

# The Practice of ‘Witness Proofing’ in International Criminal Tribunals: Why the International Criminal Court Should Prohibit the Practice

WAYNE JORDASH\*

## Abstract

Witness proofing – or witness preparation – has been common practice at the ad hoc criminal tribunals but was prohibited in the first trial before the International Criminal Court (ICC) (the *Lubanga* case). The ad hocs have robustly defended the practice, claiming that it assists the efficient presentation of evidence and enhances the truth-finding process. This article examines the way in which the ad hocs have allowed the process to become an integral feature of their procedural regimes without sufficient examination of these apparent merits. The ad hocs appear to have accepted that prohibiting the parties from rehearsing, practising, and coaching evidence was in the interests of justice, but yet – in the uncritical acceptance of the benefits of proofing – have sanctioned practices which are impossible to distinguish. The *Lubanga* case represented a welcome attempt by the ICC to examine proofing and its attendant risks and, for the reasons outlined in the article, the chambers arrived somewhere close to the right decision.

## Key words

International Criminal Court; international criminal trials; International Criminal Tribunal for Rwanda; International Criminal Tribunal for the former Yugoslavia; Special Court for Sierra Leone; witness proofing

## I. INTRODUCTION

On 30 November 2007, the *Lubanga* Trial Chamber of the International Criminal Court (ICC) broke with the long-standing tradition of the ad hoc tribunals – the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL) – and prohibited the practice of witness proofing or substantive preparation of evidence by the parties.<sup>1</sup> This affirmed the earlier – and no less controversial – decision by the Pre-Trial Chamber on 8 November 2006 which prohibited the prosecution from witness proofing prior to the confirmation hearing.<sup>2</sup>

\* UK lawyer, practising from Doughty Street Chambers, London. The author was the Lead Counsel for Sesay in the ‘RUF’ case at the Special Court for Sierra Leone; Co-Counsel for Stanišić at the International Criminal Tribunal for the former Yugoslavia and Co-counsel for Bagaragaza at the International Criminal Tribunal for Rwanda. The views expressed herein are solely those of the author.

1 *Prosecutor v. Lubanga*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, Case No. ICC-01/04-01/06, T.Ch.I, 30 November 2007 (hereinafter *Lubanga* Trial Decision).

2 *Prosecutor v. Lubanga*, Decision on the Practices of Witness Familiarisation and Witness Proofing, Case No. ICC-01/04-01/06, PTCI.Ch.I, 8 November 2006 (hereinafter *Lubanga* Pre-Trial Decision).

The Pre-Trial Chamber's decision was subsequently relied upon by the defence at the ICTY and the ICTR. On 2 December 2006 the *Milutinović* trial chamber at the ICTY, faced with a defence application to prohibit the prosecution from proofing witnesses, concluded that the *Lubanga* Pre-Trial Chamber Decision was distinguishable.<sup>3</sup> In the view of the ICTY trial chamber the practice was permissible under the law of the Tribunal, did not per se prejudice the rights of the accused, and could enhance the fairness and expeditiousness of the trial.<sup>4</sup> Three days after *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*,<sup>5</sup> the ICTR trial chamber, in a pointedly barbed response to the *Lubanga* Pre-Trial Decision, declined to prohibit the practice, stating that the way in which the ICC Pre-Trial Chamber 'came to its decision . . . [was] . . . not based on a comprehensive knowledge of the established practice of the ad hoc Tribunals, which is justified by the particularities of these proceedings that differentiate them from national criminal proceedings'.<sup>6</sup> On 11 May 2007 the ICTR Appeals Chamber upheld the *Karemera* Trial Decision, repeating the claim that it was 'evident from the jurisprudence of the ad hoc Tribunals that . . . a practice of witness proofing has developed and has been accepted in various cases'.<sup>7</sup> The Appeals Chamber concluded that witness proofing – a review of the content of witness statements with a witness – was acceptable unless it involved an attempt to 'influence that content in ways that shade or distort the truth'.<sup>8</sup>

Emboldened by the ICTY and ICTR decisions, the *Lubanga* prosecution raised the issue afresh with the Trial Chamber, claiming that witness proofing was a well-established practice before the ad hoc tribunals.<sup>9</sup> Trial Chamber I acknowledged that the practice was 'commonly utilized' at the ad hoc tribunals<sup>10</sup> but, nonetheless, declined to adopt the practice, observing that the procedural rules and jurisprudence of the ad hoc tribunals were not 'automatically applicable to the ICC without detailed analysis'.<sup>11</sup> The Trial Chamber found, *inter alia*, that 'whilst some aspects of a proofing session could potentially help the Court arrive at the truth in an efficient manner, many others may prove detrimental'.<sup>12</sup> In particular, the Trial Chamber noted that preparation of witness testimony by the parties could lead to a distortion of the truth, may come dangerously close to constituting a rehearsal of in-court testimony, could inhibit the 'entirety or the true extent of' an account,<sup>13</sup> and could 'diminish

3 *Prosecutor v. Milutinović, Sainović, Odžanić, Pavković, Lazarević, and Lukić*, Decision on Ojdanić Motion to Prohibit Witness Proofing, Case No. IT-05-87-T, Trial Chamber III, 12 December 2006 (hereinafter *Milutinović* Trial Decision).

4 *Ibid.*, at paras. 16 and 22.

5 *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, Decision on Defence Motions to Prohibit Witness Proofing, Case No. ICTR-98-44-T, 15 December 2006 (hereinafter *Karemera* Trial Decision).

6 *Ibid.*, at para. 8.

7 *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, Decision on Interlocutory Appeal Regarding Witness Proofing, Case No. ICTR-98-44-AR73.8, 11 May 2007 (hereinafter *Karemera* Appeal Decision) at para. 8.

8 *Ibid.*, at para. 9.

9 *Lubanga* Trial Decision, *supra* note 1, at para. 8.

10 *Ibid.*, at para. 43.

11 *Ibid.*, at para. 44.

12 *Ibid.*, at para. 47.

13 *Ibid.*, at para. 51.

what would otherwise be helpful spontaneity during the giving of evidence by a witness'.<sup>14</sup>

This article will consider the jurisprudence from the ICTY, the ICTR, and the SCSL (the ad hocs) to examine whether the practice of proofing witnesses (the substantive preparation of evidence, as opposed to the practice of familiarizing a witness with the process) has been shown to contribute to the truth-finding process which lies at the core of the adjudication of international crimes.

Contrary to the forthright claims by the ad hocs, an examination of the relevant jurisprudence illustrates the absence of any uniform practice and, more worryingly, of any convincing attempt to assess or regulate its impact upon the truth-finding process. The ad hocs have consistently failed to examine the detail of the practice and consequently its adverse effects, potential or otherwise, have been largely disregarded. This dereliction arises not for want of opportunity, but, rather, from an unquestioning and dubious acceptance of the intrinsic value of proofing. The *Lubanga* decisions represent a welcome attempt to try to understand and examine proofing and the attendant risks. The *Lubanga* Chamber's examination and ultimate rejection of proofing is logical and to be welcomed: proofing at the ad hocs has for too long been allowed to undermine the truth-finding process while simultaneously weakening fair trial guarantees. Furthermore, the robust approach by the ICC to this subject provides some measure of hope that the undesirable practices and prevailing orthodoxies of the ICTY, the ICTR, and the SCSL will not automatically be imported into the ICC's nascent procedural regime.

## 2. UNIFORMITY AT THE ICTY, THE ICTR AND THE SCSL?

### 2.1. Proofing: its aims and objectives

There can be no doubt that pre-trial witness preparation, or witness proofing, is accepted as a practice at the ad hoc tribunals. However, what the practice encompasses is far less obvious. The jurisprudence continuously repeats the aims and objectives of the process, but fails to deliver more than a smattering of meaningful analysis. The aims and objectives were first identified in the *Limaj* Trial Decision at the ICTY, which stated,

It must be remembered that when a witness is first 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 the time. Matters thought relevant and irrelevant during the 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 the Prosecuting counsel has decided to pursue in support of the charges, and because of differences of professional perception between Prosecuting counsel and earlier investigators. . . . The process of human recollection is likely to be assisted . . . by a detailed canvassing during the pre-trial proofing of the relevant

<sup>14</sup> Ibid., at para. 52.

recollection of a witness . . . In particular, such proofing is likely to enable the more accurate, complete, orderly and efficient presentation of the evidence in the trial.<sup>15</sup>

It can safely be assumed that all the stakeholders in the international criminal law process will have little difficulty accepting the importance of these aims and objectives. The difficulty is how best to craft practices to ensure that they are achieved – without importing irregularity or unfairness into the process. Similarly, the jurisprudence continuously reiterates that the practice should not consist of the rehearsal, practice or coaching of witnesses;<sup>16</sup> should not be considered as permission to train or tamper with a witness before he or she gives evidence; and should not be used to ‘mould its case against the Accused in the course of the trial’ or ‘amount to the manipulation of a witness’ evidence’.<sup>17</sup> Again, presumably no one with any stake in the success of the process ought to have difficulty accepting the wisdom of these prohibitions: how to steer clear of the impermissible conduct is the real issue, which ought to have been central to the debate.

Unfortunately, in the unquestioning acceptance of the value of proofing, the ad hocs have neglected to provide any meaningful guidance on an acceptable and uniform practice, leaving the parties to define its content and ethical parameters on a case-by-case basis, quite probably at the expense of fundamental fair trial guarantees.

## 2.2. The lack of an agreed definition

The lack of an agreed definition was raised by the trial chamber in the *Haradinaj* case at the ICTY in 2007:

Despite the fact that the practice of proofing witnesses, by both the Prosecution and the Defence, has been in place since the inception of the Tribunal, there is no set definition of proofing at the Tribunal. The ICTR Appeals Chamber has found the definition of acceptable witness proofing adopted by the Trial Chamber in the *Karemera et al.*<sup>18</sup> case ‘is consistent with the approach sanctioned by the Appeals Chamber in the *Gacumbitsi* Appeal Judgement’. The Prosecution in a case before this Tribunal offered another definition of proofing.<sup>19</sup>

In the *Karemera* Trial Decision at the ICTR, the prosecution suggested that proofing was limited to

preparing and familiarizing a witness with the proceedings before the Tribunal, comparing prior statements made by a witness, detecting differences and inconsistencies in recollection of the witness, allowing a witness to refresh his or her memory in respect of the evidence he or she will give, and inquiring and disclosing to the Defence additional

15 *Prosecutor v. Limaj*, Decision on Defence Motion on Prosecution Practice of ‘Proofing’ Witnesses, Case No. IT-03-66-T, 10 December 2004 (hereinafter *Limaj* Trial Decision), at para. 2.

16 *Milutinović* Trial Decision, *supra* note 3, at para. 16.

17 *Karemera* Trial Decision, *supra* note 5 at paras. 11, 12, 15.

18 *Karemera* Trial Decision, *supra* note 5.

19 *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, Case No. IT-04-84-T, 23 May 2007 (hereinafter *Haradinaj* Trial Decision), at para. 8, quoting from the prosecution’s pleadings underlying the *Milutinović* Trial Decision, *supra* note 3: Prosecution Response to General Ojdanić’s Motion to Prohibit Witness Proofing, 29 November 2006, n. 2 (hereinafter *Milutinović* Prosecution Response).

information and/or evidence of incriminatory or exculpatory nature in sufficient time prior to the witness's testimony.<sup>20</sup>

The 'other definition' offered by the prosecution (referred to by the trial chamber in *Haradinaj*) was in the *Milutinović* case. The additional activities claimed to fall within acceptable proofing activities were:

informing the witness on the areas likely [to] be asked in examination, cross-examination and re-examination as well as the form in which questions are likely [to] be asked and expected to be answered; informing the witness of appropriate and effective witness behaviour . . .<sup>21</sup>

The additional *Milutinović* elements would allow the parties to spell out the questions which the witness might expect or be required to answer during examination by the parties. The witness could be directed to specific areas in his or her witness statement before being provided with the form of the questions that would arise during cross-examination on those areas. This allows a substantially different form of witness preparation from the narrower version defined in the *Karemera* Trial Decision. Allowing a witness to read his or her statements and asking for explanations concerning inconsistencies is one approach; informing the witness of the exact questions in the exact order, indicating the correct form of the answers, while demonstrating effective witness behaviour, is quite another.

The significance of this distinction is obvious and was recognized by the prosecution in the *Lubanga* proceedings, in which there was a retreat at the trial chamber stage from the wider definition advanced at the pre-trial stage. At the earlier stage (confirmation) the prosecution sought to persuade the chamber that the parties ought to be permitted, *inter alia*, to 'put to the witness the questions he/she intends to ask the witness during the witness' testimony, and in the order as anticipated'.<sup>22</sup> Having failed to secure judicial approval for this wider definition the prosecution asked for less on their next attempt, being at pains to reassure the trial chamber '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>23</sup> It would appear that the prosecution on this latter occasion implicitly recognized that the wider definition amounted to rehearsal, could not be justified, and would not gain judicial approval from the robust ICC trial chamber.

### 2.3. The prosecution's adoption of the wider practice at the ICTY

The prosecution's approach during the *Milutinović* case appears to have been based upon an internal code of practice promulgated by the Office of the Prosecutor (OTP) at the ICTY in May 2005. During the *Haradinaj* trial at the ICTY the three accused, Haradinaj, Balaj, and Brahimaj, made an application to the trial chamber to have the prosecution audio- or videotape, or record by digital means or with the use of a stenographer, the proofing sessions. There was no challenge to proofing as a whole.

<sup>20</sup> *Karemera* Trial Decision, *supra* note 5, at para. 15.

<sup>21</sup> *Milutinović* Prosecution Response, *supra* note 19.

<sup>22</sup> *Lubanga* Pre-Trial Decision, *supra* note 2, at para. 17.

<sup>23</sup> *Lubanga* Trial Decision, *supra* note 1, at para. 8.

Instead, the defence were concerned to have a clear, accurate, and independent means of verifying what was in fact stated by the witness to the prosecution in the proofing sessions, to allow the trial chamber to assess the credibility of the witness.<sup>24</sup> This was opposed by the prosecution, who argued *inter alia* that they would provide, instead of the usual unsigned and unadopted notes recording the witness's comments during the proofing sessions, supplementary statements signed by its witnesses.<sup>25</sup> Upon the request of the trial chamber the prosecution disclosed its policy for 'Proofing Witnesses' dated 26 May 2005.<sup>26</sup> The policy, according to the prosecution, was said to reflect the *Limaj* Decision<sup>27</sup> and contained – alongside the aims and objectives – a six-point list purportedly setting out acceptable proofing activities, namely:

- (1) Informing the witness about the purpose of the trial and its procedure. This would include the role of the judges, prosecution, defence, and the accused, the purpose and method of examination-in-chief, cross-examination and re-examination amongst other similar matters.
- (2) Subject to paragraph 6,<sup>28</sup> informing the witness on areas likely to be asked about in examination, cross-examination, and re-examination, as well as the form in which questions are likely to be asked and the form in which they are expected to be answered.
- (3) Informing the witness of appropriate and effective witness behaviour.
- (4) Reading back the witness's prior statement(s) for the purpose of refreshing witness memory and identifying inconsistencies.
- (5) Showing the witness exhibits likely to be used during the witness's testimony, such as marked or unmarked documents, sketches, maps, photos, videos, or any other relevant material.
- (6) Questioning the witness on areas relevant to their testimony, which should include questions on inconsistencies between prior statements and information provided in witness proofing.

It is arguable that this six-point list allows for an even greater range of activities than those argued for in the *Milutinović* case. On the face of the description, it appears to allow a lawyer and a witness to rehearse from beginning to end the totality of the in-court examinations. While there is a clear and unequivocal prohibition on giving the witness the substance of the answers, there is nothing in the description which would prevent a party taking a witness through the exact questions which would (likely) be the subject of each and every examination – including those of the opposing parties. It allows answers to be reformulated so that they are in the 'form in

24 Prosecution Response to *Haradinaj* Submissions on the Procedure for the Proofing of Prosecution Witnesses, 21 March 2007, at para. 22.

25 *Ibid.*

26 *Ibid.*, at para. 44 and Annex: Proofing Guidelines.

27 *Ibid.*, at para. 44.

28 *Ibid.*, at para. 6 ('Witness proofing *cannot* include informing the witness about the specific substance of an answer they are expected to give during their testimony').

which they are expected to be answered' and thus are delivered in the most effective manner – presumably judged with regard to the lawyer's view on what would be most likely to persuade the chamber of the truthfulness or reliability of the account being proffered in support of the prosecution's case. It would allow the lawyer the facility to ensure that the witness was comprehensively aware of all the pitfalls and problems within his or her account. It would provide the opportunity for a witness to plan, before entering the courtroom, precisely which answers might best deal with those difficulties. In other words, this definition – a policy underpinning the prosecution's practice at the ICTY – permits the lawyer to provide any and all assistance, just, and only just, short of providing the substance of the answers.

### 3. VARIOUS JUDICIAL APPROACHES

#### 3.1. The approach at the ICTY

Notwithstanding the claims of judicial endorsement by the ad hocs, the wider policy of the prosecution at the ICTY has not received any clear consideration at the ICTY, the ICTR, or the SCSL. While purporting to be based upon the *Limaj* Trial Decision, the prosecution's policy has permitted activities which do not appear to have been envisaged or endorsed in that decision. The prosecution, during their submissions in the *Limaj* Decision, did not outline the exact mechanics of its proofing practice. Instead, in its response to the defence motion to prohibit proofing, the prosecution gave a description which was at best ambiguous concerning the parameters of the question-and-answer sessions, noting:

Witness preparation is therefore required in order to explain to witnesses how they will testify, who will be in the court room, *how* questions will be put to them and by whom, how their answers will be recorded, the process of translation, and the availability and mechanisms of witness services and protective measures, among other issues . . . a witness must acclimate [*sic*] himself or herself to the formal interplay of question and answer and to breaking down information into small pieces.<sup>29</sup>

As recognized by the Pre-Trial Chamber in *Lubanga*, the *Limaj* Decision did not regulate in detail the content of the practice.<sup>30</sup> However, it appears that the trial chamber did not have in mind rehearsals of the exact questions and answers, which is the essence of the wider definition and practice. In the first place the trial chamber was purportedly addressing defence concerns that proofing sessions could be used as rehearsals.<sup>31</sup> In these circumstances it would appear curiously neglectful to have permitted this 'rehearsal' activity without expressly commenting on it, never mind regulating it. More importantly, the trial chamber appeared expressly to limit the activities which could constitute permissible proofing, noting that it would 'properly extend to a detailed examination of deficiencies and differences in recollection when

<sup>29</sup> *Prosecutor v. Limaj et al.*, Prosecution's Response to Defence Motion on Prosecution Practice of Proofing Witnesses, 3 December 2004 (hereinafter *Limaj* Prosecution Response) (emphasis added).

<sup>30</sup> *Lubanga* Pre-Trial Decision, *supra* note 2, at para. 32.

<sup>31</sup> *Limaj* Prosecution Response, *supra* note 29.

compared with each earlier statement of the witness'.<sup>32</sup> The trial chamber was, logically, endorsing only the narrow definition of witness proofing.

The *Milutinović* Trial Decision appears to be the only instance at the ICTY when a trial chamber was faced directly with the question of the legitimacy of the wider question-and-answer process. It is far from clear that the practice was properly considered or the ramifications firmly grasped. While the trial chamber outlined that it sought to analyse the practice of proofing along the same lines as the *Lubanga* Pre-Trial Decision (that is, by dividing it into two components, the second component being reviewing the evidence, including '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'<sup>33</sup>), this analysis does not emerge from the eventual decision. Conversely the decision appears to limit itself to the consideration and endorsement of the narrower version of proofing. As was noted by the trial chamber,

This Chamber is of the view that discussions between a party and a potential witness regarding his/her evidence can, in fact, enhance the fairness and expeditiousness of the trial, provided that these are a genuine attempt to clarify a witness' evidence. This is what the Chamber considers to be the essence of proofing conducted by the parties before the Tribunal and considers that this practice does not amount to 'rehears[ing], practis[ing], or coach[ing]' a witness.<sup>34</sup>

This was the sum total of the judicial commentary addressing the detail of the process. It is not obvious that the trial chamber addressed its mind, adequately or otherwise, to the so-called second component. The trial chamber endorsed activities which were intended to clarify evidence, as distinct from activities designed to polish its delivery – such as those suggested by the wider version of witness proofing.

### 3.2. The approach at the ICTR

The *Karemera* trial and appeal decisions, in the context of purporting to describe a consistent practice at the ICTR, made it clear that it was not endorsing the wider practice. In that case the defence had expressed concern about the permissibility of the wider practice, and it was deliberated upon by the trial chamber. The trial chamber made a finding that '[i]t is not shown by the Defence, nor does it transpire from the said disclosures that the Prosecution puts to the witness the exact questions to be asked during his or her own testimony'.<sup>35</sup> In this way the trial chamber – whose view was implicitly affirmed by the Appeals Chamber – singled out the wider practice as problematic and rejected it as impermissible.<sup>36</sup>

32 Ibid.

33 *Milutinović* Trial Decision, *supra* note 3, at para. 6.

34 Ibid., at para.16.

35 *Karemera* Trial Decision, *supra* note 5, at para. 23.

36 The Appeals Chamber, in endorsing the Trial Chamber's definition, noted that their approach was 'consistent with the approach sanctioned by the Appeals Chamber in the *Gacumbitsi* Appeal Judgement' (*Karemera* Appeal Decision, *supra* note 7, at para. 9). The description given in the *Gacumbitsi* Appeal Judgement stated that 'It is not inappropriate per se for the parties to discuss the content of testimony and witness statements with their witnesses, unless they attempt to influence that content in ways that shade or distort the truth' (*Prosecutor v. Gacumbitsi*, Appeal Judgement, Case No. ICTR-2001-64-A, Judgement, 7 July 2006, at para. 74.



### 3.3. The approach at the SCSL

The term 'proofing', connoting pre-testimony meetings, was used throughout the trials by the various parties at the SCSL. The use of proofing and its legitimate boundaries were the subject of many hours of highly contentious written and oral debate throughout the prosecution's case in *Prosecutor v. Sesay, Kallon and Gbao (Revolutionary United Front 'RUF' Case)*. Regrettably, despite repeated requests by the accused Sesay, the trial chamber refused to define the practice beyond the generalized guidance provided in the *Limaj* Decision.<sup>37</sup>

The defence in the *Sesay* case stated that it had no objections to proofing sessions, when conducted fairly and with due regard to Rule 66 of the Rules and Article 17 of the Statute of the Special Court.<sup>38</sup> However, in a series of motions (requesting the exclusion of evidence adduced through proofing notes) the accused alleged that the prosecution was using the proofing sessions, not as a means to clarify existing evidence, but to 'actively re-interview witnesses with the calculated aim of increasing the evidence against the Accused and moulding their case according to their ongoing assessment of the way in which their case has progressed'.<sup>39</sup>

The defence alleged that the prosecution was attending proofing sessions with notes of previous court (witness) testimony which were used to conduct re-interviews with future witnesses. It was alleged that this process thus involved an ongoing assessment and analysis of the progress of the case in the courtroom, anticipated future evidence (as deduced from pre-existing witness statements and the anticipated defence cases, as revealed through ongoing cross-examination).<sup>40</sup> In four separate written motions the defence alleged that this approach went beyond the acceptable bounds of proofing, particularly those envisaged by the narrower version – the clarification of inconsistencies.<sup>41</sup> On each occasion the prosecution, while denying wrongdoing, refused (for reasons best known to themselves) to clarify the mechanics of their approach or otherwise outline the parameters of their proofing process. The prosecution would not step beyond reference to the objectives of the proofing sessions which were those outlined in the *Limaj* Decision, namely those said to be 'intended to identify accurately, before the witness testifies, all matters relevant to the case that are within the witness's knowledge'.<sup>42</sup>

On each occasion the trial chamber, quoting extensively and approvingly from the *Limaj* Decision, ruled against the defence, finding no prima facie evidence of

37 The author led the Sesay defence team who were responsible for the requests.

38 See, e.g., *Prosecutor v. Sesay, Kallon and Gbao*, Defence Reply to the Prosecution Response to the Defence Requesting the Exclusion of Paragraphs 1, 2, 3, 11 and 14 of the Additional Information Provided by Witness TFI-117 Dated 25th, 26th, 27th and 28th October 2005, Case No. SCSL-04-15-T, 12 January 2006, at paras. 4–11.

39 *Prosecutor v. Sesay, Kallon and Gbao*, Defence Motion Requesting the Exclusion of Evidence arising from the Additional Information Provided by Witness TFI-168 (14th, 21st, January and 4th February 2006, TFI-165 (6th, 7th February 2006) and TFI-041 (9th, 10th, 13th February 2006), Case No. SCSL-04-15-T, 23 February 2006, at paras. 1 and 14.

40 *Prosecutor v. Sesay, Kallon and Gbao*, Defence Motion Seeking a Stay of the Indictment and Dismissal of all Supplemental Charges (Prosecution's Abuse of Process and/or Failure to Investigate Diligently), Case No. SCSL-04-15-T, 24 April 2007, at para. 14.

41 *Ibid.*, at para. 15.

42 *Ibid.*, Prosecution Response, at para. 13.

wrongdoing by the prosecution. Consequently the trial chamber ‘declined to enquire further into the Prosecution practices in relation to the proofing of witnesses’.<sup>43</sup> The prosecution’s oft-repeated (but completely opaque and beside-the-point) explanation – that proofing could be used to re-interview witnesses and cover not only issues that were dealt with in the witness’s previous statements, but also issues which were pertinent to the whole case<sup>44</sup> – appeared to satisfy the trial chamber that all was well. In truth, the chamber’s approach – and its refusal to enquire of the prosecution – meant that the practice of all parties remained mired in secrecy, with no agreement or judicial guidance concerning the appropriate parameters of proofing.

#### 4. THE AD HOCS’ FAILURE TO EXAMINE THE PRACTICE

The *Limaj* Decision in December 2004 was the first attempt by the ad hocs to examine the process of proofing. It is logical to assume that until this time lawyers acted with reference to their own national rules and the dictates of their own conscience.<sup>45</sup> In May 2005 the Prosecutor at the ICTY promulgated a code of practice, purportedly reflecting the general guidance provided in the *Limaj* Decision. The code permitted activities substantially wider than those endorsed in the late 2006–early 2007 ICTR *Karemera* trial and appeal decisions and arguably wider than envisaged by the *Limaj* Decision. The *Milutinović* Trial Decision is the only decision at the ICTY which might amount to a judicial endorsement of this wider version of proofing – the endorsement is equivocal at best. Until the *Karemera* decisions the debate at the ICTR had revolved around the prosecution’s practice of disclosing ‘will say’ or ‘reconfirmation’ statements. The Appeals Chamber in the *Karemera* Appeal Decision considered that this practice reflected a judicial endorsement of proofing.<sup>46</sup> However, this is a claim too far, given that the disclosure of such statements is also consistent with a practice of eleventh-hour interviews or re-interviews, which appear to have been a pre-eminent feature of proofing at the SCSL.<sup>47</sup> In any event, the Appeal Chamber’s endorsement of the narrow version of proofing at the ICTR in 2007 provides little, if any, real insight into the prosecution or defence practice of proofing during the previous years and throughout nearly all of the cases. The same is true at the SCSL. The wholesale refusal to enquire into the prosecution’s conduct (and the

43 *Prosecutor v. Sesay, Kallon and Gbao*, Decision on Defence Motion Seeking a Stay of the Indictment and Dismissal of all Supplemental Charges (Prosecution’s Abuse of Process and/or Failure to Investigate Diligently), Case No. SCSL-04-15-T, 24 April 2007, (hereinafter *Sesay* Decision on Abuse Motion), at para. 7.

44 For example: *Prosecutor v. Sesay, Kallon and Gbao*, Prosecution Response to Sesay Defence Application for Leave to Appeal the Decision of 1st August 2006, Case No. SCSL-04-15-T, 23 August 2006, at para. 7.

45 See *Lubanga* Pre-Trial Decision, *supra* note 2, at para. 36 and n. 40, referring to M. Schrag (Senior Trial Attorney at the ICTY Office of the Prosecution between 1994 and 1995), ‘Lessons Learned from ICTY Experience’, (2004) 2 *Journal of International Criminal Justice* 427, at 432, n. 9.

46 *Karemera* Appeal Decision, *supra* note 7, at para. 10.

47 The Senior Prosecution Trial Attorney at the SCSL, Kevin Taverner, confirmed this obvious point, admitting that proofing sessions at the SCSL were used to rectify substandard pre-trial investigations: ‘All we got from the investigation was a collection of statements – some of which were useful, most of which had to be re-done . . . Really all we ended up with were names of people and the potential statement’ (P. Van Tuyt, *Effective, Efficient, and Fair? An Enquiry into the Investigative Practices of the Office of the Prosecutor at the Special Court for Sierra Leone* (2008), para. 44).

concealment by the prosecution) made it impossible to know whether there existed a uniform definition of proofing and, if there were, the range of activities included.

This lack of an agreed uniform approach to proofing across the ad hoc's trials is symptomatic of a much greater problem. The prevailing orthodoxy – that proofing brings incontrovertible benefits to the truth-finding process – has never been properly examined; on the contrary, the process and this unfortunate orthodoxy have remained beyond criticism. Consequently there has been a comprehensive failure to make balanced assessments of the attendant risks or to reach an appreciation of the impact on the truth-finding process. These issues will be discussed below.

## 5. RISKS INHERENT IN THE PRACTICE (REHEARSAL, PRACTISING, TRAINING, OR COACHING)

There are differing views concerning the value and risks of witness proofing (or preparation, as it is known in some national jurisdictions). Consideration of these subjects has given birth to a body of legal authority and commentary on the process, much of it emanating from the United States, which 'is probably the only (common law) jurisdiction where proofing is practised on a daily basis . . . without a comprehensive set of rules (as, for example, exists in England and Wales)'.<sup>48</sup>

The potential difficulties were succinctly summarized – and relied upon by the *Lubanga* Pre-Trial Chamber<sup>49</sup> – in the English Court of Appeal case of *Momodou*, which stated,

The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule [against training] reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. 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'. These dangers are present in one-to-one witness training.<sup>50</sup>

These risks are not universally accepted, and there are some who consider them to be 'remote and manageable'.<sup>51</sup> However, there are few practitioners who would disagree that 'in dealing with the boundaries of effective preparation of witnesses on one end and inappropriate preparation leading to untruthful testimony on the other end, there appears to be a 'vast amount of "gray areas" of discretion between these

48 K. Ambos, 'Witness Proofing in International Criminal Tribunals: A Reply to Karemaker, Taylor, and Pittman', (2008) 21 LJIL 911, at para. 4.a.

49 *Lubanga* Pre-Trial Decision, *supra* note 2, at para. 39.

50 *R. v. Momodou*, (2005) EWCA Crim. 177, at para. 61.

51 R. Karemaker, B. D. Taylor III, and T. Pittman, 'Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence', (2008) 21 LJIL 683, section 5.2.3.

two polar opposites'.<sup>52</sup> It is in these grey areas of discretion where a practitioner must operate and where the potential conflict – between a duty to represent their client or case zealously and the duty to present only that which is believed to be the truth – must be reconciled. And it is here where lawyers can subtly, or otherwise, influence or distort a witness's testimony and where the zealous proofing of witnesses for the benefit of the client or case may cause damage to the truth. In short, it is within these grey areas that the risks, remote or otherwise, must be carefully weighed and where the utmost judicial vigilance is required in order to detect any wrongdoing or influence upon testimony.

### 5.1. The ad hocs' failure to examine the risks

Whether the dangers of proofing are remote or give rise to 'serious risks of manipulation',<sup>53</sup> it is obviously critical to consider all the arguments and ensure that the risks are properly understood and managed. In this regard, the merits of any domestic practice are not 'entirely beside the point', as is suggested by some commentators.<sup>54</sup> It is not helpful to argue in favour of a practice or procedural rule without considering and weighing the risks or lessons learnt in other criminal trial processes, domestic or otherwise. An examination of domestic practice and experience would have informed the ad hocs of some of the potential risks. It would have provided some insight into the evidence which suggests that a 'clear-cut distinction between the permitted and the prohibited witness preparation does not work in practice'<sup>55</sup> and could have allowed for guidance to be given to the parties at the international level.

Instead, the ad hocs have been content to ignore the experience elsewhere and consequently have failed to address the grey areas of discretion. The ad hocs' approach – to claim confidently that their experience is unique, implicitly justifying the abandonment or disregard of lessons learnt elsewhere – has not been supported by proper analysis. It is clearly unsatisfactory for the trial chamber in the *Karemera* case at the ICTR to claim, in its rebuff to the *Lubanga* Pre-Trial Chamber, that proofing was justified by the particularities of international proceedings that differentiate them from national criminal proceedings,<sup>56</sup> but offer nothing by way of contrast or comparison to justify such a claim. This type of claim is often made by the ad hocs but rarely justified or explained. It is frequently nothing more than a poorly disguised excuse for unreasoned decision making and perfunctory analysis. This approach has meant that the ad hocs have demonstrated little insight into the practice of proofing or the risks involved, and have provided scant guidance to the parties to enable the development of a uniform and regulated practice.

52 G. L. Shargel, 'Federal Evidence Rule 608(B): Gateway to the Minefield of Witness Preparation', (2007) 76 *Fordham Law Review* 1263, at 1271.

53 Ambos, *supra* note 48, at para. 4.b.

54 R. Karemaker, B. D. Taylor III, and T. Pittman, 'Witness Proofing in International Criminal Tribunals: Response to Ambos', (2008) 21 *LJIL* 917, 2.

55 Ambos, *supra* note 48, at para. 4.a.

56 *Karemera* Trial Decision, *supra* note 5.

On the very few occasions when the ad hocs appear to have turned to a consideration of the risks, the overriding concern has been the detection of *undue* influence, intentional manipulation, and contemptuous conduct by lawyers. In the *Milutinović* Decision the trial chamber stated that it sought to analyse proofing along the same lines as the *Lubanga* Pre-Trial Decision. It should be recalled, as discussed above, that this involved a consideration of the wider practice of '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'.<sup>57</sup> This suggests that the trial chamber intended to engage, at a minimum, with the question of what would constitute rehearsal, practising, training, or coaching and how the question-and-answer exercises could avoid these prohibited practices. The decision does not indicate that this essential analysis was conducted. On the contrary, the trial chamber, while implicitly acknowledging the inappropriateness of any rehearsal, practice, or coaching, makes the clearly erroneous claim that activities directed to clarifying witness testimony could (or would) not amount to these illegitimate practices.<sup>58</sup>

In its ruling the trial chamber suggested that the intention of the party conducting the proofing was the critical factor. Accordingly, without an improper motive there could be no rehearsal, practice, or coaching. This is plainly wrong. A party can rehearse or practise with a witness while harbouring the most honest of intentions – even while confining its activities to the narrower version of the practice of proofing. A witness who is taken repeatedly through his or her statement in order to clarify may find this a useful rehearsal or practice of the testimonial account. The identification of inconsistencies or flaws in the evidence provides ample opportunity for a witness to rehearse and practise his or her explanation. The longer the exercise continues, the more the witness is rehearsed and practises. As regards the wider version of proofing, it is difficult, if not impossible, to see what would constitute rehearsal or practice of a witness's testimony if it is not the exercise of lawyer and witness going through the exact questions and answers. This exercise would seem to define the essence of a rehearsal or practice in this context.

The remainder of the relevant jurisprudence from the ad hocs falls into the same error – focusing on the intention of the party rather than on the mechanics of the activity and the potential effects on the testimony. As a consequence the ad hocs have purported to prohibit rehearsing, practising, and coaching, but, in fact, have sanctioned – or turned a blind eye to – activities which are indistinguishable in practice. In the *Limaj* Trial Decision the trial chamber, faced with the defence concern that the prosecution's proofing practice might provide an opportunity for rehearsals of the evidence, concluded that the concern was misplaced because there were 'clear standards of professional conduct which apply to Prosecuting Counsel when proofing witnesses'.<sup>59</sup> The *Karemera* Trial Decision took the same approach and concluded that proofing 'poses no undue prejudice', provided it did 'not amount to

57 *Milutinović* Trial Decision, *supra* note 3, at para. 6

58 *Ibid.*, at para. 16.

59 *Limaj* Trial Decision, *supra* note 15.

the manipulation of a witness's evidence'.<sup>60</sup> Again, it was implicitly suggested that the problems were confined to conduct which was designed to influence the content of the evidence. Consequently the feared prejudice could be avoided, because there were 'clear standards of professional conduct and ethics which apply to prosecuting counsel when conducting interviews', and they are 'not knowingly to make an incorrect statement of material fact to the Tribunal or offer evidence which Prosecution Counsel knows to be incorrect or false'.<sup>61</sup> Similarly, the *Karemera* Appeals Chamber, quoting approvingly from the *Gacumbitisi* Appeal Judgement, appeared to limit its consideration of the risks to those which might arise from intentional conduct, noting that 'it is not inappropriate per se for the parties to discuss the content of testimony and witness statements with their witnesses, unless they attempt to influence that content in ways that shade or distort the truth'.<sup>62</sup>

## 5.2. Cross-examination and contempt

The focus on conduct intended to influence testimony, rather than a focus on the grey areas of discretion or on conduct which might, whatever the motive or intention, influence testimony, has led to a failure of risk appreciation. In the most extreme of cases this failure has led to a complete abandonment of all safeguards, namely (an almost comprehensive) prohibition on cross-examination concerning the conduct of pre-testimony meetings (proofing sessions). In *Prosecutor v. Brima, Kamara and Kanu* at the SCSL, the trial chamber granted the prosecution application and ruled that defence questions on pre-testimony meetings were, 'in the absence of any substantiated allegation of misconduct . . . limited to the number of such meetings, the dates of the meetings, and their duration'.<sup>63</sup> The trial chamber failed to offer any explanation as to how the defence might be able to obtain the evidence to substantiate an allegation of misconduct without being able to cross-examine the witness; such evidence rarely falls from the heavens but needs to be carefully and meticulously sought and uncovered. This decision deprived the accused of any real means by which they could explore the impact (proper or otherwise) of the proofing sessions on the testimony, the charges, the convictions, and their eventual 45- and 50-year sentences.<sup>64</sup>

In most other trials at the ad hocs this failure of risk assessment has given rise to an unrealistic belief that 'careful cross-examination' and the ability of a trial chamber to initiate contempt proceedings under Rule 77 of the Rules<sup>65</sup> are sufficient safeguards to deal with a remote risk. These risks and these minimal safeguards ought to have been approached with a greater degree of care and enquiry. It is not difficult to see how even the most effective cross-examiner would struggle to

60 *Karemera* Trial Decision, *supra* note 5, at paras. 10 and 15.

61 *Ibid.*, at para. 16.

62 *Karemera* Appeal Decision, *supra* note 7 at para. 9.

63 *Prosecutor v. Brima, Kamara, and Kanu*, Decision on Objection to Question Put by Defence in Cross Examination of Witness TFI-227, Case No. SCSL-04-16-T, 15 June 2005, at para. 20.

64 See also *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Transcripts, 21 August 1997, at paras. 1812-1813 and *Prosecutor v. Bizimungu et al.*, Case ICTR-00-56-T, Decision on Bizimungu's Urgent Motion Pursuant to Rule 73 to Deny the Prosecutor's Objection Raised during the 3 March Hearing, 1 April 2005.

65 *Karemera* Appeal Decision, *supra* note 7, at para. 13.

uncover intentional wrongdoing, never mind the more subtle forms of influence. A dishonest witness who has adopted the suggestions of a miscreant lawyer is unlikely to be in a hurry to admit it. Presupposing that such a witness were struck by a sudden bout of honesty, that witness would suffer from inherent credibility problems, especially when pitched against the denial of a purportedly respectable professional lawyer. Only the most blatant misbehaviour would be detected – as the jurisprudence illustrates.<sup>66</sup> In these circumstances it is difficult to see how the contempt proceedings – or as concerns the ICC, the administration of justice jurisdiction<sup>67</sup> – could have more than the barest of deterrent effects.

As concerns the more subtle forms of influence it would be difficult to bring these to light, especially with no clear definition concerning what is or is not acceptable proofing practice. Witnesses who have been subtly influenced may well not appreciate the fact and may be reluctant to accept it. They may not remember the specifics of the proofing which led to the distortion; this, and a clear framework of appropriate proofing conduct, would appear to be the minimum required to expose the impact of the proofing exercise. Moreover, cross-examination at the ad hocs is invariably conducted through the distortion of cultural and translation barriers. This has a huge impact on the length of the proceedings, due to the difficulties inherent in obtaining testimony in these circumstances. It is overly optimistic and ultimately unrealistic to accept this difficulty – as the ad hocs routinely do when justifying delays in their proceedings – but then expect cross-examination to uncover and fully expose the cause and effect. The justification for proofing at the ad hocs is explicitly premised upon the fragility of human recollection and the (apparent) need to allow a witness the chance to provide a later, fuller, and thus more accurate version. It is assumed that the late production of evidence is the norm, as is the last-minute alteration of previously given testimony; both are attributed to the frailties of human memory. It would seem reasonable to presume that this logic would be employed to explain away most, if not all, changes in a witness's account. The 'distortions' would be explained away by reference to other factors – the failure of initial investigations, the natural process of remembering, the increased confidence of the witness, and so on – rather than being attributed to the exact interrogative technique used during proofing, the nature of the rehearsal of evidence, the one-off leading question, or any other aspect of proofing which might cause subtle distortions. In other words, it is difficult to see how most of the subtle distortions caused by proofing could be discovered and disentangled from the very many possible and seemingly more compelling and competing explanations.

## 6. THE IMPACT ON THE PROCEDURAL REGIMES OF THE ICTY, THE ICTR, AND THE SCSL

The ad hocs have assumed that proofing is the way to ensure that all the evidence is 'generated' for trial and to enable 'differences in recollection, especially additional

<sup>66</sup> *Prosecutor v. Tadić*, Appeal Vujin Contempt 31 January 2000, Case No. IT-94-I-AR77.

<sup>67</sup> ICC Statute, Art. 70(1).

recollections, to be identified and notice given of them to the Defence, before the evidence is given'.<sup>68</sup> Consequently, the truth-finding process at the ad hocs has increasingly become underpinned by the assumption that there is no other means of achieving this objective and therefore that the late and piecemeal production of evidence is inevitable.

This assumption has narrowed the debate about the risks or disadvantages of proofing to a question of whether evidence produced during proofing is admissible.<sup>69</sup> Notwithstanding the procedural difficulties caused by the practice and a considerable amount of judicial disquiet,<sup>70</sup> this has not evoked any meaningful reflection on the wider role and impact of proofing within international criminal law. The judicial response, in the face of challenges, has been to suggest – but not to demand – that 'a more appropriate remedy would be a requirement for earlier proofing of witnesses, rather than a ban on the practice'.<sup>71</sup> This approach reflects the deeply entrenched belief in the incontrovertible benefits of proofing, which has become the prevailing orthodoxy, permitting important procedural safeguards to be subordinated or weakened to accommodate the practice. The ad hocs appear to have missed the contradiction: the inevitable consequence of a judicial acceptance of proofing as a key component of the criminal process is that the parties will conduct it as late as possible and this will weaken procedural safeguards and undermine the whole procedural regime. It hardly makes sense to encourage proofing – a final review by the trial lawyer when trial ready and the form of the case is known<sup>72</sup> – and then be surprised that it takes place just before the witness gives evidence. This is predictable and inevitable, as are the consequences to the trial process, which will be discussed below.

The practice has caused a slow but fundamental shift in the collective mindset of the ad hocs as concerns the approach to due diligence, especially as regards investigations and disclosure. There is no longer a presumption that a party has to investigate diligently and effectively through pre-trial interviews and get it right the first time. Equally, there is no longer the expectation that the information disclosed – as part of a party's disclosure obligations – will be accurate and timely. The belief in the essential benefits of proofing has caused a shift in the assumption underpinning the disclosure of a case against an accused. The prosecution is no longer expected to disclose the totality of its case before its commencement. An accused must now demonstrate why he or she was entitled to the 'proofing' evidence before the commencement of the case, rather than the burden being on the prosecution to justify why it was unable to discover the evidence at an earlier time.

68 *Limaj* Trial Decision, *supra* note 15, at para. 2.

69 See, e.g., *Prosecutor v. André Rwamakuba*, Decision on the Defence Motion Regarding Will-Say Statements (TC), Case No. ICTR-98-44C-T, 14 July 2005, at para. 7.

70 For example: *Milutinović* Trial Decision, *supra* note 3, at para. 23 and fn. 42, quoting extensively from various comments made by Judge Bonomy at the ICTY including, 'I've said it before, I'll say it again: it seems to me a crazy system, this proofing days before a witness is supposed to give evidence when there has been a lengthy pre-trial phase in the case.'

71 *Milutinović* Trial Decision, *supra* note 3, at para. 21.

72 *Limaj* Trial Decision, *supra* note 15, at para. 2.



This shift is clear from a perusal of the jurisprudence and judicial commentary on the subject, which, despite looming closure schedules, now routinely accepts and excuses prosecutorial dilatoriness.<sup>73</sup> This unfortunate acceptance was outlined by the *Limaj* trial chamber, when considering an application by the defence to find the prosecution in violation of their disclosure obligations following seventy new disclosures during the prosecution case. The Chamber noted that some of these

were disclosed to the Defence after the arrival of a witness in The Hague, when he or she was proofed, but before the witness gave evidence, although in some cases written notice was given after evidence-in-chief commenced but before cross-examination of the witness. The final and detailed proofing of a witness by counsel, who is by then fully prepared for trial, will very often lead to the clarification and variation of an earlier statement of a witness or to additional issues being dealt with for the first time during proofing. While it would be preferable if this could be achieved at an earlier time, there are practical considerations that often lead to this occurring when the witness arrives in The Hague shortly before giving evidence.<sup>74</sup>

It is the acceptance of the inevitability and righteousness of proofing which underlies this claim. The ad hocs had failed to examine the claim that proofing is necessary to identify 'fully the facts known to the witness that are relevant to the charges in the actual indictment'<sup>75</sup> and to accommodate differences of professional perception between investigators and prosecuting counsel.<sup>76</sup> The ad hocs have not attempted to explain why these undeniably important objectives cannot be achieved through prompt and efficient investigation or why disclosure obligations have to be subordinated to these (unspecified) 'practical considerations'. The prevailing orthodoxy, that the process needs proofing, has led to quite startling claims, not the least of which was that made by the *Karemera* trial chamber in its defence of proofing. The trial chamber stated that witness statements may not be complete and proofing therefore essential because '[s]ome witnesses only answered questions put to them by investigators whose focus may have been on persons other than the accused'.<sup>77</sup>

73 See, e.g., *Prosecutor v. Orić*, Case No. IT-03-68-T, Transcript, 2 December 2004, at para. 2371, per Judge Agius, 'Yes, that [late disclosure of evidence through proofing notes] happens. And that's not going to cause an earthquake. That happens in the case of many, or most witnesses, I would say.' See also *Prosecutor v. Prlić*, Case No. IT-04-74/T, Transcript 22 March 2007, at paras. 16149–16150: discussions about the general practice at the ICTY, per defence lawyer: 'our primary concern is that proofing sessions, especially with 92 *ter* witnesses, are turning into whole new statements, and what the prosecution is doing is, now that they have some evidence that has come in and they want to bolster their case, they're using the opportunity to take an entirely new statement.' In response, the prosecution lawyer, *inter alia*, stated, 'if I was designing the system to start all over again, I would probably do some things differently myself . . . these witnesses, again for better or worse, I make no justification for it have not been seen for a number of years. They were interviewed in 1998. They were interviewed in 2001. They come in. We meet with them. We talk to them. We take them through their statements . . . I do not think that in the vast majority of instances they represent new statements or something fundamentally new. Usually it's additional – it's an additional detail, it's an additional amplification of something's that's been said.' *Ibid.*, at paras. 16173–16174.

74 *Prosecutor v. Limaj et al.*, Decision on Joint Defence Motion on Prosecution's Late and Incomplete Disclosure, Case No. IT-03-66-T, 7 June 2005, at paras. 3, 4, and 26.

75 *Limaj* Trial Decision, *supra* note 15, at para. 2.

76 *Ibid.*

77 *Karemera* Trial Decision, *supra* note 5, at para. 11. This assumption was repeated in the *Karemera* Appeal Decision, *supra* note 7, at para. 10, wherein the Appeals Chamber suggested that proofing was necessary to avoid putting a party in the position of having to cross-examine a witness 'cold' without first knowing what he would say.

The suggestion that the prosecution is permitted to commence a trial against an accused without disclosing focused witness statements, and that this belated focus may be achieved through proofing, is evidence of an unhealthy acceptance of poor investigative processes and unsatisfactory disclosure practices, and consequently ought to have been evidence of the need to examine the assumptions underlying proofing.

Proofing has become the ‘fail-safe’ mode. In the event that a party fails to fulfil its disclosure obligations, proofing provides the remedial safety valve, allowing the party to do what ought to have been done before. It is now practically impossible for a party to be found to be negligent or deleterious in the preparation of its case. If all else fails, there is always proofing or lack of it to explain away the failure. During the ‘RUF’ case at the SCSL late proofing sessions produced over one hundred new charges (distinct factual bases for convictions) against the first accused, this despite a pre-trial investigation period spanning three years. These were disclosed throughout the prosecution case, shortly before the witnesses testified.<sup>78</sup> Notwithstanding the late production of this number of factual allegations, Trial Chamber I still declined to make any enquiry of the initial investigation or the proofing sessions, stating that there was no prima facie evidence of negligence or foul play.<sup>79</sup> It is difficult to see what would be prima facie evidence of negligence if it was not the late production of such a mass of evidence; the prevailing orthodoxy – that proofing was bound to produce evidence that prompt, focused investigations could not – remained firmly embedded in the chamber’s consideration of the subject and, however problematic the result for the accused or the process, was employed to justify the prosecution’s approach.

And so, over the last ten years, the ad hocs have moved a long way from an adherence to the lofty ideals expressed during the *Blaškić* trial proceedings in 1997. At that time it was recognized that the accused had the right to ‘receive the most complete information regarding the charges against him in order to prepare his defence under the best conditions’.<sup>80</sup> Further, it has been recognized by the ad hocs that the accused has the right to *all* the evidentiary material on which the prosecution seeks to rely before the commencement of the trial.<sup>81</sup> The ad hocs have disclosure rules which are supposed to mandate the disclosure of exculpatory material as ‘soon as practicable’.<sup>82</sup> The reasons why the *Blaškić* trial chamber was correct is obvious: the devil of a prosecution and defence case is in the detail. The more the parties (and the chambers) know about a case at the earliest point in time the greater the prospects for a fair and expeditious trial. The smallest details may prove important

78 *Prosecutor v. Sesay, Kallon and Gbao*, Decision on 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, Case No. SCSL-04-15-T, 27 February 2006, at para. 11.

79 *Sesay* Decision on Abuse Motion, *supra* note 43, at para. 22.

80 *Prosecutor v. Blaškić*, Decision on Defence Motion Alleging Defects in the Form of the Indictment and Order on Prosecution Motion to Amend the Indictment, Case No. IT-95-14, 4 April 1997, at para. 11. See also *Prosecutor v. Nyiramasuhuko*, Decision on Defence Motion for Disclosure of Evidence, Case No. ICTR-97-29-T, 1 November 2000, at para. 38.

81 E.g., *Prosecutor v. Nyiramasuhuko*, Decision on Defence Motion for Disclosure of Evidence, Case No. ICTR-97-29-T, 1 November 2000.

82 See ICTY, ICTR, and SCSL, Rules of Procedure and Evidence, Rule 68.

and the more that are available at an early stage – ideally before the commencement of the prosecution case – the better. This aids the taking of instructions, detailed investigations, the planning of overall strategy, and trial management, including efficient and focused court sessions.

There are, at times, compelling and understandable reasons to explain any failure to attain these standards. This is the nature of large, complex trials. However, at the ad hocs these essential rights appear to have been abandoned or compromised on the altar of a nebulous proofing practice, which implicitly condones, if not encourages, late preparation and disclosure. The ad hocs have forgotten that there is always another way, namely focused and effective investigations conducted through the vehicle of professionally conducted interviews, well in advance of a party's case. As noted in 2006 by Judge Bonyony at the ICTY, with an understandable degree of exasperation concerning ongoing disruptions caused by late proofing, '[w]hat's the problem about lawyers . . . actually investigating the case properly in the pre-trial phase at the latest?'<sup>83</sup> The choice is, as was recognized by Judge Bonyony, not one of allowing proofing to be conducted or the loss of valuable, well-presented evidence, as has been suggested by some commentators.<sup>84</sup> The real choice is one of either diligent investigations and remedial proofing; or timely, comprehensive disclosure and delayed disclosure; or, in the final analysis the choice between a procedural regime which demands efficiency or one which excuses a lack of due diligence.<sup>85</sup>

Clearly it will be the case that first interviews with witnesses are conducted when there is no indictment or when the focus was on other accused. However, one presupposes that the eventual indictment against an accused is based on evidence collated against that named accused. In the event that the prosecution needs to re-interview witnesses in order to focus on a particular accused, then the procedural regime should demand that this is done pre-trial. This will allow indictments to be amended, and pre-trial briefs and other disclosure to be supplemented in a timely manner. Early re-interviews, conducted through an ongoing collaboration between counsel and investigators, will enable any 'troubling differences' to be resolved in plenty of time before the witness is called to testify and before the commencement of the trial. A witness ought not to be called to testify against that accused without the prosecution being sure that the witness will give reliable, relevant, and detailed evidence, probative of the charges and this evidence having been disclosed well in advance. There should be a presumption that evidence is disclosed at the earliest opportunity and, when it is disclosed late – as will occur at times – the parties should be left in no doubt that this will require explanation and justification.

These are the due-diligence requirements that should underpin the procedural regimes. In the light of the unacceptable delays which have occurred, especially at the ICTR, it is difficult to argue to the contrary. They will not guarantee that all the evidence will be collated and disclosed in advance of the commencement of the

83 *Milutinović* Trial Decision, *supra* note 3, at para. 23 and n. 42, referring to Transcript, 2 November 2006, at para. 5791.

84 Karemaker, Taylor, and Pittman, *supra* note 51, at 5.2.2.

85 Van Tuyl, *supra* note 47.

trial, but, in most cases, strict adherence should bring obvious benefits. The earlier evidence is obtained the better for everyone: the more specific the indictments, the fuller the pre-trial briefs, and the more detailed the original witness statements and the corresponding disclosure. There would be fewer adjournments to deal with late evidence, less wasted court time dealing with applications for additional evidence, fewer witnesses brought to the court only to be abandoned at considerable expense, and better treatment for the witnesses, including traumatized victims, who are able to more swiftly return home. The list of benefits is potentially endless.

## 7. *LUBANGA*: A STEP IN THE RIGHT DIRECTION

For the reasons outlined above, the chambers in *Lubanga* at the ICC were right to conduct a detailed examination of the merits of a proofing practice. The pre-trial chamber was correct to find that international criminal law was lacking an established practice.<sup>86</sup> As found by both *Lubanga* chambers – and implicitly conceded by the prosecution at the trial chamber stage – the practice at the national level did not offer any real support for a continuation of the process at the ICC. While the practice is found in various national jurisdictions, such as Australia, Canada, England and Wales, and the United States, the scope of what it includes varies across the jurisdictions.<sup>87</sup> For example, the practice in the United States – allowing a witness to be taken through his or her evidence with a view to improving its delivery – bears little relation to the practice in England and Wales, which permits only discussions directed at assessing the reliability of a witness's evidence or to provide the lawyer with a greater understanding of complex evidence.<sup>88</sup> The ad hoc's repeated claim that proofing was a widespread practice in jurisdictions where there was an adversarial procedure<sup>89</sup> needed to be properly examined and was rightly found wanting.

The *Lubanga* decisions represented the first attempt to dissect witness familiarization into differing components: to separate those which aim 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'<sup>90</sup> from those which concern the substantive preparation of the evidence. The Trial Chamber was right to conclude – as the prosecution, the defence, and the victims' representatives agreed – that the former process, in accordance with Articles 16(2) and 17(2) of the ICC Statute, was the role of the Victim and Witness Service (VWS).<sup>91</sup> It was right to delineate a clear moment in time when the witnesses were left in no doubt that they were witnesses of the court. It was, however, sensible to recognize the value of allowing the parties to work in consultation with the party calling the witness, in order to ensure that this aspect of witness familiarization is carried out

86 *Lubanga* Pre-Trial Decision, *supra* note 2, at para. 33.

87 *Ibid.*, at para. 12, and *Lubanga* Trial Decision, *supra* note 1, at para. 9.

88 *Lubanga* Pre-Trial Decision, *supra* note 2, at paras. 38, 39. See also the latest Code of Conduct for Prosecutors issued in February 2008.

89 *Limaj* Trial Decision, *supra* note 10, at para. 2.

90 *Lubanga* Pre-Trial Decision, *supra* note 2, at para. 15.

91 *Lubanga* Trial Decision, *supra* note 1, at paras. 6, 17, 22, 33.

in the most effective way possible.<sup>92</sup> Clearly the parties may well bring valuable knowledge to the process. This separation and specification of roles and tasks itself represented a significant jurisprudential advance and showed what could be achieved with a little consideration and examination of the way in which witnesses are prepared for court and for giving evidence.

Moreover, as was implicitly recognized by the ICC, it is obvious that the ad hocs' readiness to allow the late practice of proofing interfered with the role of the VWS in ensuring that witnesses, when they arrive at the seat of court, are able to focus on familiarizing themselves with the process, rather than being compelled to meet lawyers to review or supplement their testimony. The ICC decision cleared a space in time for the witnesses to be cared for by the professionals, rather than being pressed for more evidence by parties engaged in an ostensibly adversarial process. It could hardly have been beneficial for witnesses at the ad hocs to be engaged in evidence collation after arriving at the court in readiness to give live evidence, especially while the VWS are waiting patiently to commence – or continue – their work. The ICC decision promises to bring huge improvements in the treatment of witnesses and victims.

In terms of proofing concerning substantive witness preparation, the ICC has dealt firmly with the anomaly which underpinned the ad hocs' practice and, almost certainly, led to miscarriages of justice. The ad hoc tribunals appear to have recognized that prohibiting the rehearsal, practice, and coaching of evidence and witnesses was in the interests of justice, presumably because such practices ran the risk of obscuring the truth, but yet consistently sanctioned practices which were impossible to distinguish. It ill behoves those who offer fulsome support for proofing not to offer any insight into how it is possible to proof, even whilst employing only the narrow version of proofing, without falling into these undesirable practices, or how it is possible to investigate during proofing sessions and yet avoid the moulding of the proofing evidence to fit the party's case. The problem is straightforward: the very exercise of taking a witness systematically through each and every inconsistency in his or her account, provides an opportunity for rehearsal, practice, and coaching, whether it produces additional explanation or not. It is unclear why the ad hocs would purport to prohibit practices and yet turn a blind eye to the obvious, allowing a witness's account to be polished and improved in sessions that are training sessions in all but name. Bearing in mind that judgements concerning reliability and credibility are often being made by judges who have little or no experience of the intricacies of the oral or linguistic cultures of the witnesses, the *Lubanga* decisions promise to allow witnesses to give their accounts uncoloured by the skills of preparing counsel. Judges will be provided with a more visible illustration of the weakness of an account. The ICC decisions are thus more coherent and consistent and a welcome move towards eradicating (or minimizing the risks of) conduct recognized by all as unhelpful to the discovery of the truth.

---

92 Ibid., at para. 34.

Importantly the *Lubanga* decisions have also dealt with the long-standing unsubstantiated assumption – that, without proofing, evidence will be lost or will be presented less effectively. The ad hocs have failed to provide any explanation why proofing is able to produce relevant, accurate, complete, orderly, and efficient presentation of evidence, but professionally conducted interviews are not. The *Lubanga* decisions did not prohibit a party from conducting professional interviews with a witness during the investigation stage to ensure that all the relevant evidence was obtained, and doing so efficiently and in a structured manner. As was pointed out by the defence in the *Lubanga* case, there were examples of the prosecution interviewing witnesses between five and 15 times during the investigations stage. Whilst this was denied by the prosecution, which contended that some of the statements had been taken over several days and were not technically separate interviews,<sup>93</sup> nonetheless this illustrates that there were ample time and opportunity for the prosecution to conduct structured, searching, and clear interviews. There are no obvious reasons why, if a party has an opportunity to interview a truthful witness and does so chronologically or thematically, it cannot adduce cogent and clear evidence. The structure of these interviews will be reflected in the witnesses' presentation.

No doubt an incoherent and arbitrary interview process will hinder the presentation, since the witness will likely follow the framework created through the interviewing process; clearly the converse is also true – if the statements produced are clear and coherent the witness will be able to read and consider them at his or her leisure before giving evidence.

Moreover it is this interviewing process, combined with the witness being able to refresh his or her memory through reading the statement(s) in their own language,<sup>94</sup> which will assist a true process of recollection, rather than one engendered through rehearsal and practice. The risks inherent in the proofing process, whether remote or otherwise, will have been removed, while the parties will be compelled to organize their investigative practices more efficiently for the betterment of the whole procedural process. The application of the ICC decision will thus raise the standards of pre-trial investigations for all parties – as well as fostering a return to a culture of due diligence and accountability.

It was entirely logical that the *Lubanga* Trial Chamber would consider that proofing was incompatible with the explicit (and novel) requirement that the prosecution must investigate exculpatory material.<sup>95</sup> The alternative – the sanctioning of deleterious investigative practices and the late recovery of exculpatory material – would have created an unnecessary risk that the cases against the accused lacked specificity or, worse, that the innocent remained wrongly accused of serious crimes. In this regard the ICC Trial Chamber might well have gone further and observed that proofing was a practice which was hardly compatible with the requirement that the prosecution must also 'cover all facts and evidence' in the investigation stage,<sup>96</sup>

---

93 *Lubanga* Trial Decision, *supra* note 1, at 19.

94 *Ibid.*, at 55.

95 *Ibid.*, at 45.

96 ICC Statute, Art. 54(1).

know its case before the commencement of the trial, and disclose it at the earliest opportunity.<sup>97</sup> It is therefore not surprising that the Trial Chamber – in the search for a procedural regime which best provides for the *efficient* establishment of the truth – would consider proofing to be incompatible with these various aims.

## 8. CONCLUSION – UNANSWERED QUESTIONS

The *Lubanga* decisions represent a welcome attempt to understand and examine proofing and the attendant risks. The decisions go some way to commencing a much needed debate and, for the reasons argued above, in large part have arrived at a logical and coherent conclusion – that proofing adds little but risks much. There remain some unanswered questions which will have to be grappled with in due course. There must be a debate about whether trial lawyers are permitted to interview (rather than proof or prepare) witnesses. It might be unwise and somewhat artificial to make the distinction between lawyers and investigators, prohibiting the former but not the latter, especially in the light of the complexity of the issues in most international trials and the need to guarantee effective and efficient investigations, within the constraints of limited resources. A brief interview of a witness by a lawyer may well allow sensible decisions to be made about the of reliability of the witness. It is proofing that is the real problem and not all contact between witnesses and lawyers.

For the same reason the ICC Trial Chamber might have gone too far with its prohibition on discussions with witnesses concerning potential exhibits. In large, complex cases, such as those at the ICC, the parties derive much benefit from being able to have witnesses comment on exhibits pre-trial to provide a greater understanding of the exhibits and the totality of a witness's evidence on the relevant issues. This activity need not be classified as part and parcel of proofing, provided that the process involved is analogous to interviewing a witness and provided that it steers clear of providing the kind of cues which bedevil the proofing of witnesses at the ad hocs. This would be investigation, not proofing and would assist the presentation of evidence without the attendant risks.

Nonetheless, despite these and other unanswered questions, the *Lubanga* decisions represent a welcome attempt to try to understand and examine proofing and the risks. Reassuringly, it is the *Lubanga* Trial Chamber which will be in charge of this process, at least in the initial stages. It appears to be more than capable of challenging old orthodoxies and crafting innovative and common-sense solutions to deal with the undoubted difficulties inherent in the efficient adjudication of international crimes.

---

97 E.g. *Prosecutor v. Kupreškić*, Judgement, Case No. IT-95-16-A, 23 October 2001, at 114.