. Reassuring witnesses about their role in proceedings before the Court;
- c. Ensuring that witnesses clearly understand that they are under a strict legal obligation to tell the truth when testifying;
- d. Explaining to the witnesses the process of examination;
- e. Discussing matters relating to the security and safety of witnesses in order to determine the necessity of applications for protective measures;
- f. Providing witnesses with an opportunity to acquaint themselves with the people who may examine them in court;
- g. "Walking witnesses through" the courtroom and its procedure prior to the day of their testimony in order to acquaint them with the layout of the

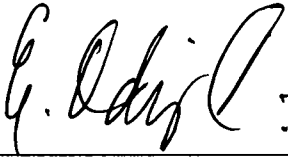
court, and particularly where the various participants will be seated and the technology that will be used in order to minimise any confusion or intimidation.

54. The Victims and Witnesses Unit must take special care, pursuant to Article 68 of the Statute and Rule 88 of the Rules to ensure that vulnerable witnesses are treated in a sensitive manner which takes into account any special needs or vulnerabilities which an individual witness may have.
55. Further, the Victims and Witnesses Unit shall make available to the witness a copy of any witness statement they may have made in order to refresh their memory. The party who is responsible for calling the witness for testimony before the Bench shall make any previous witness statements available to the Victims and Witnesses Unit.
56. Once the process of witness familiarisation has been commenced, any further meeting between a party and its witness outside of Court is prohibited.
57. While witness familiarisation as defined in this decision will be permitted as well as the practice of providing a witness, for the sole purpose of refreshing memory, with his or her previous statements prior to testimony in Court, the practice of "witness proofing" as characterized by the prosecution is prohibited.

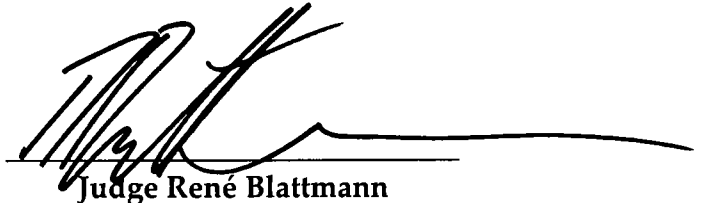
Done in both English and French, the English version being authoritative.



Judge Adrian Fulford



Judge Elizabeth Odio Benito



Judge René Blattmann

Dated this 30 November 2007

At The Hague, The Netherlands