Witness Proofing in International Criminal Law: Is Widening Procedural Divergence in International Criminal Tribunals a Cause for Concern?

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At first blush, few subjects in international criminal law are as unglamorous as the practice of witness 'proofing'—reviewing a witness's evidence and preparing the witness for his or her trial testimony during a meeting with counsel prior to the witness's appearance. Although proofing has long been an accepted—even encouraged—practice before the *ad hoc* tribunals, it has so far escaped scholarly attention. Challenges to the practice, however, highlight that international criminal tribunals are not monolithic in procedural approach. Indeed, recent divergence on this issue is reminiscent of the clash between the adversarial and inquisitorial approaches seen in the early days of the *ad hoc* tribunals. Moreover, the aftermath of the International Criminal Court's (ICC) first decision addressing proofing—diametrically opposed to the approaches taken by the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL)—highlights one area of widening procedural divergence. I should note here that the goal of this presentation and accompanying paper is not to answer the question posed in the title. It is simply to pose the question.

1. Witness Proofing at the *ad hoc* Tribunals Pre-*Lubanga*

1.1. The practice

Although relatively unknown in the inquisitorial model, witness proofing is a practice quite common in adversarial systems.[2] A proofing session is a meeting between a witness and counsel prior to the witness's appearance at trial, during which the witness's evidence is reviewed and the witness is familiarised with what to expect at trial. Of these two components, it is the former—reviewing a witness's evidence—that has proved controversial. Familiarising the witness with the trial process is, at least in principle, generally accepted, although challengers assert that this is appropriately the domain of victim/witness departments rather than counsel.

1.2. The ICTY: The *Limaj* Case

Neither the ICTY's Statute nor its Rules of Procedure and Evidence directly address witness proofing. Nevertheless, it appears to have been common practice at the ICTY from its earliest days.[3] Only a handful of written decisions formally address the practice, most of recent origin.

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[2] The term "proofing" appears to be of British origin. Although such informal meetings are routine in criminal practice in the United States, no similar term is ordinarily used.

[3] *See Prosecutor v. Limaj, Bala and Musliu*, Decision on Defence Motion on Prosecution Practice of 'Proofing' Witnesses, Case No. IT-03-66-T, 10 December 2004 ("*Limaj* Trial Decision"), at 2 ("The practice of proofing witness, 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"). Records of various oral proceedings before the ICTY seem to bear this out. *See e.g. Prosecutor v. Sikirica, Došen, and Kolundžija,* Case No. IT-95-8-PT, T. 446 (8 February 2001) (Trial Chamber encouraging proofing as "helpful for the Prosecution … helpful clearly for the Defence to know the issues … and … helpful for the Trial Chamber"); *Prosecutor v. Stakić*, Case No. IT-97-24-T, T. 3568 (27 May 2002) (Trial Chamber thanking the Prosecution for the provision of "the proofing notes"); *Prosecutor v. Blaskić*, Decision on Subject Matter of Testimony of Witnesses on Appeal and Prosecution's Request for Re-Consideration of Scheduling Order for Evidentiary Hearing, Case No. IT-95-14-A, 8 December 2003, at 3 (Appeals Chamber noting the provision of "witness proofing summaries" by the Prosecution); *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, T. 6022

In November 2004, all three accused in the case of *Prosecutor v. Limaj, Bala and Musliu*[4] asked the Trial Chamber to order that the Prosecution immediately cease proofing its witnesses or, in the alternative, that a defence representative be permitted to attend the Prosecution's proofing sessions or that the defence be provided with a video or tape-recording of the proofing sessions.[5] The request originated in the context of a specific late disclosure dispute surrounding a missing photographic line-up previously shown to a Prosecution witness.[6] As a general matter, however, the defence asserted that the numerous proofing sessions conducted by the Prosecution in that case were more properly characterised as coaching, rather than proofing, and that the sessions usurped the role of the ICTY's Victims and Witnesses Section.[7]

In denying the defence request, the Trial Chamber noted "[t]he practice of proofing witnesses, by both the Prosecution and Defence, has been in place and accepted since the inception of [the ICTY]. It is certainly not unique to this Chamber. It is a widespread practice in jurisdictions where there is an adversary procedure."[8]

Moreover, the Trial Chamber agreed with the Prosecution that, in principle, the practice of proofing provides a number of advantages to the judicial process. First, witnesses are assisted in coping with the process of testifying. Second, proofing is directed to fully identifying all facts known to the witness that are relevant to the actual charges at issue in the trial, ensuring that the evidence presented at trial is more accurate and complete. Third, careful proofing can facilitate the orderly and efficient presentation of the witness's evidence at trial. Finally, proofing enables notice of new or different evidence to be disclosed to the other party prior to the witness's appearance on the stand, "thereby reducing the prospect of the [other party] being taken entirely by surprise."[9]

The Trial Chamber dismissed the defence assertion that the familiarisation component of proofing was the province of the ICTY's Victims and Witnesses Section rather than the Prosecution. The Trial Chamber also put little stock in the defence concern that the Prosecution might be tempted to use future proofing sessions for coaching witnesses, noting "[t]here are clear standards of professional conduct which apply to Prosecuting counsel when proofing witnesses."[10] Having no reason to doubt that the applicable standards of professional conduct were not being properly observed, the Trial Chamber refused to grant any of the requested relief.

1.3. The ICTR: Implicit recognition

Like the ICTY, the ICTR's Statute and Rules of Procedure and Evidence are both silent on the practice of witness proofing. Nevertheless, the practice appears to have been well accepted at the ICTR.[11] Despite the ongoing practice, however, the ICTR had no jurisprudence directly addressing

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(23 April 2004) (Trial Chamber addressing the witness, noting that the witness met the Prosecution "in the proofing"); *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, T. 8172–8173 (26 April 2004) (Defence counsel describing to the Trial Chamber that proofing notes were provided to the Prosecution); *Prosecutor v. Strugar*, Case No. IT-01-42-T, T. 8058, 8065 (16 July 2004) (Trial Chamber describing problems arising at trial due to inadequate witness proofing).

[4] *Prosecutor v. Limaj, Bala and Musliu*, Case No. IT-03-66-T ("*Limaj*" or "the *Limaj* Case").

[5] *Limaj* Trial Decision, at 1.

[6] *See Limaj*, at T. 1143–1170 (30 November 2004).

[7] *Limaj* Trial Decision, at 1.

[8] *Limaj* Trial Decision, at 2.

[9] *Limaj* Trial Decision, at 2.

[10] *Limaj* Trial Decision, at 3. It is noteworthy that the defence did not claim that any such coaching had actually occurred by the Prosecution. Rather, there was a danger that it might. *Ibid*., at 1. *Limaj*, at T. 1161 (30 November 2004).

[11] *See Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, Decision on Interlocutory Appeal Regarding Witness Proofing, Case No. ICTR-98-44-AR73.8, 11 May 2007 ("*Karemera* Appeal Decision"), at para. 8 ("It is evidence from the jurisprudence of the ad hoc Tribunals that, as Trial Chambers have exercised this discretion, a practice of witness

witness proofing prior to the *Dyilo* decision, although the Appeals Chamber had noted that "[i]t 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."[12]

1.4. The SCSL: The *Sesay* Case

In October 2005, two of the accused in *Prosecutor v. Sesay, Kallon and Gbao*,[13] asked Trial Chamber I of the SCSL to exclude the evidence of a witness that had previously testified at trial. They claimed that the Prosecution had knowingly or negligently destroyed handwritten notes from a proofing session, violating, *inter alia*, a previous ruling of the chamber. Although the applications to the chamber focused on disclosure obligations and the practice of proofing itself was not at issue, the trial chamber's decision is instructive on two counts. First, it recognized that witness proofing—in the style conducted at the ICTY—formed part of the Prosecution's practice at the SCSL beginning early in the work of the tribunal. Second, the trial chamber specifically considered and affirmed the merits of proofing.

The trial chamber noted the Prosecution's assertion that the purpose of proofing was "for counsel to discuss matters, including the witness' proposed evidence, with the witness who has little experience appearing in court."[14] It is noteworthy that the Accused do not seem to have raised any objection to the practice of proofing *per se*, seemingly concerned only with the disclosure of evidence surfacing during proofing. Quoting approvingly—and extensively—from the *Limaj* Trial Decision, the *Sesay* Chamber held

> that proofing witnesses prior to their testimony in court is a legitimate practice that serves the interests of justice. This is especially so given the particular circumstances of many of the witnesses in this trial who are testifying about traumatic events in an environment that can be entirely foreign and intimidating for them.[15]

The following year, one of the accused claimed the Prosecution was using its proofing practice "to calculatedly [mould] its case by continuing to seek new evidence from its witnesses in rebuttal of evidence successfully challenged by the Defence."[16] The trial chamber quickly dismissed the claim, noting that any attack on the integrity of the process would need to be substantiated by a *prima*

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proofing has developed and has been accepted in various cases"); *see also Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, Decision on Defence Motions to Prohibit Witness Proofing: Rule 73 of the Rules of Procedure and Evidence, Case No. ICTR-98-44-T, 15 December 2006 ("*Karemera* Trial Decision"), at 5 (describing that proofing has been recognized in the ICTR's jurisprudence in relation to how the content of an interview with a witness is to be disclosed, and noting the Prosecution's practice of disclosing 'will-say' or 'reconfirmation statements prior the testimony of a witness) (citing trial chamber decisions in *Proecutor v. Bagosora et al*., Decision on Admissibility of Witness DBQ, Case No. ICTR-98-41-T, 18 November 2003; *Prosecutor v. Simba*, Decision on the Admissibility of Evidence of Witness KDD, Case No. ICTR-01-76-T, 1 November 2004, at para. 9; and *Prosecutor v. Rwamakuba*, Decision on the Defence Motion Regarding Will-Say Statements, Case No. ICTR-98-44C-T, 14 July 2005, at para. 4).

[12] *Sylvestre Gacumbitsi v. The Prosecutor*, Judgement, Case No. ICTR-2001-64-A, 7 July 2006, at para. 73.

[13] *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T ("*Sesay*" or "the *Sesay* Case").

[14] *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141 ("First *Sesay* Trial Decision"), 26 October 2005.

[15] First *Sesay* Trial Decision, para. 33.

[16] *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Decision on Defence Motion to Request the Trial Chamber to Rule that the Prosecution Moulding of Evidence is Impermissible ("Second *Sesay* Trial Decision"), 1 August 2006, para. 10.

facie showing "of foul play, either deliberate or negligent" by the Prosecution.[17] Leave to file an appeal against this dismissal was denied.[18]

2. The *Lubanga* Pre-Trial Decision

On 8 November 2006, Pre-Trial Chamber I of the ICC issued that Court's first decision on proofing in the case of *Prosecutor v. Lubanga*.[19] After finding that that the expression "proofing of a witness" was not found in the Statute, Rules of Procedure and Evidence, or Regulations of the Court,[20] the Pre-Trial Chamber differentiated proofing into two broad components. The first component concerned witness preparation for giving oral testimony and witness familiarisation with the proceedings.[21] The second component concerned witness proofing in the sense of the prosecution 1) allowing a witness to read his or her statement(s) and refresh his or her memory in respect of the evidence to be given at trial, 2) relying on the statement(s) to put questions to the witness which are intended to be asked at trial and in the order they are to be asked, and 3) inquiring of the witness about possible additional information of an inculpatory or exculpatory nature.[22] The 'familiarisation' component was found to be admissible if conducted by the Victims and Witnesses Unit rather than the prosecution, but the 'evidentiary review' component was found inadmissible and prohibited.

In concluding that proofing was not appropriate, the Pre-Trial Chamber reasoned that the only relevant case advanced by the Prosecution to support the practice was the *Limaj* case; a case which—in its view—actually disproved the Prosecution's submission that proofing was a "widely accepted practice in international criminal law".[23] The Pre-Trial Chamber rejected the Prosecution's proposition that the nature of the crimes tried at the ICC or the fact that they had occurred long ago supported the practice of proofing, noting that "national jurisdictions, such as *inter alia* Spain, Belgium or Germany" had not decided to adopt the practice of proofing when implementing the Rome Statute in national legislation.[24]

Recalling Article 21(1)(c) of the Rome Statute, the Pre-Trial Chamber further suggested—without finding—that the practice of proofing might not be consistent with the national laws of the Democratic Republic of the Congo.[25] The Chamber (without reference) observed that proofing would be "either unethical or unlawful in jurisdictions as different as Brazil, Spain, France, Belgium, German, Scotland, Ghana, England and Wales and Austrialia, to give just a few examples."[26] Giving particular attention to England and Wales, the Chamber viewed that the Code of Conduct of the Bar Council of England and Wales specifically prohibited proofing.[27]

Based on the foregoing, the Pre-Trial Chamber found that the practice of proofing 'is not embraced by any general principle of law that can be derived from the national laws of the legal systems of the world'. Thus, it concluded that 'if any general principle of law were to be derived from the

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[17] Second *Sesay* Trial Decision, at para. 17.
[18] *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Decision on Application for Leave to Appeal the Decision on Defence Motion for a Ruling that the Prosecution Moulding of Evidence is Impermissible, 2 February 2007, at p. 6.
[19] *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Pre-Trial Chamber I, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006 ("*Lubanga* Pre-Trial Decision").
[20] Ibid., at para. 11.
[21] Ibid., at para. 15.
[22] Ibid., at para. 17.
[23] Ibid., at paras. 31–33.
[24] Ibid., at para. 34 and fn. 35.
[25] Ibid., at para. 35.
[26] Ibid., at para. 37.
[27] Ibid., at paras. 38, 39.

national laws of the legal systems of the world on this particular matter, it would be the duty of the Prosecution to refrain from undertaking the practice of witness proofing […]'.[28]

3. The Rejection of the *Lubanga* Pre-Trial Decision by the *ad hoc* Tribunals

3.1. The ICTY: The *Milutinović* Case

It only took one week for the *Lubanga* decision to be wielded offensively at the ICTY.[29] Relying exclusively on the *Lubanga* decision, one of the accused in *Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević and Lukić*,[30] moved the trial chamber for an immediate order prohibiting the Prosecution from proofing its witnesses.[31]

The Trial Chamber pointed out several procedural differences between the decision-making processes of the two courts. Moreover, it considered that the *Lubanga* Pre-Trial Chamber addressed the practice of proofing in the context of a single witness set to testify at the pre-trial confirmation hearing of the first accused before the Court, whereas the *Milutinović* Chamber had to consider the practice in the context of numerous witnesses who had or would testify in an actual trial.[32]

Contrary to the *Lubanga* Pre-Trial Chamber, the *Milutinović* Trial Chamber found that proofing is not inconsistent with the prohibition in Article 705 of the Code of Conduct of the Bar Council of England and Wales against 'rehears[ing,] practis[ing,] or coach[ing] a witness in relation to his evidence', noting:

> [d]iscussions 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 discussions are a genuine attempt to clarify a witness'[s] 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".[33]

Finally, the Chamber concluded that proofing did not prejudice the rights of the accused, and defence allegations that the prosecution had or would violate the "clear standards of professional conduct which apply…when proofing witnesses" were dismissed.[34]

3.2 The ICTR: The *Karemera* Case

Within five days of issuance, the *Lubanga* decision was used offensively at the ICTR.[35] In *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, two of the accused cited the trial chamber to the *Lubanga* decision and asked for an immediate order prohibiting the Prosecution from any further witness proofing.

The *Karemera* Trial Chamber carefully considered the *Lubanga* Pre-Trial Decision, the practice of proofing at the ICTR and the ICTY, and noted the *Milutinović* Trial Decision, filed just three days before. Rejecting *Lubanga*, the chamber noted that proofing "not only poses no undue prejudice, but is also a useful and permissible practice."[36] The chamber acknowledged that some witness

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[28] Ibid., at para. 42.
[29] *Prosecutor v. Milutinović, et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion to Prohibit Witness Proofing, 12 December 2006 ("*Milutinović* Trial Decision"), at p. 2. The defence motion was filed on 15 November 2006.
[30] *Prosecutor v. Milutinović,et al.,* Case No. IT-05-87-T ("*Milutinović*" or "the *Milutinović* Case").
[31] *Milutinović* Trial Decision, at para. 1.
[32] Ibid., at paras. 11–15.
[33] Ibid., at para. 16.
[34] Ibid., at paras. 19, 22.
[35] The motion was filed on 13 November 2006. *Karemera* Trial Decision, at para. 1, fn. 1.
[36] Ibid., at para. 10.

statements may not be complete and that it is common for witnesses to subsequently recall and add details to those statements. Moreover, this practice could not be considered "as permission to train, coach or tamper [with] a witness before he or she gives evidence."[37]

The chamber then considered, *inter alia*, the *Limaj* Trial Decision and the *Milutinović* Trial Decision, and held

> Provided that it does not amount to the manipulation of a witness' 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' testimony. […] [T]he Chamber notes that there are clear standards of professional conduct and ethics which apply to Prosecuting Counsel when conducting interviews. According to the Prosecutor's Regulations No. 2, the members of the Office of the Prosecutor can be regarded as permanent officers of the court who are "to serve and protect the public interest, including the interests of the international community, victims and witnesses, and to respect the fundamental rights of the suspects and accused" and 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."[38]

The chamber noted that several witnesses had been cross-examined specifically on the proofing process and their evidence provided no support for the Defence allegations that the Prosecution's behaviour was inappropriate. The *Karemera* Trial Chamber rejected *Lubanga in toto*, both in theory and practice.

3.2.1 The ICTR Appeals Chamber seals the Lubanga Pre-Trial Decision's fate

Whatever promise of influence the *Lubanga* Pre-Trial Decision might once have had on the practices or procedures of the ICTR was forever dashed when the ICTR Appeals Chamber subsequently affirmed the *Karemera* Trial Decision. The crux of the accused's appeal was characterised by the Appeals Chamber as "the supposition, based his reading of the *Lubanga* decision, that witness proofing is considered unethical and unlawful in the ICC and in most major legal systems in the world."[39]

Dissecting and rejecting each of the accused's challenges, the Appeals Chamber concluded by noting that careful cross-examination was the key for parties to address the possibility that proofing sessions may have improperly influenced a witness's testimony. Moreover, the Appeals Chamber issued a stern warning, reminding all parties that "intentionally seeking to interfere with a witness's testimony is prohibited, and if evidence of this comes to light, a Trial Chamber can take appropriate action by initiating contempt proceedings under Rule 77 of the Rules and by excluding the evidence pursuant to Rule 95 of the Rules."[40]

4. The *Lubanga* Trial Decision

[37] *Karemera* Trial Decision, at para. 12.
[38] Ibid., at paras. 15–16 (citing ICTR Prosecutor's Regulations No. 2 (1999), Standard of Professional Conduct Prosecution Counsel).
[39] *Karemera* Appeal Decision, at para. 6.
[40] Ibid., at para. 13.

On 12 September 2007, the Prosecution requested the Trial Chamber in *Lubanga* to reconsider the Pre-Trial Chamber's decision prohibiting proofing.[41] Following a hearing, the Trial Chamber prohibited any meetings between the parties and witnesses outside of court beyond that which occurs during the process of witness familiarisation undertaken by the Victim and Witnesses Unit to '[provide] witnesses with an opportunity to acquaint themselves with the people who may examine them in court'.[42]

Similar to the Pre-Trial Chamber, the Trial Chamber separated proofing into two components: 1) a review of the process undertaken to 'familiarise witnesses with courtroom procedure' and 2) a review of the process of "preparing a witness in a substantive way for their testimony at trial".[43] With respect to 'witness familiarisation', the Trial Chamber agreed with the Pre-Trial Chamber that certain functions were exclusively within the purview of the Victims and Witnesses Unit.[44] Allowance was made, however, for the Victims and Witnesses Unit to 'work in consultation with the party calling the witness, in order to undertake the practice of witness familiarisation in the most appropriate way'.[45]

The Trial Chamber rejected the Prosecution's argument that proofing was provided for in the Rome Statute. It further rejected the contention that a general principle of law allowing for the practice could be derived from national legal systems worldwide. Disagreeing with the Pre-Trial Chamber, the Trial Chamber noted that the jurisprudence of the ICTY and ICTR establishes proofing 'in the sense advocated by the prosecution in the present case' as being in common use at these Tribunals, but that such precedent was non-binding on the Court.[46] Additionally, the Trial Chamber stated that the Rome Statute 'through important advances … moves away from the procedural regime of the ad hoc tribunals, introducing additional and novel elements to aid the process of establishing the truth'.[47] The Trial Chamber concluded its analysis of proofing by opining—without elaboration—that preparation of witness testimony prior to trial might diminish the "spontaneous nature of testimony" which could be of 'paramount importance to the Court's ability to find the truth'.[48]

5. The impact of *Lubanga*

5.1. The ICC

As a preliminary matter, the *Lubanga* decisions are probably best characterised by reference to what they are not. The decision of any given chamber is not binding precedent in any other cases before the ICC. Certainly other chambers might consider the decision as a matter of courtesy.

5.2. The *ad hoc* tribunals

Measured solely from an outcome-determinative perspective, the impact of the *Lubanga* decisions on the law and practice of the *ad hoc* international criminal tribunals might legitimately be

[41] *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Trial Chamber I, Prosecution's submissions regarding the subjects that require early determination: procedures to be adopted for instructing expert witnesses, witness familiarization and witness proofing, 12 September 2007.
[42] *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30, November 2007, ICC-01/04-01/06-1049 ("*Lubanga* Trial Decision"), at para. 53(f).
[43] Ibid., at para. 28.
[44] Ibid., at para. 29.
[45] Ibid., at para. 34.
[46] Ibid., at paras. 43–44.
[47] Ibid., at para. 45.
[48] Ibid., at para. 52.

characterised as negligible. Each tribunal to consider the *Lubanga* Pre-Trial Decision firmly rejected its approach. Prosecutors at the ICTY, ICTR and SCSL continue to proof witnesses, as they have for many years, in a manner directly at odds with what the ICC Prosecutor—at least in the *Lubanga* case—is permitted. Such a limiting perspective, however, fails to capture the true impact of the *Lubanga* Pre-Trial Decision.

Consider how remarkable it is that a longstanding practice at the ICTY—a practice not only well-settled in tradition but also bearing a judicial seal of approval in the *Limaj* Trial Chamber Decision—was challenged solely on the basis of the *Lubanga* Decision. While it is certainly true that trial chambers of the ICTY are not bound to follow each other, either in reasoning or result, there has traditionally been remarkable harmony between them on procedural matters. Indeed, it would be unthinkable for an ICTY trial chamber not to at least consider what another ICTY trial chamber has said when facing a similar situation. Thus, although the *Limaj* Trial Decision could not bind any other chamber at the ICTY, the issue was seemingly settled.

Although they share an appeals chamber as well as virtually identical Statutes and Rules of Procedure and Evidence, the ICTY and the ICTR are separate institutions that have at times taken quite divergent approaches to both substantive and procedural law. And although no formal hierarchy exists, the relative paucity of formal reliance on decisions and judgements of the 'sister' tribunal makes it arguable that each views trial chamber decisions of the other as somewhat less authoritative than chambers within the same tribunal. Indeed, it remains an open question whether ICTY and ICTR trial chambers are bound by appeals chamber decisions and judgements of the other tribunal, although in practice, it would seem that much deference is paid.

Even following the *Lubanga* Trial Chamber Decision, there is no reason to suppose the core practice of witness proofing at the *ad hoc* tribunals will change. The *Karemera* Appeal Decision forecloses any such possibility for the ICTR, and, combined with the ICTY trial chamber decisions in *Limaj* and *Milutinović* would seem to make any such change at the ICTY equally as doubtful. As to the SCSL, there will be no change in Freetown or even, ironically, the premises of the ICC in The Hague where Charles Taylor is being tried. It appears that the future of witness proofing at the ICTY, the ICTR and the SCSL—in the same manner in which it has traditionally been done—is in no danger of being replaced with a *Lubanga* style process before the completion of their mandates.

6. Widening divergence: where from here?

That the practice of witness proofing at the *ad hoc* tribunals is unlikely to ever resemble the approach adopted in *Lubanga* tells us little on the question of what witness proofing should look like as international criminal procedure evolves. Nor does it tell us whether the current divergence is problematic. Yet the competing approaches diverge so greatly, and the suspicion of the "adversarial" method of proofing is so clearly voiced in the *Lubanga* decisions that several questions must be asked. What, exactly, is the risk mitigated by prohibiting a practice accepted—even encouraged—in the *ad hoc* tribunals? Are there comparative advantages to proofing? Are the risks of proofing, as voiced by the *Lubanga* Chambers, reasonable? If so, is the adopted approach the best way forward?

Answering these questions is beyond the scope of this presentation, the sole purpose of which has been to raise the questions. However, a few observations seem warranted. Categorically prohibiting proofing as in *Lubanga* seemingly rejects at least four principles that underlie the rationale for proofing as endorsed by the judges of the ICTY, ICTR, and SCSL. First, that cross-examination is an effective counterweight to any risk that proofing may improperly influence a witness's evidence. Second, that the professional judges at the international tribunals possess the tools to govern proofing appropriately and the discernment to weigh the evidence accordingly. Third, that the

ethical codes governing the conduct of counsel specifically prohibit practices which may improperly influence a witness's evidence. Finally, that the contempt power effectively endows judges with the authority to punish those who would improperly influence witness evidence. Whether these measures provide an acceptable margin of safety against the perceived 'risks' of proofing may depend greatly upon one's point of view as determined largely by cultural or systemic legal background. My purpose, however, is not to characterise the *Lubanga* decisions as an 'adversarial versus inquisitorial' struggle. As one author has so eloquently stated:

> While these tensions [between common law and civil law principles] were instrumental in the development of important aspects of international criminal law, it is now time to abandon the preoccupation of international criminal courts and tribunals with this dichotomy and embrace the newly created system of international criminal law as a jurisdiction in its own right.[49]

If the ICC's governing law unequivocally dictates the result reached in the *Lubanga* Decisions there is little practical value to analysing the merits of the competing approaches to proofing. It is far from clear, however, that the result reached in either decision was inevitable. As a policy matter, if proofing is currently prohibited by the ICC's governing law, it might well be that the comparative advantages of proofing would legitimise serious state contemplation of legislative reform. Thus, what is needed is reasoned analysis and a debate that describes the best path to the future, telling us whether the approach adopted in *Lubanga* is progress, neutral divergence, or a problematic rejection of a promising procedural modality.

[49] G. Boas, The Milosevic Trial: Lessons for the Conduct of Complex International Criminal Proceedings (2007), p. 9.