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UNITED NATIONS	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-04-84-T
		Date:	23 May 2007
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Frank Höpfel
Judge Ole Bjørn Støle

Registrar: **Mr Hans Holthuis**

Decision of: **23 May 2007**

PROSECUTOR

v.

RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ

PUBLIC

DECISION ON DEFENCE REQUEST FOR AUDIO-RECORDING OF PROSECUTION WITNESS PROOFING SESSIONS

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1. The Chamber is seised of a request by the Defence seeking an order to the Prosecution to audio-record the proofing sessions with its witnesses.[1]

2. On 8 March 2007, Witness 38 testified before this Chamber that she was mistreated at a certain location, before a vehicle, allegedly carrying one of the Accused, arrived at that location.[2] However, the proofing notes produced by the Prosecution record the witness as saying that there had been no mistreatment prior to the arrival of the vehicle.[3] Witness 38 responded to the Chamber's question as to what she had said to Prosecution counsel during the proofing session as follows:

> I really don't know. I honestly can't remember. I told him [Prosecution counsel] how we were mistreated. But when I told my story, it wasn't in chronology. I skipped from one thing to another.[4]

The following exchange between Defence Counsel for Mr Haradinaj and Witness 38 ensued:

> Q. Witness 38, did you or did you not tell Mr Di Fazio on Tuesday that the jeep -- by the time the jeep arrived, you had already been stripped naked and assaulted? Did you tell him that or not.
>
> A. I think I did, yes.[5]

According to the Defence, another such instance of discrepancy between in-court testimony and proofing notes occurred on 13 March 2007, when Witness Radošević testified in court that a certain person was "only a distant relative",[6] whereas the proofing notes record this witness as stating that the person in question was his "cousin".[7] In a third instance, which concerned Witness 60, there was a discrepancy between the witness's in-court testimony, on the one hand, and the contents of a Prosecution letter addressed to the Defence and containing notes of a communication between Witness 60 and the Prosecution, on the other.[8]

3. As a way of preventing similar problems in the future, the Defence proposed that the Prosecution should audio-record the proofing sessions with its witnesses. On 15 March 2007,

[1] Defence Submissions on the Procedure for the Proofing of Prosecution Witnesses, 22 March 2007 ("Defence Submission"), para. 31. Already on 19 January 2007, Counsel for Mr Balaj had sent a letter to the Prosecution suggesting that it audio-record its proofing sessions. Further letters regarding this issue were sent to the Prosecution by Mr Balaj's Counsel on 6 February 2007 and 12 March 2007. The Chamber did not consider these letters when deciding the current issue.
[2] T. 730-732.
[3] Exh. D2 (Proofing notes of Witness 38), p. 5.
[4] T. 789.
[5] T. 792.
[6] T. 1035.
[7] Defence Submission, para. 6.

the Chamber ordered the Prosecution, as a provisional measure, to audio-record proofing sessions until a final decision on the matter.[9] The Chamber then invited the parties to make written submissions on the issue in order to assist the Chamber to make its ruling.[10]

I. Submissions received

4. On 22 March 2007, the Prosecution filed the "Prosecution's Written Submissions Opposing Verbatim Recording of 'Proofing' Sessions with Witnesses" ("Prosecution Submission").[11] Also on 22 March, counsel for all three Accused filed the "Defence Submissions on the Procedure for the Proofing of Prosecution Witnesses". On 23 March 2007, the Prosecution filed a "Corrigendum to Prosecution's Written Submissions Opposing Verbatim Recording of 'Proofing' Sessions with Witnesses" and a "Book of Authorities for the Prosecution's Written Submissions Opposing Verbatim Recording of 'Proofing' Sessions with Witnesses".[12]

5. On 23 March 2007, the Chamber requested the parties to file further written submissions[13] and to address therein whether an order to audio-record proofing sessions should bind both parties.[14] Furthermore, the Chamber requested the Prosecution to file the Prosecution's staff guidelines for proofing sessions.[15] On 28 March 2007, the Prosecution filed the "Prosecution's Written Submissions in Response Opposing Verbatim Recording of 'Proofing' Sessions with Witnesses" ("Prosecution Response"). Also on 28 March, the Defence for Mr Haradinaj filed the "Response of the Defence for Ramush Haradinaj to Prosecution Submissions on the Procedure for the Proofing of Prosecution Witnesses" ("Haradinaj Response"),[16] and the Defence for Mr Balaj filed the "Response by the Defence for Idriz Balaj to Prosecution's Written Submission Opposing Verbatim Recording of 'Proofing' Sessions with Witnesses" ("Balaj Response"). The Defence for Mr Brahimaj filed

[8] T. 2292-2293, 2259-2265 and 3872-3873.
[9] T. 1260 and 1398.
[10] T. 1302.
[11] This was supplemented on 30 March 2007 with the "Prosecution Submission of Further Authority in Relation to 'Prosecution's Written Submissions Opposing Verbatim Recording of 'Proofing' Sessions with Witnesses'".
[12] In supplementation of the last-mentioned filing, on 26 March 2007, the Prosecution filed the "Prosecution's Notice of Unofficial English Translations of the Authorities Cited in the Prosecution's Written Submissions Opposing Verbatim Recording of 'Proofing' Sessions with Witnesses".
[13] T. 1823-1824.
[14] T. 1841.
[15] T. 1825.
[16] On 29 March 2007, the Defence for Mr Haradinaj supplemented this filing with a "Book of Authorities for Defence Submissions on the Procedure for the Proofing of Prosecution Witnesses".

its "Defence Response to Prosecution Submissions on the Procedure for the Proofing of Prosecution Witnesses", belatedly, on 16 April 2007.

6. On 30 March 2007, the Prosecution filed the "Prosecution Reply to 'Response for Ramush Haradinaj to Prosecution Submissions on the Procedure for the Proofing of Prosecution Witnesses'".

7. On 14 May 2007, the Prosecution filed the "Prosecution's Reference to Supplementary Authority in Relation to 'Prosecution's Written Submissions Opposing Verbatim Recording of 'Proofing' Sessions with Witnesses'". On 15 May 2007, the Defence for Mr Haradinaj filed a partly confidential "Submission of Additional Information in Regards to 'Prosecution's Written Submissions Opposing Verbatim Recording of 'Proofing' Sessions with Witnesses' with Confidential Annex". Counsel for Mr Balaj and Mr Brahimaj joined this filing.[17] On 16 May 2007, Counsel for Mr Balaj filed "Idriz Balaj's Response to the Prosecution's Supplementary Authority Regarding Verbatim Recording of 'Proofing' Sessions with Prosecution Witnesses". On 18 May 2007, the Prosecution filed the "Prosecution Submission Concerning *Karemera* Appeals Chamber Decision re Witness Proofing Interviews". On 21 May 2007, the Defence for Mr Brahimaj filed "Lahi Brahimaj's Response to the Prosecution's Supplementary Authority Regarding Verbatim Recording of Proofing Sessions with Prosecution Witnesses". On 23 May 2007, Counsel for Mr Haradinaj filed an "Additional Submission on behalf of Ramush Haradinaj in Respect of a Further Authority on 'Witness Proofing' filed by the Prosecution".

II. Proofing defined

8. 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,[18] there is no set definition of proofing at the Tribunal. The ICTR Appeals Chamber has found that the definition of acceptable witness proofing adopted by the Trial Chamber in the *Karemera et al.* case "is consistent with the approach sanctioned by the Appeals Chamber in the *Gacumbitsi* Appeal

[17] See Notice by the Defence for Idriz Balaj of Joinder, filed on 16 May 2007, and Notice by the Defence for Lahi Brahimaj of Joinder, filed on 17 May 2007.
[18] See also *Prosecutor v. Limaj et al.*, Decision on Defence Motion on Prosecution Practice of 'Proofing' Witnesses, 10 December 2004 ("*Limaj* Decision"), p. 2.

Judgment".[19] The Prosecution in a case before this Tribunal offered another definition of proofing.[20] In the view of this Chamber, the term "proofing" refers to a meeting held between a party to the proceedings and a witness, usually shortly before the witness is to testify in court, the purpose of which is to prepare and familiarize the witness with courtroom procedures and to review the witness's evidence.[21] The Trial Chamber in the *Limaj et al.* case found that witness proofing assists in (i) providing a detailed review of relevant and irrelevant facts in light of the precise charges to be tried; (ii) aiding the process of human recollection; (iii) enabling the more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial; and (iv) identifying and putting the Defence on notice of differences in recollection, thereby preventing undue surprise.[22] This finding was endorsed by the *Milutinović et al.* Trial Chamber.[23]

9. In the *Limaj et al.*, *Milutinović et al.*, and *Karemera et al.* cases, the Trial Chambers were faced with a challenge to the practice of proofing itself, as the Defence in those cases sought an order disallowing proofing entirely.[24] This Chamber is not seised of such a challenge, as counsel for the Accused in this case do not object to the practice of proofing.[25]

[19] *Prosecutor v. Karemera et al*, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007, paras 4 and 9. The definition adopted by the Trial Chamber in that case is as follows: "Provided that it does not amount to the manipulation of a witness'[s] evidence, this practice may encompass 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 information and/or evidence of incriminatory or exculpatory nature in sufficient time prior to the witness'[s] testimony", *Prosecutor v. Karemera et al.*, Decision on Defence Motions to Prohibit Witness Proofing, 15 December 2006, para. 15.

[20] See the Prosecution's filing in the *Milutinović et al.* case, referred to in fn. 25 of the Prosecution Submission: "The Prosecution understand witness proofing to be meetings or other contacts with witnesses prior to their testimony. Witness proofing includes 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; 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. Witness proofing can also include showing the witness their prior statements for the purpose of refreshing their memory; showing the witness exhibits likely to be used during the witness's testimony or any other relevant material; questioning the witness on areas relevant to their testimony which should include questions on inconsistencies between prior statements and information provided in witness proofing. Witness proofing is not used for 'coaching' the witness. In particular, witness proofing cannot include informing the witness about the specific substance of an answer they are expected to give during testimony", *Prosecutor v. Milutinović et al.*, Prosecution Response to General Ojdanić's Motion to Prohibit Witness Proofing, 29 November 2006, fn. 2.

[21] *Prosecutor v. Milutinović et al.*, Decision on Ojdanić Motion to Prohibit Witness Proofing, 12 December 2006 ("*Milutinović* Decision"), paras 10, 16 and 20.

[22] *Limaj* Decision, p. 2.

[23] *Milutinović* Decision, para. 20.

[24] This was also an issue recently at the International Criminal Court (see *Prosecutor v. Dyilo*, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006 ("*Dyilo* Decision")).

[25] See Defence Submission, para. 2; see also Balaj Response, para. 4. See further T. 1303-1304.

The issue before this Chamber is whether proofing sessions between counsel and witnesses should be audio-recorded.

III. Arguments for and against audio-recording of proofing sessions

10. Several arguments for and against the audio-recording of proofing sessions were advanced by the parties:

(1) The Prosecution submits that the issuance of an order to audio-record proofing sessions "would amount to an improper exercise of the Trial Chamber's discretion".[26] The Prosecution submits further that such an order would "encroach upon powers that the Statute expressly delegates to the Prosecutor", namely the responsibility to investigate and to prosecute.[27] The Prosecution argues that its "broad inherent power to determine the manner in which it should conduct its case ... must extend to witness preparation".[28] Balaj's Defence responds that "*none* of the cases cited by the Prosecution stand for the proposition that a trial court in a common law jurisdiction has no power ... to order that witness interviews be tape recorded".[29]

(2) The Prosecution submits that the order sought by the Defence "would also be contrary to the Tribunal's Rules and practice".[30] It adds that "by way of contrast the Rules require that questioning of suspects or accused persons be audio or video taped".[31] Balaj's Defence responds that the Tribunal's Rules of Procedure and Evidence ("Rules") are silent on proofing in general, and yet proofing is accepted practice at the Tribunal.[32] In its Response, the Prosecution states that an earlier version of Rule 66 of the Rules required the Prosecution to disclose to the Defence an audio-recorded statement of an "accused or witness", and that the fact that this provision was deleted after eleven months, supports the Prosecution's position in this case.[33] The Prosecution refers to Rules 89(D) and 95 of the

[26] Prosecution Submission, paras 5, 14-19.
[27] *Ibid.*, para. 20.
[28] *Ibid.*, para. 21.
[29] Balaj Response, paras 26 and 31.
[30] Prosecution Submission, paras 5, 20-21.
[31] *Ibid.*, para. 15.
[32] The Balaj Defence adds that "the fact that a practice is not specifically 'authorized' under the rules does not mean that it is therefore specifically prohibited under the rules", Balaj Response, para. 9.
[33] Prosecution Response, paras 29-31.

Rules as the appropriate mechanisms to "deal with any issues surrounding the circumstances of obtaining evidence such as to warrant exclusion of evidence".[34]

(3) The Prosecution argues that an order to audio-record proofing sessions would "go against the trend of domestic practice and be counter to evidence regarding the current state of customary international law".[35] The Prosecution submits that its "survey of the practices of 25 countries" reveals that the requested order "would be inconsistent with the practice of the most relevant domestic jurisdictions".[36] The Prosecution proceeds to make an extensive submission, based on the negotiating history establishing the Rules of Procedure and Evidence of the International Criminal Court ("ICC Rules"), that an order to audio-record proofing sessions would be in contradiction with customary international law.[37] The Prosecution relies on Rules 111 and 112 of the ICC Rules, which require the audio- or video-recording of interviews with suspects or accused before the ICC, but not of other persons interviewed in the course of an investigation.[38] Haradinaj's Defence responds that the *Dyilo* Decision shows that the ICC state parties did not contemplate witness proofing at all.[39] It further responds that it is not sufficient to assert that there is no customary international rule which requires proofing, but that "the Prosecution would need to be able to show that there is a rule of Customary International Law which *forbids*" audio-recording of proofing sessions.[40] Haradinaj's Defence also notes that only eight out of the twenty-five countries surveyed by the Prosecution allow for witness proofing, and that therefore "there is no consensus on whether witnesses can be proofed at all, let alone whether proofing sessions should be taped".[41] Balaj's Defence adds that the cases cited by the Prosecution which arise from civil-law jurisdictions "provide little to no guidance on the subject at issue in this case".[42]

(4) The Prosecution submits that an order to audio-record proofing sessions would "not serve the aims and objectives of proofing and could potentially cause delays in the conduct of this trial".[43] The Defence argues that following the Trial Chamber's provisional order to audio-record the proofing sessions, "the Prosecution has not identified any concrete

[34] Prosecution Submission, paras 5, 75-76.
[35] *Ibid.*, para. 5.
[36] *Ibid.*, para. 44.
[37] *Ibid.*, paras 53-74.
[38] *Ibid.*, paras 54-59.
[39] Haradinaj Response, para. 8.
[40] *Ibid.*, para. 9 (emphasis in the original).
[41] *Ibid.*, para. 16.
[42] Balaj Response, para. 27.

problems with the implementation" of that order.[44] The Defence also argues that audio-recording of proofing sessions will "enhance the effective fulfilment" of the objectives of proofing as set out by the *Limaj* Trial Chamber.[45] Haradinaj's Defence states that there are "three critical distinctions between statements taken in the investigation stage, and proofing sessions", namely that (i) proofing is immediately related to trial proceedings; (ii) the principle of equality of arms requires both parties to know what the witness has said during proofing; and (iii) in relation to statements taken during the investigation phase, investigators can be called to give evidence whereas trial counsel cannot in relation to what was said during proofing "without being placed in a situation of potential professional embarrassment".[46] The Defence submits that audio-recording of proofing sessions will protect the Prosecution from allegations of "coaching or rehearsing witnesses", and that it "will provide the parties and the Trial Chamber with an accurate record of the discussions that have taken place with witnesses".[47] The recordings would in turn "permit evaluation and resolution of any differences that arise between a witness'[s] evidence in court and the record of what the witness stated during a proofing session with the Prosecution" and will avoid "unnecessary litigation about witness proofing".[48]

(5) The Prosecution submits that "audio, video or digital recording would discourage witnesses from openly sharing and discussing their anxieties and fears about testifying",[49] and that such recording "could discourage witnesses from freely speaking about any inconsistencies in their prior statements" or a refusal by the witness to have the proofing session audio-recorded or even to "a refusal to appear at the Tribunal".[50] Relying on unspecified provisions of the European Convention on Human Rights ("ECHR") and the International Covenant on Civil and Political Rights, the Prosecution adds that the privacy rights of a witness should also be considered.[51] The Haradinaj Defence responds that Article 8 of the ECHR does not apply to the issue at hand and that audio-recording would promote the right to a fair hearing protected by Article 6 of the ECHR.[52] The Balaj Defence also submits that "there is no reason to conclude … that witnesses willing to

[43] Prosecution Submission, para. 5.
[44] Defence Submission, para. 29.
[45] Defence Submission, para. 16; see *supra* para. 8.
[46] Haradinaj Response, para. 11.
[47] Defence Submission, para. 21.
[48] *Ibid.*, paras 22-23.
[49] Prosecution Submission, para. 28.
[50] *Ibid.*, paras 29-30.
[51] *Ibid.*, para. 31.
[52] Haradinaj Response, paras 20-22.

testify at trial, under oath, where their statements will be audio taped, video taped, stenographically transcribed and broadcast to the world on the internet, will be unduly uncomfortable if asked to speak, with a tape recorder running in the background".[53] The Prosecution also asserts that the procedure of audio-recording would be "inefficient and costly".[54] The Balaj Defence responds that "simply listening to the tape or the relevant portion of it" will be sufficient to resolve any future dispute between testimony and proofing notes and that in most cases there would be no need for the Chamber to listen to the recordings or to transcribe the recordings.[55]

(6) The Prosecution has offered to "provide the defence with supplementary statements signed by witnesses. These would set out any new, additional or different evidence gleaned from such witnesses during proofing. They would be translated into the language of the witness wherever practicable".[56] With such a mechanism in place the Defence would, according to the Prosecution, have the possibility to cross-examine witnesses on any new, additional or different evidence, request additional information from the Prosecution about witness preparation and seek time for additional investigations.[57] The Defence does not object to the proposal of supplementary statements, but nevertheless insists that audio-recordings be made.[58] The Defence proposes a detailed procedure for the proofing of Prosecution witnesses which would not require the automatic disclosure of audio-recordings by the Prosecution to the Defence.[59] Balaj's Defence submits that cross-examination of the witness or a request for additional information from the Prosecution is not a sufficient remedy, as demonstrated in the case of Witnesses 38 and Radošević.[60] In relation to Witness Radošević, the Prosecution submits that there was a simple mistake in the translation of a particular Serbian word, which can mean both "cousin" and "relative" in English.[61]

IV. Discussion

[53] Balaj Response, para. 23.
[54] Prosecution Submission, para. 32.
[55] Balaj Response, para. 16.
[56] Prosecution Submission, para. 2; see also para. 37. See further Prosecution Response, paras 24-26.
[57] Prosecution Submission, para. 38.
[58] Defence Submission, para. 3(v).
[59] *Ibid.*, paras 2-3. In para. 3(ii), the Defence suggests that it "should have the right to request the recordings or portions thereof should any matter arise which necessitates a review of the recordings" and that "any disagreement over the disclosure of the recordings ... should be referred to the Trial Chamber to resolve it". See also Balaj Response, paras 6 and 34.
[60] Balaj Response, para. 22.
[61] Prosecution Response, paras 19-22.

(a) Does the Chamber have the discretion to order the Prosecution to audio-record proofing sessions?

11. The Prosecution did not refer to any provision in the Tribunal's Rules or Statute that would prevent a Trial Chamber order to the Prosecution to audio-record proofing sessions. The Chamber does not agree with the Prosecution's interpretation of the amendment to Rule 66 of the Rules, as the amendment does not specifically address witness proofing, but is rather related to the investigation phase of the Prosecution's case.

12. The Prosecution contends that an order to audio-record proofing sessions would "encroach" upon its investigative powers vested in the Statute. However, by the time a trial has commenced, the Prosecution's investigations should be largely complete, save for the investigative work prompted by new information which was unavailable at an earlier stage. Moreover, the purpose of proofing is not investigation, but the preparation and familiarization of the witness with courtroom procedures and the review of the witness's evidence, these being matters closely related to the trial proceedings and their streamlining.[62] It should be noted that the Defence is not seeking an order to extend audio-recording to the interviewing of witnesses during the investigation phase.[63] The Chamber considers that the requested order is limited to witness proofing and would not have any effect on the taking of witness statements during an investigation. The Prosecution has failed to show how such an order would infringe upon its statutory role to investigate and prosecute crimes under the Tribunal's jurisdiction.

13. The Trial Chambers in the *Milutinović et al.* and *Limaj et al.* cases, on which the parties rely in their submissions, have considered whether proofing itself should be allowed before the Tribunal. The Chamber considers that if a Trial Chamber possesses the discretion to consider that question, it surely must also have the authority to determine how the proofing of witnesses may be conducted in the interests of justice and with respect to the fairness of the trial.

14. Article 20 of the Statute provides that it is the duty of Trial Chambers to ensure that a trial is fair and expeditious. The Chamber recalls Rule 54 of the Rules, which provides:

[62] *Milutinović* Decision paras 10, 16, 20, relying on the *Limaj* Decision.
[63] Haradinaj Response, para. 28; Balaj Response, para. 13.

> At the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial.

Considering that witness proofing assists in the preparation and conduct of the trial, the Chamber finds that Rule 54, together with the Chamber's duty to ensure a fair and expeditious trial, give it the discretion to issue an order to the Prosecution on the conduct of proofing sessions with witnesses.

(b) Would it be contrary to customary international law to order the Prosecution to audio-record proofing sessions?

15. In order to prove the existence of a rule of customary international law, Article 38(1)(b) of the Statute of the International Court of Justice ("ICJ") requires a general practice accepted as law. In the *Asylum* case, the ICJ found that:

> The party which relies on a custom ... must prove that this custom is established in such a manner that it has become binding on the other party ... that the rule invoked ... is in accordance with a constant and uniform usage, practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State ...[64]

In the *Continental Shelf* case, the ICJ further stated that in order for state practice to constitute the necessary *opinio juris*, two conditions must be fulfilled:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by sense of legal duty.[65]

16. The Prosecution maintains that a general order to audio-record proofing sessions is "not support[ed]"[66] by a rule of customary international law, or "would go far beyond"[67] the provisions of customary international law, as evidenced by the negotiations behind the ICC

[64] ICJ Reports (1950), pp. 276-277.
[65] ICJ Reports (1969), p. 44.
[66] Prosecution Submission, para. 70.
[67] *Ibid.*, para. 71.

Rules. The Prosecution would need to show that there is a rule against such a procedure to be found in customary international law; and in order to show that, the Prosecution would have to prove that there is settled practice which prohibits the ordering of the audio-recording of witness proofing and that this prohibition amounts to a legal obligation.

17. The Chamber takes into account the fact, acknowledged by the Prosecution,[68] that witness proofing is a common practice only in jurisdictions following an adversarial system of criminal justice, and is not to be found in civil-law jurisdictions.[69] Considering that in a large number of states (including, but not limited to, states within the civil-law tradition) proofing of witnesses does not occur, it is difficult to see how the ICC negotiating process could be interpreted as reflecting a general practice. Furthermore, the Prosecution's own review of the ICC negotiating process does not identify any explicit reference to the audio-recording of witness proofing. In the Chamber's view, the Prosecution has failed to prove the existence of a general practice, and therefore has failed to prove the existence of a rule of customary international law prohibiting the ordering of audio-recording of witness proofing. Therefore, the closely related question, to what extent, if any, a permissive or prohibitive rule of customary international law may, in this respect, affect the development of procedural law at the Tribunal need not be addressed.

(c) Do the circumstances of the present case merit an order to the Prosecution to audio-record proofing sessions?

18. The proofing notes of Witness 38 were not read back to the witness before the commencement of her testimony.[70] It is not contested that there was a discrepancy between what Witness 38 stated in court and what the proofing notes reflect. Had there been an audio-recording of Witness 38's statement during proofing, the Defence would have had the ability to challenge the credibility of the witness on that basis. Thus the Defence may have suffered some disadvantage in relation to the testing of a part of Witness 38's evidence, but the Chamber finds that any possible disadvantage was, in the context of this case, very slight. In

[68] *Ibid.*, para. 22.
[69] Annex B to the Prosecution Submission, entitled "Countries that permit witness preparation" refers to States with a common-law tradition (Australia, Canada, India, Pakistan, South Africa, Tanzania, England and Wales and United States of America). By contrast, Annex C to the Prosecution Submission, entitled "Countries that do not use proofing" refers to States with a civil-law tradition (Argentina, Austria, Belgium, Cameroon, Chile, Croatia, Denmark, France, Germany, Italy, Netherlands, Norway, Peru, Serbia, Spain, Sweden and Switzerland).
[70] T. 788.

any case, the Chamber will take into account the potential disadvantage when assessing the weight of Witness 38's evidence.

19. In relation to the alleged contradiction between the testimony and the proofing notes of Witness Radošević, the Chamber is satisfied that this instance involved nothing more than a difference in translation during in-court testimony and proofing. The Chamber is satisfied that the word the witness used in his own language is "very general" and does not specify whether the family relationship is close or distant.[71]

20. Concerning the incident in relation to Witness 60, the Prosecution conceded making an "error in transcribing" the notes it had made during the interview with that witness, and therefore the letter sent to the Defence also contained an error.[72] The error was of relatively minor significance as it gave an impression that certain allegations were conveyed to Witness 60 on two occasions in recent years, when in fact that was done on only one occasion.[73] In this case the Prosecution was able to remedy the error by reviewing its written notes and did not strictly need to review the audio-recording of the witness's proofing.

21. The Chamber will now consider what measures should be taken in order to prevent the reoccurrence of the problem which arose with Witness 38. The Prosecution proposes as a remedy the exclusion of evidence pursuant to Rules 89(D) and 95 of the Rules. While this is a possibility, it is not the most efficient solution, as it assumes litigation of the issue, and does not necessarily serve the interests of justice and the discovery of the truth.

22. Although the Chamber is concerned about the possibility of a similar problem arising in the future, it is not convinced that the audio-recording of Prosecution proofing sessions is the most appropriate way at this stage to avoid such a problem. While the audio-recording of proofing sessions is consistent with, and may indeed facilitate some or all of the above-mentioned purposes of witness proofing, the incident on which the Defence bases its request is not sufficient to justify a general measure which will have considerable implications for the Prosecution and which may be remedied just as well by a more diligent and cautious approach by Prosecution counsel when taking notes during witness proofing. In particular, the Chamber endorses the Prosecution's offer to provide the Defence with a supplementary statement signed by the witness that would set out any new, additional or different evidence gleaned

[71] T. 1058-1059.
[72] See Submission of Additional Information in Regards to 'Prosecution's Written Submissions Opposing Verbatim Recording of 'Proofing' Sessions with Witnesses' with Confidential Annex, 15 May 2007, Confidential Annex A, p. 1.
[73] *Ibid.*, p. 2.

from the witness during proofing, and which is to be translated into the language of the witness wherever practicable.[74] The Chamber finds that such a practice would ensure that proofing notes are attested to by the witness – something that did not happen in the case of Witness 38 – and, in turn, this would lessen any concern that proofing notes are not a correct record of what the witness said during proofing. Such attestation can be achieved, as a minimum, by having the witness sign the proofing notes in his or her language or by having the witness sign the English version of proofing notes after they are read back to the witness in a language he or she understands.

23. If future circumstances demonstrate that the above remedy is insufficient, the Chamber may reconsider its decision not to order audio-recording of proofing sessions.

24. Finally, the parties made submissions, upon the Chamber's request, on how any order to audio-record Prosecution proofing sessions might apply to Defence witness proofing. The parties also briefly touched upon the issue of whether proofing should be recorded when dealing with witnesses who give evidence pursuant to Rule 70 of the Rules. In light of the foregoing discussion, it is premature to consider these matters at this stage, as the Prosecution is not being ordered to audio-record proofing sessions.

[74] Prosecution Submission, para. 2; see also para. 37. and Prosecution Response, paras 24-26.

DISPOSITION

For the foregoing reasons:

1. The Defence request is denied;
2. The Chamber's interim order is revoked and the Prosecution is no longer required to audio-record witness proofing sessions;
3. The Prosecution shall preserve the audio-recordings made prior to the filing of this decision;
4. The Prosecution is instructed to produce its proofing notes in accordance with the practice described in paragraph 22.

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

Judge Alphons Orie
Presiding Judge

Dated this 23rd day of May 2007
At The Hague
The Netherlands

[Seal of the Tribunal]