Legal Aspects of International Organization

VOLUME 48

The Emerging Practice of the International Criminal Court

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MARTINUS NIJHOFF PUBLISHERS

LEIDEN • BOSTON

2009

Chapter 31 "Witness proofing" before the ICC: Neither legally admissible nor necessary

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1. The object of the contention

In their jurisprudence, Pre-Trial Chamber (PTC) I and Trial Chamber (TC) I distinguish between "familiarisation" and "proofing" of witnesses.[1] The distinction goes back to a recent English Court of Appeal decision where it was described as "dramatic".[2] The essence of familiarisation is to make the witness generally familiar with the court's infrastructure and procedures in order to prevent him or her being totally taken by surprise or even re-victimised. Thus, the underlying idea of familiarisation is generally to prepare the witness to enable her to give oral evidence at trial in a satisfactory manner.[3] For this purpose the Court's Victims and Witnesses Unit ("VWU") has been set up and its functions can be summarized, based on Article. 57 (3) (c), 68 (1) ICC Statute, Rules 16 (2), 17 (2) (b) and 87, 88 of the Rules of Procedure and Evidence ("RPE"), as follows:[4]

- Assisting witnesses when they are called to testify before the Court;
- Taking gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings;
- Informing witnesses of their rights under the Statute and the Rules;

* I thank my research assistant Szymon Swiderski for his help in the recollection of the material. I also thank my colleagues Profs. Drs. Richard Vogler (Sussex, UK), Steve Thaman (St. Louis, U.S.A.) and Hector Olásolo (The Hague) for useful comments.

1 Pre-Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the practices of witness familiarisation and witness proofing, 8 November 2006, ICC-01/04-01/06, para. 18 et seq., 28 et seq.; Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision regarding the practices used to prepare and familiarise witnesses for giving testimony at trial, 30 November 2007, ICC-01/04-01/06, para. 28, 53, 57.

2 *R. v. Momodou*, [2005] EWCA Crim 177 (England & Wales), para. 61; see more detailed *infra* fn. 54 et seq. and main text. Pre-Trial Chamber I, *supra* note 1, refers to this decision in para. 19, 39.

3 Pre-Trial Chamber I, *supra* note 1, para. 27.

4 Cf. Pre-Trial Chamber I, *supra* note 1, para. 22; conc. Trial Chamber I, *supra* note 1, para. 29.

Carsten Stahn and Göran Sluiter (eds.), The Emerging Practice of the International Criminal Court.
 ISBN 978 90 04 16655 4. pp. 599-614.

- Advising witnesses where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony;
- Assisting witnesses in obtaining medical, psychological and other appropriate assistance; and
- Providing witnesses with adequate protective and security measures and formulating long-term and short-term plans for their protection.

After initial confusion[5] it is now clear that there is no disagreement between OTP and Chambers (PTC I and TC I) as to this practice. With its recent submission the OTP, reacting to the PTC I's decision of 8 November 2006, explicitly concurred with the PTC's characterisation of familiarisation and the respective competence of the VWU.[6] In the result, one can say that familiarisation is not only allowed, but even required to a certain extent to comply with the Statute's obligations with regard to the protection of victims.[7]

As to the definition of proofing, there also seems to be agreement now. The OTP – following the case law of the International Criminal Tribunal for the Former Yugoslavia ("ICTY")[8] – understands witness proofing as the "practice whereby a meeting is held between a party to the proceedings and a witness, before the witness is due to testify in Court, the purpose of which is to re-examine the witness's evidence to enable more accurate, complete and efficient testimony."[9] More generally it is said that witness proofing serves to "discuss issues related to that witness's anticipated evidence."[10] With this definition the OTP distinguishes proofing from familiarisation in that the former fundamentally focuses on the concrete evidence to be presented at trial. In fact, the OTP abandons its former, much broader definition whereby it did

5 See for the initial submission of the OTP the summary in Pre-Trial Chamber I, *supra* note 1, para. 11 et seq.

6 Prosecution submissions regarding the subjects that require early determination: procedures to be adopted for instructing expert witnesses, witness familiarization and witness proofing, ICC-01/04-01/06-952, 12 September 2007, para. 14.

7 See Pre-Trial Chamber I, *supra* note 1, para. 20: "there are several provisions ... in order to assist the witness ... so as to prevent the witness from finding himself or herself in a disadvantageous position, or from being taken by surprise as a result of his or her ignorance ..."; and the Trial Chamber allows "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". See Trial Chamber I, *supra* note 1, para. 34. See also the recent decision of Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision regarding the Protocol on the practices to be used to prepare witnesses for trial, 23 May 2008, ICC-01/04-01/06-1351, para. 38 et seq. where the Chamber concretely determines the scope of familiarisation, in particular whether the witness may receive a copy of his/her earlier statement made to an investigator.

8 See the definition in *Prosecutor v. Haradinaj* et al., Decision on Defence requests for audio-recording of prosecution witness proofing sessions, 23 May 2007 (IT-04-84-T), para. 8 which, however, includes preparing and familiarizing the witness.

9 See Prosecution submissions, *supra* note 6, para. 15.

10 See Prosecution submissions, *supra* note 6, para. 9.

not distinguish between familiarisation and proofing.[11] In the result, the OTP's definition concurs with TC I, according to which the gist of proofing lies in "preparing a witness in a substantive way for ... testimony at trial".[12] Thus, in sum, there is now a general agreement that witness proofing is substantive preparation with a view to giving testimony at trial.

2. *The remaining contention with regard to "witness proofing": Legality and necessity*

The remaining contention between the OTP and the Chambers refers to the proofing of lay (common) witnesses as opposed to professional (expert) witnesses. For the latter, there is general agreement between the parties (OTP and Defence) and the TC that they may be instructed jointly (by the parties) or, if this is not possible, separately (by each each party respectively).[13] As to ordinary witnesses the disagreement is twofold.

First, there is disagreement as to the legal basis of proofing in the *lex lata*: Does one exist in the ICC Statute or can proofing be considered a general principle of law and be as such part of the applicable law according to Article 21 of the Statute?

Second, from a *de lege ferenda* perspective, one may argue about the practical necessity of this practice.

2.1. Lex Lata: *Legal basis of witness proofing*

The requirement of a legal basis for proofing is uncontroversial. Even the OTP does recognize it trying to construe if directly from the Statute (see infra). In substance, the requirement follows from the mixed adversarial-inquisitorial structure of the ICC procedure[14] which does not allow for a partisan witness concept in the sense of witnesses of the prosecution and the Defence. We will return later to this structural issue.

11 See the summary of the OTP information in Pre-Trial Chamber I, *supra* note 1, para. 11 et seq.

12 Trial Chamber I, *supra* note 1, para. 28.

13 See Prosecution submissions, *supra* note 6, para. 2 et seq. and Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the procedures to be adopted for instructing expert witnesses, 10 December 2007, ICC-01/04-01/06 where the Chamber refers (para. 12), *inter alia*, to Regulation 44 (2) and (4) of the Court (adopted by the Judges of the Court on 26 May 2004, Doc. ICC-BD/01-01-04) according to which the Chamber "may direct" the instruction of expert witnesses or instruct them proprio motu; further, it refers to Regulation 54 (m) providing for an order by a Trial Chamber regarding the "joint or separate instruction by the participants of expert witnesses". – On the situation in the USA see J. S. Applegate, 'Witness preparation', (1989) 68 *Texas Law Review* 277, at 295 et seq., 348.

14 See infra note 40 with main text.

2.1.1. No explicit provision in the Statute or complementary instruments

Neither the Statute nor any of the additional instruments contain an explicit provision on the evidence-related preparation of common witnesses. The most explicit rules on the question of witness *instruction* are Regulations 44 (2) and 54 (m) of the Regulations of the Court but they only refer to *expert* witnesses.[15] Rules 16 (2) and 17 (2), already mentioned above in relation to the functions of the VWU, do not refer to evidence related instruction but only to general assistance in the sense of familiarisation.[16]

Despite this absence of any rule, the OTP construes an *e contrario* argument based on a joint reading of Article 70 (1) (c) and 54 (3)(b) of the Statute.[17] For the OTP the fact that, on the one hand, it has the power to request the presence and question witnesses according to Article 54 (3) (b) and, on the other, witness proofing is not explicitly criminalized in Article 70 (1) (c) leads to the conclusion

> "that an informed reading of the Statute actually supports the proposition that witness proofing, which does not run afoul of Article 70, ought, absent exceptional circumstances, to be permitted."[18]

Yet, this view is not convincing. Article 54 (3) precisely circumscribes the Prosecutor's authority with respect to certain investigatory measures, including its power "to request the presence of and question" witnesses (subpara. (b)). This power leaves no room for additional powers not contained therein; in particular, it cannot be extended to a substantially different measure which may change the underlying concept of witness of the Statue converting her from a witness of the court to a witness of the parties (in this case of the Prosecution). Indeed, PTC I expressed the view that

> "...the attribution of the practice of witness familiarisation to the VWU is consistent with the principle that witnesses to a crime are the property neither of the Prosecution nor of the Defence and that they should therefore not be considered as witnesses of either party, but as *witnesses of the Court*."[19]

In other words, the concept of witness as a witness of the Court or, as some may say, of the truth, prohibits not only the evidence related preparation of this witness but even his/her much more general familiarisation by one party. While one may take a more liberal view with regard to familiarisation – given that it does not entail a direct influence over the witness as to his/her testimony – the opposite is the case with regard to proofing since it implies the conversion of a potentially neutral witness into a witness of one party. We will come back to this fundamental conceptual issue but at this juncture it suffices to conclude from the mere wording of Article 54 (3) (b) that proofing is not covered by this provision.[20]

The absence of an explicit criminalization of proofing in Article 70 (1) (c) does not change this legal situation. First, it is arguable that proofing may be covered by subpara. (c) if it is practised in an abusive way eventually leading to "corruptly influencing a witness" or "tampering with" the evidence provided by him/her. Secondly, the mere absence of a certain practice in a criminal prohibition does not warrant the conclusion that this practice is, *e contrario*, permitted; in other words, there is no legal rule, as the OTP seems to suggest, that allows for the construction of a permission by reason of the absence of an explicit (criminal) prohibition.[21] On the contrary, the thin line between punishability and non-punishability of proofing calls for an explicit permissive norm of this practice.

Thus, in sum, each of the OTP's arguments is flawed on its own merits and their joint reading reinforces this result.

2.1.2. A general principle of law?

Given the absence of an explicit provision in the relevant instruments, including international or supranational rules (Article 21 (1) (b)), the question arises whether a general principle of law within the meaning of Article 21 (1) (c) with regard to witness proofing exists. Interestingly, the importance of general principles with regard to evidence is acknowledged by Rule 63 (5) of the RPE according to which national evidence law must only be applied in accordance with Article 21. From this it follows that the general discretion of a Chamber with regard to the relevance or admissibility of evidence (Rule 63 (2) in conjunction with Article 64 (9) (a) ICC Statute) is not absolute but limited by general principles of law within the meaning of Art. 21. As to witness proofing this means that the practice can only be accepted from an evidentiary perspective if a general principle to that effect can be established. Such a principle may be inferred from the national law of the most important legal systems in the sense of Article 21 (1) (c). Before examining this law, it may be helpful to look briefly at the practice of the *ad hoc* tribunals since it may contribute to such a principle.

2.1.2.1. Practice of the ad hoc tribunals

Contrary to PTC I and TC I, the case law of the ICTY and ICTR considers witness proofing as an important and useful practice "accepted since the inception of this

15 See *supra* note 13.

16 See in particular Rule 17 (2) (b): "(i) Advising them where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony; (ii) Assisting them when they are called to testify before the Court".

17 See Prosecution submissions, *supra* note 6, para. 28 et seq.

18 Prosecution submissions, *supra* note 6, para. 30.

19 See Pre-Trial Chamber I, *supra* note 1, para. 26; conc. Trial Chamber I, *supra* note 1, para. 33-34.

20 For the same result, see Trial Chamber I, *supra* note 1, para. 36.

21 For the same result, see Trial Chamber I, ibid.

Tribunal";[22] the Special Court for Sierra Leone takes, in principle, the same view.[23] The most important legal difference with regard to the ICC consists of the fact that the *ad hoc* Tribunals do not dispose of a general *renvoi* to the law outside their Statutes and Rules as provided for by Article 21 ICC Statute. In fact, given the absence of any specific rule on witness proofing in their Statutes and Rules, the case law applies Rule 89 (B) – the parallel rule to the just mentioned Rule 63 (2) RPE ICC – according to which a Chamber has discretion to make use of "rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."[24] Despite the reference to "general principles" in this provision and the interpretation of Rule 63 RPE ICC in this regard, explained above, the ICTY and ICTR Chambers, using their broad discretion, never gave much weight to national law or practice;[25] instead they focused on the fairness of the proofing practice and held that it enhances the fairness and expeditiousness of proceedings "provided that these discussions are a genuine attempt to clarify a witness' evidence".[26] Further, they stated that this practice does not amount to rehearsing, practising or coaching a witness[27] and does not *per se* prejudice the rights of the accused.[28] Clearly, the Tribunals do not turn a blind eye to the problem of manipulation of witnesses – in fact, this very danger was repeatedly stressed by Defence

22 ICTY, *Prosecutor v. Limaj et al.*, Decision on the defence motion on Prosecution practice of 'proofing witnesses', 10 December 2004, p. 2; in a similar vein *Prosecutor v. Milutinović et al.*, Decision on Ojdanić motion to prohibit witness proofing, 12 December 2006, IT-05-87-T, para. 15 ("on a daily basis for the last thirteen years"); ICTR, *Prosecutor v. Karemera et al.*, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007, ICTR-98-44-AR73.8, para. 9 et seq. For this practice see also R. Karemaker et al., 'Witness proofing in international criminal tribunals: a critical analysis of widening procedural divergence', (2008) 21 *Leiden Journal of International Law* 683.

23 Special Court for Sierra Leone, *Prosecutor v. Sesay* et al., Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005 (SCSL-04-15-T), para. 33 referring to *Prosecutor v. Limaj* et al., *supra* note 22, and stating that proofing is a "legitimate practice that serves the interests of justice".

24 *Prosecutor v. Karemera* et al., *supra* note 22, para. 8.

25 In fact, apart from the Limaj Trial Chamber's reference to the practice in "jurisdictions where there is an adversary procedure" (*Prosecutor v. Limaj* et al., Decision on defence motion on prosecution practice of "proofing witnesses", 10 December 2004, [IT-03-66-T], p. 2; conc. *Prosecutor v. Karemera et al.*, Decision on defence motions to prohibit witness proofing, 15 December 2006 [ICTR-98-44-T], para. 13) national practice has not been taken into account. See also *Prosecutor v. Milutinović* et al., *supra* note 22, para. 13 stressing the difference between the ICTY and the ICC with regard to the recourse to national law.

26 *Prosecutor v. Milutinović* et al., *supra* note 22, para. 16; conc. *Prosecutor v. Karemera* et al., supra note 5, para. 14.

27 *Prosecutor v. Milutinović* et al., *supra* note 22, para. 16.

28 *Prosecutor v. Milutinović* et al., *supra* note 22, para. 22; conc. *Prosecutor v. Karemera* et al., *supra* note 25, para. 14.

submissions[29] –, and the possible distortion of truth by the proofing practice,[30] but they prefer to assume the risks instead of renouncing on this practice completely. Thus, in fact, the Tribunal's admission of this practice rests on the assumption that its advantages outweigh its risks.

2.1.2.2. National law, in particular England and Wales and the United States

Be that as it may, as to the legal basis of proofing for the ICC, its qualification as a general principle within the meaning of Article 21 (1) (c) would require that it were recognized in the major "legal systems of the world" (Article 21 (1) (c)), i.e., at least in the Anglo-American and Romano-Germanic legal systems.[31] This is, however, not the case. In fact, the ICTY and the ICC-OTP themselves concede that this practice is used only in "jurisdictions which are principally adversarial in nature";[32] the OTP enumerates explicitly five countries (Australia, Canada, England and Wales and the United States) where this practice is applied.[33] While a main feature of an adversarial procedure is, *inter alia*, the domination of proceedings, in particular the production and presentation of evidence, by the parties while the judge remains passive,[34] in the so called inquisitorial systems, rooted in the Romano-Germanic tradition of an *ex officio* and judge-led procedure,[35] the production and presentation of evidence is mainly in the hands of the judge. Thus, in these systems witness proofing is, as a matter of principle, inadmissible since witnesses do not belong to one party (Prosecution or Defence) but are witnesses of the Court or the truth.[36] In addition, witnesses are not examined in the same way as in the adversarial trial, in particular, cross-examina-

29 See, e.g., *Proscutor v. Karemera* et al., *supra* note 25, para. 21-2.

30 See e.g. *Prosecutor v. Karemera* et al., *supra* note 25, para. 12, 15; *Prosecutor v. Karemera* et al., *supra* note 22, para 9, 12.

31 I prefer this terminology over "common law" and "civil law" since it better expresses the roots of these two traditions, better accounts for the modern "common law" (being mainly in the ex-colonies of the English motherland statute law) and avoids the misunderstanding that "civil law" refers only to this section of the law (namely the law regulated in the Civil Code etc. instead of the whole tradition).

32 Prosecution submissions, *supra* note 6, para. 24; see also *Prosecutor v. Limaj* et al., as quoted supra note 25; conc. *Prosecutor v. Karemera* et al., *supra* note 25, para. 13.

33 Prosecution submissions, *supra* note 6, para. 24.

34 Cf. P. Roberts & A. Zuckerman, *Criminal Evidence* (2004), at pp. 47-48. Interestingly, this passivity of the judge is based on the belief that it is a guarantee for a fair trial. See R.J. Delise & D. Stuart, *Learning Canadian Criminal Procedure*, 7th ed. (2003), at p. 523.

35 For terminology and structure see K. Ambos, 'International criminal procedure: adversarial, inquisitorial or mixed?' (2003) 3 *International Criminal Law Review*, at 2 et seq.; see for a innovative comparative analysis of both the "inquisitorial" and "adversarial" traditions R. Vogler, *A world wide view of criminal justice* (2005), at 1 et seq.

36 In contrast, it may be argued that witness familiarisation in the above sense (*supra* note 3 and main text) cannot be objected to even in these systems since it is a useful and necessary practice to assist witnesses to cope with their function in open court adequately.

tion, highly relevant to verify the authenticity of a witness statement,[37] is not a common practice.[38] It comes, therefore, as no surprise that the OTP does not refer to "any citations from the Romano-Germanic legal system."[39] In any case, the structural difference of the inquisitorial and adversarial systems with regard to the production and presentation of evidence shows the underlying "system dimension" of proofing. If one conceives the ICC procedure, as does this author,[40] as a mixed procedure, with Prosecution and Defence committed to the truth but not to their respective cases (see Article 54 (1) (a)) and, as understood by PTC I,[41] with witnesses of the truth instead of one party, witness preparation in the sense of proofing by one party is a structural contradiction; the only possible preparation would be a joint one, as recognized by TC I for expert witnesses,[42] or a preparation by an independent organ like the VWU.

Even if one identified a mainly adversarial tendency in the ICC procedure, a general principle in the sense of Article 21 (1) (c) would still be required and such a principle cannot be established. Apart from the absence of this practice in the Romano-Germanic systems even in the so-called adversarial systems this practice is by no means uniform.[43] I shall demonstrate this with regard to the most important ones, namely England and Wales and the United States. The situation in England and Wales is characterized by the formal separation of pre-trial and trial functions between solicitors and barristers.[44] As the latter are, as specialised litigation lawyers, in charge of the conduct of a case only during the trial phase, they are not allowed to interview witnesses during the pre-trial phase.[45] Interviewing includes discussing

37 Cf. on the importance of preparation for cross-examination L. Ellison, 'Witness preparation and the prosecution of rape', (2007) 27 *Legal Studies* 171, at 175 et seq. with regard to rape cases and *infra* note 79.

38 Take for example the German case where § 239 of the StPO provides for a form of cross-examination with regard to witnesses called by the prosecution or the Defence but which, in practice, is never applied.

39 Critically Trial Chamber I, *supra* note 1, para. 41.

40 Cf. Ambos, The structure of international criminal procedure: Adversarial, inquisitorial or mixed?, in M. Bohlander (ed.), *International criminal justice: a critical analysis of institutions and procedures* (2007), at 431 and passim with further references.

41 See *supra* note 19.

42 See *supra* note 13.

43 Trial Chamber I, *supra* note 1, para. 39-42; Pre-Trial Chamber I, *supra* note 1, para. 12: "number of expression", "greatly differs from jurisdiction to jurisdiction".

44 F. Lyall, *An Introduction to British Law*, 2nd (2002), p. 42; A. Sanders, in P. Tak, *Task and Powers of the Prosecution Services in the EU Member States*, Vol. 1 (2005), p. 121; R.C. Wydick, 'The ethics of witness coaching', (1995) 17 *Cardozo Law Review* 1, at 5 et seq.

45 The relevant rules are paras. 704 to 708 (notably para. 705) of the Code of Conduct (Bar Council, Bar Standards Board, 8th ed. October 2004, <www.barstandardsboard.rroom.net/standardsandguidance/codeofconduct>. They have been put into more concrete form by the Code's section 3 Written Standards for the Conduct of Professional Work <www.barstandardsboard.rroom.net/standardsandguidance/codeofconduct/writtenstandardsfortheconductofprofessionalwork/> and the Guidance on Witness Preparation, prepared in October 2005 in light of the Momodou decision (*supra* note 2) <www.barstandardsboard.rroom.net/standardsandguidance/codeguidance/witnesspreparationmomodouandlimani/>.

with any witness the substance of his or her evidence or the evidence of other witnesses.[46] A barrister may contact a witness only for reasons unrelated to the specific evidence to be given in court, e.g. he may explain the court procedure to a witness.[47] Only when acting as prosecution counsel may a Barrister, if instructed to do so, interview potential witnesses.[48] Solicitors are mainly active in the pre-trial phase and thus necessarily have contact with witnesses at this stage.[49] They are allowed to interview and take statements from any witness or prospective witness at any stage in the proceedings.[50] However, both for a Barrister acting as prosecution counsel and for a solicitor, the respective Codes establish clear *limits* for the interviewing of witnesses, namely, they are not allowed to

> "(a) place witnesses who are being interviewed under any pressure to provide other than a truthful account of their evidence;
> (b) rehearse, practise or coach witnesses in relation to their evidence or the way in which they should give it".[51]

To put pressure on a witness in the sense of (a) above may result in punishment according to section 7 of the Perjury Act 1911.[52] The testimony of a coached witness is regarded as unfair evidence and therefore is not admitted into evidence at trial.[53] In fact, the Court of Appeals in *R. v Momodou and Limani*, a fundamental decision already mentioned at the beginning of this essay,[54] explicitly prohibited witness training and coaching.[55] The Court saw a "dramatic distinction" between the former and

46 Para. 6. 3. 1. Written Standards, *supra* note 45.

47 Para. 6. 1. 3 Written Standards, *supra* note 45; for more examples see para. 6. 1. 4.

48 Cf. para. 6.3.2 Written Standards, *supra* note 45.

49 See generally The Law Society, Code for Solicitor Advocates, last amended 13 January 2003 <http://lawsociety.org.uk/documents/downloads/Profethics_Advocacy.pdf>.

50 Principle 21.10 of the Law Society's Guide to Professional Conduct as quoted in CPS, Pre-trial Interviews by Prosecutors, A Consultation Paper, para. 4; the same follows, *e contrario*, from para. 6 (5) of the Law Society's Code for Solicitor Advocates, *supra* note 49, since this provision refers to "interviewing a witness out of court".

51 Cf. para. 6 (5) Code for Solicitor Advocates, *supra* note 50; see also para. 705 (a), (b) Code of Conduct, *supra* note 45.

52 Section 7 holds liable the aider and abettor to an act of perjury within the meaning of sect. 1, i.e., a knowingly objectively or subjectively false statement by a witness <www.england-legislation.hmso.gov.uk/RevisedStatutes/Acts/ukpga/1911/cukpga_19110006_en_1>.

53 See Ellison, *supra* note 37, at 182 referring to *R. v. Salisbury* and section 78 of The Police and Criminal Evidence Act 1984.

54 See *supra* note 2, para. 61-65.

55 Ibid., para. 61.

familiarisation, emphasizing the "inherent" risks of witness training with a view to the desired uninfluenced witness statement:

> "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. ... Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited."[56]

Thus, while training is prohibited, familiarisation is allowed, even to be welcomed on condition that it does not involve discussions about evidence.[57]

A Code of Practice issued by the Crown Prosecution Service[58] provides for more detailed guidance as to the precise content of a witness pre-trial interview. The interview shall assist the Prosecutor "to assess the reliability of a witness's evidence or to understand complex evidence."[59] For this purpose, the witness may be asked about the content of his or her statement, which may include "taking the witness through his/her statement, asking questions to clarify and expand evidence, asking questions relating to character, exploring new evidence or probing the witness's account."[60] The attendance of a witness at such an interview is "voluntary and cannot be compelled", the prosecutor must remain "objective and dispassionate at all times",[61] in particular with regard to the responses given by the witness.[62] As to the limits of such an interview it is, first, stated generally that it "must not be held for the purpose of improving

56 Ibid.

57 Ibid., para. 62: "Pre-trial arrangements to familiarise witnesses with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants (...) are generally to be welcomed. Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works." Guidance for this practice is then given in para. 63-65.

58 CPS, Pre-trial witness interviews: Code of practice, December 2005, <www.cps.gov.uk/victims_witnesses/interviews.html>. The Code of practice is based on a Attorney General Report of 2004 and provides guidance to prosecutors in certain CPS areas as part of a pilot scheme.

59 Ibid., para. 2.1.

60 Ibid., para. 2.3.

61 Ibid. para. 6.1., 6.2.

62 Ibid., para. 7.3.

a witness's evidence or performance."[63] More specifically, undue influence or pressure amounting to "training" and "coaching" is prohibited:

> "Prosecutors must not under any circumstances train, practise or coach the witness or ask questions that may taint the witness's evidence. Leading questions should be avoided."[64]

Any departure from the "dispassionate" standard mentioned above entails "the risk of allegations that the witness has been led or coached in their evidence."[65] If there are contradictions between witness statements, "alternative accounts" may be offered but it must not be suggested to the witnesses that "they adopt the alternative account".[66]

A different picture is presented in the United States.[67] Here, witness preparation is widely practised and precise limitations are still to be established. In fact, witness preparation is understood as an umbrella term encompassing familiarization as well as proofing[68] and thus the term does not entail a clear cut distinction between permitted and prohibited conduct. Indeed, the difficult question as to where to draw the line between permitted preparation (in the sense of familiarization) and prohibited coaching (in the sense of altering "a witness's story about the events in question"[69]) has generated an intense debate about the ethical limitations of witness preparation,[70] a debate which goes back to the famous *dictum* of Judge Francis Finch of the New York Court of Appeals in 1880 where it was held:

> "While a discrete and prudent attorney may very properly ascertain from witnesses in advance of the trial what they in fact do know, and the extent and limitations of their memory, as a guide for his own examinations, he has no right, legal or moral, to go fur-

63 Ibid., para. 2.2.

64 Ibid., para. 7.1.

65 Ibid., para. 7.3.

66 Ibid., para. 7.2.

67 Cf. A. Watson, 'Witness preparation in the United States and England & Wales,' (2000) 164 *Justice of the Peace* 816, at 816 et seq., 820-21.

68 Cf. Applegate, *supra* note 13, at 278: "any communication between a lawyer and a prospective witness (...) that is intended to improve the substance or presentation of testimony to be offered at a trial or other hearing."

69 See Wydick, *supra* note 44, at 2 further distinguishing between three grades of coaching according to the lawyer's mens rea and his acting overtly or covertly (at 3-4, 18 et seq.). All these grades interfere with the truth-seeking function of the court but grades one and two even amount to inducing the witness to a false testimony and to perjury.

70 See Applegate, *supra* note 13, at 281 and passim; Wydick, *supra* note 44, at 1 et seq.; L. R. Salmi, 'Don't walk the line: Ethical considerations in preparing witnesses for deposition and trial, (1999) 18 *Review of Litigation* 136, at 136 et seq.; Watson, *supra* note 67, at 818 et seq.; P.J. Kerrigan, 'Witness preparation,' (1999) 30 *Texas Tech L. Review* 1367, at 1369 et seq.; F.C. Zacharias & S. Martin, 'Coaching witnesses,' (1999) 87 *Kentucky Law Journal* 1001, at 1011 et seq.

ther. His duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know."[71]

Similarly, in a recent decision, the Maryland court in *State v. Earp* said that

> "[b]ecause the line that exists between perfectly acceptable witness preparation ... and impermissible influencing of the witness ... may sometimes be fine and difficult to discern, attorneys are well-advised to heed the sage advice ... [to] exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses."[72]

There is general agreement that witness preparation is an integral part of the adversarial system[73] – given its central features of partisan fact seeking and a passive tribunal –,[74] and that it is even a lawyer's obligation to prepare his witnesses.[75] However, whereas there is an institutional necessity and strategic duty of witness preparation,[76] it is equally recognized that this practice interferes with the truth-seeking function of the court[77] and may ultimately distort the witness's memory and thus the truth.[78] The efficacy of cross-examination to counter these dangers is, to say the least, doubtful.[79] For some scholars this expectation is even "nothing more than an Article of faith".[80] In fact, the intrinsic tension between partisan representation and truth-seeking is the underlying reason for the difficulty in drawing a clear-cut line between the permitted and the prohibited.[81] In practice, the law is ambivalent and the ethical limits of witness preparation are controversial and blurred. The American Bar Association's Model Rules of Professional Conduct, adopted in nearly all US states, contain only a

71 In re Eldridge, 37 N.Y. 161, 171 (N.Y. 1880), quoted according to Wydick, supra note 44, at 52.

72 State v. Earp, 571 A.2d 1227, 1234-35 (Md. 1990).

73 See e.g. Applegate, *supra* note 13, at 341: "child of the adversary system".

74 Applegate, *supra* note 13, at 282, 324, 333 et seq., 341, 342, 352; conc. Wydick, *supra* note 44, at 12-13; Kerrigan, *supra* note 70, at 1367-68; Salmi, *supra* note 70, at 141; Zacharias & Martin, *supra* note 70, at 1010.

75 Applegate, *supra* note 13, at 287; Salmi, *supra* note 70, at 141.

76 Applegate, *supra* note 13, at 338.

77 Applegate, *supra* note 13, at 328, 334; Watson, *supra* note 67, at 819.

78 Applegate, *supra* note 13, at 282, 328 et seq.; Wydick, *supra* note 44, at 9 et seq.; Watson, *supra* note 67, at 818-19, 822.

79 Cf. Applegate, *supra* note 13, 307 et seq. (311); critically also Salmi, *supra* note 70, at 142-43. Too uncritical Karemaker et al., *supra* note 22, at 695, referring to cross-examination as the most important tool to mitigate the perceived risk of witness proofing.

80 J. H. Langbein, The German Advantage in Civil Procedure, (1985) 52 *U. Chi. L. Rev.* 823, at 833 n.31; conc. Applegate, *supra* note 13, at 311.

81 Applegate, *supra* note 13, at 326, 341.

few provisions generally applicable to witness preparation[82] which, in sum, prohibit the creation of false evidence by inducing a witness to false testimony and perjury.[83] Yet, given the unclear ethical limits, almost every technique of witness preparation can be converted into unethical conduct once it is applied with the objective to alter or distort the facts.[84] Thus, for example, refreshing the witness's memory is considered "[O]ne of the most fragile areas in ascertaining a witness's version of the facts" since a "witness's perceptions of critical events are easily eroded and distorted with time."[85] Also, rehearsal, "the ultimate witness-preparation technique",[86] for some necessary "to make the witness feel comfortable"[87] and prepare him or her for cross-examination,[88] is most controversial since it treats the trial as "a play scripted by the lawyers"[89] and "comes uncomfortably close to the line between the lawyer's knowing what would help the case and the lawyer's advising the client how to help the case."[90] In sum, an individual analysis of each technique leads to opposing conceptual pairs – refreshing/contamination, advising/memorisation, developing/creating facts, familiarization/coaching etc. – expressing the permitted and the prohibited but showing at the same time how thin the line between the two is. This situation has for some scholars touched upon the very foundations of the criminal justice system:

> "In recent years, the American legal profession's reputation has suffered because lay people do not trust lawyers, and they believe that all attorneys are crooks who will tell their witnesses and clients to say anything in order to win a lawsuit."[91]

2.1.3. Conclusion

From the above it clearly follows that proofing has no legal basis in the ICC Statute or complementary instruments. In particular, given the limited and even inconsistent practice of witness preparation in the adversarial system, PTC I is correct in stating that "the practice of witness proofing ... is not embraced by any general principle of

82 Model Rules of Professional Conduct (2007), see for example Rules 1.2 (d) stating that a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent" or Rule 3.4. (b) mandating that a "lawyer shall not ... assist a witness to testify falsely." <www.abanet.org/cpr/mrpc/mrpc_toc.html>.

83 See also R. D. Rotunda & J. S. Dzienkowski (eds.), *The Lawyer's Deskbook on Professional Responsibility 2007* (2008), § 3.4.-3(e): "Lawyers may interview witnesses and prepare them for trial, but lawyers may not "suggest" that a client or witness testify falsely"; see also Salmi, *supra* note 70, at 138.

84 See Salmi, *supra* note 70, at 154 et seq.; on the importance of knowledge see also Applegate, *supra* note 13, at 343 and Wydick, *supra* note 44, as quoted *supra* in fn. 69.

85 See Salmi, *supra* note 70, at 157.

86 See Applegate, *supra* note 13, at 323.

87 See Salmi, *supra* note 70, at 165.

88 See Watson, *supra* note 67, at 818.

89 See Applegate, *supra* note 13, at 323; also Salmi, *supra* note 70, at 165.

90 See Applegate, *supra* note 13, at 323; crit. also Wydick, *supra* note 44, at 15-16.

91 See Salmi, *supra* note 70, at 178.

law"[92] referring to such different jurisdictions as Brazil, France, Germany, Spain, on the one hand, and England and Wales and the United States, on the other.[93] In fact, the forms of proofing suggested by the OTP, e.g., refreshing the witness's memory or enabling a more orderly and efficient presentation of the evidence at trial,[94] would go directly against the principles established by the recent rules in England and Wales[95] and by some of the ethical considerations discussed in the United States. The incompatibility with these standards is aggravated by the fact that the pre-trial interviews conducted by the OTP directly relate to the *Lubanga* case and thus conflict with the general principle that "... training of this kind ... should not be arranged in the context of nor related to any forthcoming trial" and the "trainers" should have no personal knowledge of the case in hand to avoid any impact on it.[96] Against this background one may even argue that "it would be the duty of the Prosecution to refrain from undertaking the practice of witness proofing".[97] In any case, given the absence of a general principle and thus a legal basis of proofing this practice must be considered "prohibited" under the current legal regime of the ICC.[98]

2.2. De Lege Ferenda: *Is witness proofing necessary?*

While it is true that the ICC and the ICTY/ICTR are not mutually bound by their case law[99] and the procedural framework established by the ICC Statute deviates substantially from the one of the *ad hoc* tribunals[100] the ICTY/ICTR's practice triggers the question whether the advantages of proofing are so overwhelming that it should be provided for in the ICC Statute. According to the OTP the advantages are the following:[101]

> "(i) Providing a detailed review of relevant and irrelevant facts in light of the precise charges to be tried;

92 See ICC-PTC I, *supra* note 1, para. 42.

93 Ibid., para. 37.

94 Prosecution submissions, *supra* note 6, para. 16.

95 See also Pre-Trial Chamber I, *supra* note 1, para. 40. For a different view, see Karemaker et al., *supra* note 22, p. 689 with fn. 36 who do not, however, analyse the practice in England and Wales and fail to mention the controversial discussion in the United States.

96 See *R v. Momodou, supra* note 2, para. 62; Ellison, *supra* note 37, at 186.

97 See Pre-Trial Chamber I, *supra* note 1, para. 42.

98 See Trial Chamber I, *supra* note 1, para. 57.

99 See from the perspective of ICTY/ICTR: *Prosecutor v. Karemera* et al., *supra* note 22, para.7; *Prosecutor v. Milutinović* et al., *supra* note 22, para. 13; from the ICC perspective: Trial Chamber I, *supra* note, para. 44-45. It is therefore irrelevant that, as submitted in *Prosecutor v. Karemera* et al., *supra* note 25, para. 8, the *Lubanga Dyilo* Chamber has no comprehensive knowledge of practice of *ad hoc* tribunals.

100 See Trial Chamber I, *supra* note 1, para. 44-45. For a comparative analysis see, Ambos, *supra* note 40, pp. 453 et seq., 475 et seq.

101 Prosecution submissions, *supra* note 6, para. 16.

> (ii) Refreshing the witness's memory of past events through a review of previous statements;
> (iii) Ensuring the witness is aware of any issues on which he/she is not permitted to testify about (for instance, due to a previous ruling by the Chamber on inadmissibility of evidence);
> (iv) Enabling a more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial;
> (v) Identifying and putting the Defence on notice of any differences in recollection, thereby preventing undue surprise."

Further, by "clarifying the evidence to be called, assessing the credibility of the witness and by disclosing to the defence any new, additional or contradictory information, proofing can result in significant improvements in judicial economy and the accuracy of the testimony."[102] The OTP even goes so far to state that proofing "within limits, advances the Court's ability to ascertain truth."[103] The same view has been advanced in a recent paper by Don Taylor, Karemaker and Pittman.[104]

Yet, while it cannot be denied that witness preparation, in principle, can be a "useful practice",[105] its advantages do not outweigh its risks set out above. First of all, the national practice in England and Wales and the United States does not indicate that witness proofing will contribute to the truth, it rather, as correctly assessed by TC I, entails the serious risk of distorting the truth given the advance "rehearsal of in-court-testimony" and the consequent lack of "helpful spontaneity" during testimony at trial.[106]

102 Ibid., para. 17.

103 Ibid., para. 9.

104 See Karemaker et al, *supra* note 22, espec. at 693-694.

105 See also ICTR, *Prosecutor v. Karemera*, supra note 25, para. 17-18; ICTY, *Prosecutor v. Milutinović* et al., *supra* note 22, para. 20.

106 See Trial Chamber I, *supra* note 1, para. 46-52. For Karemaker et al, *supra* note 22, 694, with fn. 64 this view is "puzzling" but they argue from the perspective of an adversarial trial with a specific role of the parties in adducing evidence (see ibid.: "If the parties are to have any meaningful role in presenting the evidence ...") and ignore, contrary to their statement at the beginning ("not ... casting the *Dyilo* Decision in the simple terms of an 'adversarial v. inquisitorial' struggle ...", 1.), the different (mixed) nature of the ICC procedure with a less active role for the parties. They also dismiss the inherent risks in witness proofing too apodictically stating that "proofing is not rehearsing, practicing or coaching" (at 693) thereby ignoring the controversial discussion in England and Wales and even the U.S. They further enumerate four "principles" that may mitigate the risks of proofing but while these principles may have had the desired effect at the *ad hoc* tribunals it is unclear what effect they will have at the ICC, especially because two of them (cross-examination, contempt of court) are typical practices of adversarial trial and will not necessarily – apart from their questionable efficiency even in these jurisdictions – receive the same acceptance at the ICC. See also my reply in (2008) 21 Leiden Journal of International Law, Issue 4 (forthcoming).

In addition, witness proofing conflicts with various fair trial principles.[107] On the one hand, the principle of public trial is violated since evidence is partly rehearsed before the actual trial, in private between a party and a witness. On the other hand, proofing conflicts with the equality of arms principle. While the Defence may practice pre-trial interviews[108] (and in this context "prove" their witnesses) and indeed does so in the adversarial systems, in international criminal procedure with its mixed system this practice, it is of much more use to the prosecution given its superior infrastructure and manpower. It is therefore not surprising that the *Lubanga* defence rejected this practice.[109] The disclosure obligations of the Prosecution compensate the disadvantages of the defence only if proofing is completed during the pre-trial stage[110] and disclosure takes place early enough.[111] The problem of late proofing and thus late disclosure has even been acknowledged by the *ad hoc* tribunals.[112] Last but not least, a thorough and adequate familiarization may account for a great part of the OTP concerns. Indeed, the OTP still does not grasp the full potential of familiarisation since it relies too much on the case law of the *ad hoc* tribunals which did not distinguish between familiarisation and proofing.[113] Be that as it may, familiarisation is sufficient to guarantee that witnesses fulfil their role at trial, i.e., give evidence in the most impartial and comprehensive manner, always recalling the truth and nothing but the truth.

107 Theses concerns are ignored by Karemaker et al, *supra* note 22, who state quite apodictically in fn. 73 (referring to the timing of the discovery of new evidence) that "such concerns are extraordinarily important" but "do not directly implicate the relative merits of proofing as international judges unquestionably possess the tools to remedy any due process deprivations."

108 ICTY, *Prosecutor v. Krstić*, Decision on application for subpoenas, 1 July 2003, IT-98-33-A; ICTR, *Prosecutor v. Karemera*, *supra* note 25, para. 18.

109 See Trial Chamber I, *supra* note 1, para. 17 et seq.

110 *Prosecutor v. Milutinović* et al., *supra* note 22, para. 23.

111 *Prosecutor v. Karemera* et al., *supra* note 25, para. 13 with fn. 26.

112 *Prosecutor v. Limaj* et al., *supra* note 25, p. 3; *Prosecutor v. Milutinović* et al., *supra* note 22, para. 21.

113 In the early *Prosecutor v. Limaj* et al. decision, *supra* note 25, the notion "familiarization" was not even mentioned; in *Prosecutor v. Karemera* et al., *supra* note 25, para. 10 (mentioning familiarization separately) and para. 15 (putting it together with refreshing the witness' memory with regard to evidence etc.) both concepts have been mixed up in one definition; this same definition is quoted in *Prosecutor v. Karemera* et al., *supra* note 22, para. 4. Only in *Prosecutor v. Milutinović* et al., *supra* note 22, para. 7 the differentiation was made (but without limiting familiarization to VWU, para. 10).

Chapter 32 Anonymous witnesses before the International Criminal Court: Due process in dire straits

*Michael E. Kurth**

1. Introduction

The International Criminal Court (ICC) has started its first trials. Although most cases are still at the pre-trial phase, the Court has already had an opportunity to rule on some important issues concerning basic procedural rights of the defendant. The case against the former Congolese militia leader *Thomas Lubanga*[1] has presented the Court with issues concerning due process guarantees.[2] Among these is the scope of the participation and protection of victims and witnesses in the proceedings. In its decision of 18 January 2008, Trial Chamber I not only acknowledged but extended the rights of victims laid down in the Rome Statute[3] to a questionable degree.[4] In particular, the ruling on the possibility of witness anonymity during the trial[5] is difficult to reconcile with the defendant's due process rights as laid down in Article 67 of the Rome Statute.

The concept of due process has a long history and dates back to the English Magna Charta Libertatum of 1215.[6] This principle, which has become synonymous with the right to a fair trial, is a key component of any form of adjudication. Due process

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1 *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06. For a general first account of this case see M. Happold, 'Prosecutor v. Thomas Lubanga, Decision of Pre-Trial Chamber I of the International Criminal Court, 29 January 2007', (2007) 56 *International and Comparative Law Quarterly* 713.

2 See the International Bar Association's (IBA) Monitoring Report on the ICC (November 2007), 33-42.

3 UN Doc. A/CONF.183/9 of 17 July 1998.

4 Trial Chamber I, *Prosecutor v. Lubanga*, Decision on Victims Participation, 18 January 2008, ICC-01/04-01/06, paras. 95-122. See also the contribution by S. Vasiliev in this volume, below Chap. 33.

5 *Ibid.*, para. 131.

6 M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2004), Article 14, MN 1 with further references.

Carsten Stahn and Göran Sluiter (eds.), The Emerging Practice of the International Criminal Court.

ISBN 978 90 04 16655 4. pp. 615-634.