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

3041 AT

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-03-66-T

Date: 10 December 2004

Original: English

TRIAL CHAMBER II

Before: **Judge Kevin Parker, Presiding**
Judge Krister Thelin
Judge Christine Van Den Wyngaert

Registrar: **Mr. Hans Holthuis**

Order of: **10 December 2004**

PROSECUTOR

v.

Fatmir LIMAJ
Haradin BALA
Isak MUSLIU

DECISION ON DEFENCE MOTION ON PROSECUTION PRACTICE OF "PROOFING" WITNESSES

The Office of the Prosecutor:

Mr. Andrew Cayley
Mr. Alex Whiting
Mr. Julian Nicholls
Mr. Colin Black

Counsel for the Accused:

Mr. Michael Mansfield Q.C. and Mr. Karim A. A. Khan for Fatmir Limaj
Mr. Gregor Guy-Smith and Mr. Richard Harvey for Haradin Bala
Mr. Michael Topolski Q.C. and Mr. Steven Powles for Isak Musliu

This Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, is seised of a motion[1] by defence counsel for all three Accused in this case ("the Defence") pursuant to Rule 73, for an order that the Prosecution cease "proofing" witnesses with immediate effect, or an order that a representative of the Defence be permitted to attend the Prosecution's proofing sessions, or that the Defence be provided with a video or tape-recording of proofing sessions. The Prosecution filed a response on 3 December 2004[2] and a Defence reply was filed on 6 December 2004.[3]

In view of the written submissions filed, the Chamber is not persuaded that further oral submissions are necessary for the due consideration of this motion.

In support it is submitted that it is questionable whether it is necessary at all for the Prosecution to conduct any proofing sessions because witnesses have previously given one or more statements to UNMIK investigators and have been interviewed also by an ICTY investigator. Objection is taken to proofing any more extensive than to clarify what is likely to be a "handful of matters", and specifically to Prosecuting counsel spending a number of hours with a witness before evidence is given.

It is submitted that what is being done may affect the fairness of the trial. Attention is specifically drawn to the possibility that leading questions may be put to the witness by Prosecuting counsel before evidence is given. In oral submission it was made clear that it is not contended that this has occurred, merely that there is a danger that it may do so.

In reply it is further submitted that the practice of proofing extends "far beyond the ambit of witness preparation which is integral to the giving of sensitive testimony". It is contended the practice, especially numerous proofing meetings, are in essence a "re-interview" of witnesses and beyond what is said to be "the traditional understanding" of witness proofing. It is ventured that the practice could be said to be coaching, rather than proofing.

It is further said that Prosecuting counsel's proofing, intimates an attempt to usurp or unnecessarily duplicate the role of the Victims and Witnesses Section of the Tribunal.

---

[1] *See* transcript of the proceedings in *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-PT, T. 1147 – 1170.
[2] *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-PT, Prosecution's Response to "Defence Motion on Prosecution Practice of Proofing Witnesses", 3 December 2004.
[3] *Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-PT, Defence Reply to "Prosecution's Response to Defence Motion on Prosecution Practice of Proofing Witnesses", 6 December 2004.

The Defence submits it is seeking to avoid rehearsals of testimony that may undermine a witness's ability to give a full and accurate recollection of events.

The Prosecution's response submits that proofing is an accepted and well-established practice of this Tribunal, one which serves several important functions for witnesses and for the judicial process. It is further submitted that there is no prejudice from the present proofing practice and, in essence, that its attributes, to which the Defence point, have not ever been held to warrant interference with, or change to, the existing proofing practice which has prevailed throughout the life of this Tribunal.

The practice of proofing witnesses, by both the Prosecution and Defence, has been in place and accepted since the inception of this Tribunal. It is certainly not unique to this Chamber. It is a widespread practice in jurisdictions where there is an adversary procedure.

It has a number of advantages for the due functioning of the judicial process. Some of them may assist a witness to better cope with the process of giving evidence.

It must be remembered that when a witness is proofed this is directed to identifying fully the facts known to the witness that are relevant to the charges in the actual Indictment. While there have been earlier interviews there was no Indictment at that time. Matters thought relevant and irrelevant during investigation, are likely to require detailed review in light of the precise charges to be tried, and in light of the form of the case which Prosecuting counsel has decided to pursue in support of the charges, and because of differences of professional perception between Prosecuting counsel and earlier investigators.

In cases before this Tribunal, including this case, it is also relevant that the events founding the charges occurred many years ago. Interviews by investigators were also conducted a long time ago. The process of human recollection is likely to be assisted, in these circumstances, by a detailed canvassing during the pre-trial proofing of the relevant recollection of a witness. Proofing will also properly extend to a detailed examination of deficiencies and differences in recollection when compared with each earlier statement of the witness. In particular, such proofing is likely to enable the more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial.

Very importantly, proofing enables differences in recollection, especially additional recollections, to be identified and notice of them to be given to the Defence, before the evidence is given, thereby reducing the prospect of the Defence being taken entirely by surprise.

It is advanced that in this case the number of proofing sessions, of some witnesses, is excessive. This has also given rise to conjecture that improper or undesirable practices may be causing excessive proofing. In the Chamber's view many of the factors identified already in these observations, and the range and nature of the factual and procedural factors to be canvassed, all aggravated in time by the need for translation, serve to explain proofing sessions of the duration mentioned in submissions.

In this respect it is more a matter of the time spent, rather than the number of sessions into which that time happens to be divided, which is relevant.

Also particularly relevant are the cultural differences encountered by most witnesses in this case, when brought to The Hague and required to give a detailed account of stressful events, which occurred a long time ago, in a formal setting, and doing so in response to structured precise questions, translated from a different language. Such factors also demand time in preparing a witness to cope adequately with the stress of these proceedings. These matters, in the Chamber's view, are properly the realm of proofing, and are not to be left to the different form of support provided by the Victims and Witnesses Section.

The other concerns raised by the Defence are really inherent in the established and accepted proofing procedure. There are clear standards of professional conduct which apply to Prosecuting counsel when proofing witnesses. What has been submitted does not persuade the Chamber that there is reason to consider these are not being observed, or that there is such a risk that they may not be, as to warrant some intervention by the Chamber.

The Chamber will not make orders such as those sought.

The submissions also sought to call in aid what are in truth distinct issues. These were late notice of new material, and a failure to provide signed statements of new or changed evidence. In addition, there was a failure to provide notice of new or changed evidence in Albanian, the language of the Accused.

Late notice is an issue which may require measures to overcome resulting difficulties to the Defence. That will depend on the circumstances. Any example raised will be considered on its merits. Except perhaps where the subject of a notice of a new item of evidence, or a change of evidence is extensive, there is not any sufficient reason to require a signed statement. The prosecution has volunteered that it will provide Albanian translations in future. There is no need, therefore, to comment further on this concern.

For these reasons the motion is dismissed.

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

Judge Parker
Presiding

Dated this tenth day of December 2004
At The Hague,
The Netherlands

[Seal of the Tribunal]