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# Witness Preparation in the ICC: An Opportunity for Principled Pragmatism

John D Jackson and Y Brunger \*

## Abstract

In January 2013 Trial Chamber V of the International Criminal Court (ICC) in the cases of *Samuel Ruto, Francis Muthaura and Uhuru Kenyatta*, collectively known as the 'Kenya decisions', made a marked departure from the firm prohibition on 'witness proofing' declared by Pre-Trial and Trial Chamber I in the *Lubanga* decisions. This reversal illustrates the polarisation of an issue that has caused considerable controversy in the international legal community and demonstrates the challenges faced by the court in navigating such a controversy. While the practice may be viewed as a fault-line between two different procedural cultures, forever destined to be subject to debate, this article explores an alternative view. The article examines the reasons for the turnaround at the ICC and proposes an approach based on 'principled pragmatism'. In doing so, it considers whether witness preparation is becoming regarded as a necessary part of the practice of the ICC.

## 1. Introduction

The reliance on oral testimony in international criminal trials cannot be overstated. It is essential for victims and witnesses to give testimony in a manner, which protects their physical, emotional, and psychological well-being and also ensures that they give the 'best evidence' possible to the court.<sup>1</sup> Witnesses can find the experience of testifying in a foreign courtroom a challenging and daunting process. The face-to-face contact between a witness and counsel in preparation for that witness's in-court testimony in the immediate period prior to trial has polarised international criminal judges, practitioners and academics alike; the fundamental question being whether the practice of witness proofing should be permitted or not.<sup>2</sup> This article argues that an approach to witness preparation based on 'principled pragmatism' could provide a way forward for the ICC in dealing with the issue of witness preparation in the future. It suggests that such an approach is reflected in the reasoning of the *Samuel Ruto, Francis Muthaura and Uhuru Kenyatta* cases

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<sup>1</sup> Helping witnesses achieve their best evidence is recognised as important in domestic proceedings as well. See in England and Wales, Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and Witnesses, and Using Special Measures* (2011 revision). However, it takes on particular importance in international proceedings where so much reliance is placed on oral testimony.

<sup>2</sup> See H. Garry, 'Witness Proofing' in L. Carter and F. Pocar (eds.), *International Criminal Procedure* (Edward Elgar, 2013) 66.

(Kenya decisions).<sup>3</sup> In addition, the notion of principled pragmatism can be buttressed by data reflecting the experience of a number of international practitioners who were interviewed by the authors as part of a study designed to discover what evidentiary challenges they face in the cases they have been involved in.<sup>4</sup>

Principled pragmatism is built upon two guiding principles: the well-being of the witness about to testify and the integrity of the evidence to be given in court by the witness. The analysis will unfold in three parts. The first part of the paper explores how the systemic divergence towards witness proofing in the criminal procedures of national jurisdictions has reverberated on the international platform. The paper then moves from arguments based on systemic divergences to the arguments of principle for and against proofing that were used in the *ad hoc* tribunals and the *Lubanga* decisions. The next section moves on to discuss the Kenya decisions and the concept of 'principled pragmatism' in order to demonstrate that in the complex area of pre-trial witness preparation rules should be based upon an approach that balances the responsibilities that the ICC has towards the witness and the truth-finding function of the institution. The final section looks in detail at the Witness Preparation Protocol that was annexed to the Kenya decisions. The preparation of witnesses for courtroom testimony will never be simple, but ultimately, it will be argued that the potential of 'principled pragmatism' will only be realized if we move beyond systemic ideologies to developing ethical best practices.

## 2. Systemic Divergences over Witness Proofing

There is something of a mystery about where the term 'witness proofing' originates. The American legal system has long endorsed the practice of preparing witnesses for giving testimony at trial but uses the term 'witness preparation' rather 'witness proofing' to describe this process.<sup>5</sup> It has been

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<sup>3</sup> See *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* ICC-01/09-02/11, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Witness Preparation, ICC-01/09-01/11, Trial Chamber, 2 January 2013.

<sup>4</sup> The study was funded by the Society of Legal Scholars, the Socio-Legal Studies Association, and the School of Law, University College Dublin. The fieldwork consisted of 37 face-to-face semi-structured interviews with judges, prosecutors, investigators, defence counsel, and court officials from Chambers or the Registry, with the bulk of interviews carried out between September 2011 and September 2012. All participants were granted anonymity. The aim of the research was to generate theory from the data to construct specific knowledge relating to lived experiences of evidentiary practices of international criminal practitioners. Grounded theory was the choice of methodology used as it allows for theory to be generated through the interaction of the data gathered and the researcher's interpretation of what has been analysed, as opposed to having a preconceived concept. See generally, B. G. Glaser and A. L. Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research*, (Aldine Publishing Company, 1967) and N. Pidgeon and K. Henwood, 'Grounded theory; practical implementation', in T.E. Richardson (ed) *Handbook of Qualitative Research Methods for Psychology and Social Sciences* (British Psychological Society, 1996).

<sup>5</sup> See S. Vasiliev, 'From Liberal Extremity to Safe Mainstream? The Comparative Controversies of Witness Preparation in the United States', 9(2) *International Commentary on Evidence* (2011) 1554.

suggested that the term is used in Commonwealth adversarial systems.<sup>6</sup> But in truth it is not a term that is commonly used in these jurisdictions either. Whatever its origins, it is a term that has generated considerable controversy within the international legal community, although it is not one that can be found in the Statutes and Rules of the *ad hoc* tribunals and the ICC. Those institutions that have endorsed the practice, including the *ad hoc* tribunals – the ICTY, ICTR, SCSL, and the STL – have described it in rather neutral terms as a ‘meeting held between a party to the proceedings and a witness, usually shortly before the witness is to testify in court, the purpose of which is to prepare and familiarize the witness with courtroom procedures and to review the witness’s evidence’.<sup>7</sup> To others, however, the term has come to be associated with the darker side of lawyering. The Trial Chamber in the *Lubanga* trial, for example, considered that the preparation of witness testimony by parties prior to trial would interfere with the Court’s mandate to establish the truth.<sup>8</sup>

Such different attitudes towards proofing would be perplexing within any one particular legal system. But within the international arena, no one legal system is pre-eminent. The challenge here is succinctly described by one of the respondents from our fieldwork as:

[o]ne [that] is very endemic to the fact that we are an international tribunal and we have people coming from all different cultures and with that comes all different training, all different professional standards and all kind of different approaches.<sup>9</sup>

We need to be clear here that we are not talking necessarily about any professional attachment that actors who have transitioned into the international arena have towards the domestic systems they have come from. In the early days of the tribunals there was some evidence that practitioners had a tendency to ‘bring their domestic culture with them’.<sup>10</sup> But as practitioners progressively migrate from one international tribunal to another, they adapt (willingly or not) to the specific demands made of them by international procedure.<sup>11</sup> Rather, the differences that have emerged over the legality and merits of witness preparation would seem to have arisen from differing perceptions regarding the new procedural systems they were working in and what was demanded by such

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<sup>6</sup> C. Romano, ‘Deciphering the Grammar of the International Jurisprudential Dialogue’, 41 *New York University Journal of International Law and Politics* (2009), 755, at 767.

<sup>7</sup> *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, IT-04-84-T, 23 May 2007, para. 8.

<sup>8</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06, 30 November 2007, para. 52.

<sup>9</sup> Respondent 34, Court Official, Arusha, 18 September 2012.

<sup>10</sup> F. J. Pakes, ‘Styles of Trial Procedure at the International Criminal Tribunal for the Former Yugoslavia’, 17 *Perspectives in Law & Psychology* (2003) 309.

<sup>11</sup> See J. Jackson and Y. M’Boge, ‘The Effect of Legal Culture on the Development of International Evidentiary Practice: From the “Robing Room” to the “Melting Pot”’, 26 *Leiden Journal of International Law* (2013) 947. Of the 37 interviewees interviewed, 16 of them had experience of working in at least two international or internationalised tribunals as well as working in a domestic system. See also E. Baylis, ‘Tribunal-Hopping with the Post-Conflict Justice Junkies’, 10 *Oregon Review of International Law* (2008) 361.

systems. Here, as in so much of the development of international criminal law within the international criminal tribunals whether in its substantive or procedural aspect, the ideological shadows of the common law and civil law traditions have tended to loom large.<sup>12</sup>

Sluiter has argued that the *ad hoc* system has adopted a common law approach towards what practices may be permitted as the dominant question regarding whether a practice is lawful or not is whether there is a rule prohibiting it.<sup>13</sup> While there are clear rules prohibiting witness coaching and witness manipulation, there has been no such prohibition governing witness preparation or proofing. Conversely, however, the ICC has adopted a much more civil law approach towards procedural developments requiring that there be a positive legal basis for the practice concerned. Much of the reasoning in the *Lubanga* chambers was therefore devoted to considering whether there was anything in the ICC Statute or rules that might be construed as authorizing witness proofing. However, in the Kenya decisions Trial Chamber V appeared to take a more 'permissive' approach towards the interpretation of the legal framework of the Rome Statute.<sup>14</sup> In endorsing the practice, the Trial Chamber began once again by asking whether there is a legal basis for witness preparation. The Trial Chamber found authority in the broadly drafted Art 64 (3)(a) of the ICC Statute which provides that upon assignment of a case for trial, the Trial Chamber assigned to deal with the case shall confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings. Having considered that witness preparation is lawfully permitted, however, the Trial Chamber then took more trouble than the *ad hoc* tribunals had done to set out a complete list of permitted and prohibited conduct in the form of a witness preparation protocol appended as an Annex to both its decisions along with rules governing logistical matters and disclosure. We shall return to the content of the decisions and the Witness Preparation Protocol later. For the moment, the point to be made is that Trial Chamber V took a more flexible approach towards what is lawfully permitted under the Rome Statute framework than the Pre-Trial Chamber and Trial Chamber I in the *Lubanga* cases and developed a protocol to govern proofing practice that served the pragmatic needs of the cases before it, albeit this could only be applied to those specific cases.

Differences over the merits of witness preparation can also be ascribed to systemic divergence. Ambos has considered that there is an underlying 'system dimension' to proofing, by which he meant that the reason proofing has existed in the *ad hoc* system but not in the ICC system is because of structural differences between the systems with regard to the production and presentation of

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<sup>12</sup> See M. Bohlander, 'Language, Culture, Legal Traditions and International Criminal Justice', 12 (3) *Journal of International Criminal Justice* (2014) 491.

<sup>13</sup> G. Sluiter, 'Trends in the Development of a Unified Law of International Criminal Procedure', in C. Stahn, and L. van den Herik (eds.), *Future Perspectives in International Criminal Justice* (Asser, 2009).

<sup>14</sup> S. Finnin, 'From Lubanga to Ruto: Witness proofing under the applicable law of the ICC', in T. Mariniello (ed.), *The International Criminal Court in Search of its Purpose and Identity* (Routledge, 2014) 567-612.

evidence.<sup>15</sup> Thus in rebutting challenges to proofing, the *ad hoc* tribunals have consistently stated that it is a widespread practice in jurisdictions where there is an adversary procedure for parties, as those responsible for leading evidence at trial and to whom witnesses 'belong', to meet with potential witnesses beforehand. In this context, parties have a right and a duty to hold these meetings.<sup>16</sup> By contrast, the ICC has proceeded on the basis, as the *Lubanga* Trial Chamber put it, that the ICC Statute has created a procedural framework, which differs markedly from the *ad hoc* tribunals.<sup>17</sup> By way of illustration, the Trial Chamber gave three examples: the requirement in Article 54(1)(a) in the Rome Statute that the prosecution should investigate exculpatory as well as incriminatory evidence; the greater intervention permitted by the Bench; and the unique element of victim participation. Because of these additional and novel elements to aid the process of establishing the truth, the Trial Chamber considered that the procedure for preparation of witnesses before trial was not easily transferable into the system of law created by the ICC Statute and Rules.

The assumption in this approach that proofing is an inherent part of the adversarial procedure and that it is in some way incompatible with the way in which the ICC system was established is, however, rather dubious when one looks at the practice of witness preparation within particular national systems. The Pre-Trial Chamber in *Lubanga* went too far when it observed that the practice of proofing has nothing to do with legal tradition.<sup>18</sup> Witness preparation does seem to be universally disapproved of in classic civil law systems. But there is by no means unanimity of practice within adversarial systems in favour of such practices; as the Pre-Trial Chamber pointed out, those jurisdictions that consider it either unethical or unlawful include common law countries as well as civil law countries— for example, England and Wales, Scotland and Australia.<sup>19</sup> These examples are themselves somewhat misleading because both England and Wales and New South Wales have in recent years begun to permit more question and answer sessions between prosecutors and witnesses (in the form of pre-trial witness interviews).<sup>20</sup> But they serve at least to show that there is no necessary

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<sup>15</sup> K. Ambos, "Witness Proofing" before the International Criminal Court: a reply to Karemaker, Taylor and Pittman', 21 *Leiden Journal of International Law* (2008), 911, at 912.

<sup>16</sup> *Prosecutor v. Limaj*, Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses, IT-03-66-T, 10 December 2004, 2, *Prosecutor v. Sesay et al*, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, SCSL-04-15-T, 26 October 2005, para. 30, *Prosecutor v. Milutinovic*, Decision on Ojdanic Motion to Prohibit Witness Proofing, IT-05-87-T, 12 December 2006, paras 16, 18-19, *Prosecutor v. Karemera et al*, Decision on Defence Motion to Prohibit Witness Proofing, ICTR-98-44-T, 15 December 2006, paras. 13, 15, *Prosecutor v. Haradinaj et al*, Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, IT-04-84-T, 23 May 2007, para. 17.

<sup>17</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06, 30 November 2007, para. 45.

<sup>18</sup> *Prosecutor v. Thomas Lubanga*, Decision on the Practices of Witness Familiarisation and Witness Proofing, ICC-01/04-01/06, Pre-Trial Chamber, 8 November 2006, para. 37.

<sup>19</sup> *Ibid.*, paras. 36-7.

<sup>20</sup> See Crown Prosecution Service, *Pre-Trial Witness Interviews*, Code of Practice, December 2005 (England and Wales). See P. Roberts and C. Saunders, 'Introducing Pre-Trial Witness Interviews – A Flexible New Fixture in the Crown Prosecutor's Toolkit', *Criminal Law Review* [2008] 831, Vasiliev, *supra* note 5.

connection between witness preparation and the adversarial tradition. Such a view represents a misunderstanding of the relationship in adversarial systems between parties and witnesses. Although parties decide what witnesses to call in their case, they do not, as is commonly thought, 'own' these witnesses and when called to testify they become witnesses of the court.<sup>21</sup>

However, if the *ad hoc* tribunals' view that witness preparation is a necessary adjunct of the adversarial system is debatable, so also is the *Lubanga* decisions' claim that it is in some way incompatible with the ICC system. The particular examples given by the ICC to show that it has moved away from the more adversarial *ad hoc* systems are hardly very persuasive in illustrating that the ICC has moved so far towards the civil law system as to make witness preparation non-transferable. The fact that prosecutors have to investigate exculpatory and inculpatory evidence equally does not appear to exclude witness preparation. Indeed in so far as it involves clarifying the evidence of the witness as opposed to coaching the witness and requires that any new evidence to emerge must be disclosed to the defence, it would appear to be quite consistent with the neutral investigatory role that is invested in the prosecutor. Similarly, it is not clear how intervention from the bench or victim participation obviates the need for witness preparation.<sup>22</sup> As the War Crimes Research Office report on witness proofing pointed out,<sup>23</sup> there remain considerable similarities between the practice of the ICC and the *ad hoc* tribunals, of which perhaps the most salient point in terms of witness preparation, is that in most of the chambers the parties retain considerable control over deciding whom to call as a witness and the questioning of witnesses in the courtroom given that judges are not provided with a dossier or investigatory case file as in the traditional Romano-German tradition.<sup>24</sup> The report also makes the point that the *ad hoc* tribunals and the ICC have jurisdiction over the same types of crime and often have to rely on testimony from victims who have had to travel far from their current homes to testify in a legal system that is foreign to them.

The tendency to adopt a 'systems' approach in arguing for or against witness preparation is not only evident in the jurisprudence of the tribunals but is to be seen as well in the academic controversies. Although the academic protagonists have been wary of the debate degenerating into an "adversarial versus inquisitorial' struggle" and have expressed intentions to abstain from this dichotomy,<sup>25</sup> it seems that they too find it hard to escape it. Vasiliev has claimed that the academic altercation has been to a considerable extent framed by the clash between the common law and the civil law.<sup>26</sup> One assumption that appears to be shared by some scholars is that witness preparation is systemically linked with adversarial procedure and argument has then proceeded on the question

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<sup>21</sup> See A. Keane, *The Modern Law of Evidence* (10<sup>th</sup> edn., Oxford University Press, 2014) 120.

<sup>22</sup> See War Crimes Research Office, *Witness Proofing at the International Criminal Court*, Washington College of Law, 2009) 29.

<sup>23</sup> *Ibid.*

<sup>24</sup> See ICC Statute, Art. 69(2)-(3), ICC RPE 140(2).

<sup>25</sup> See e.g. R. Karemaker, B.D. Taylor and T.W. Pittman, 'Witness Proofing in International Criminal Tribunals', 21 *Leiden Journal of International Law* (2008) 683, at 684.

<sup>26</sup> S. Vasiliev, 'Proofing the Ban on "Witness Proofing": Did the ICC Get it Right?', 20 *Criminal Law Forum* (2009) 193, at 204-5.

whether the ICC follows an ‘adversarial’ or ‘inquisitorial’ procedure.<sup>27</sup> One argument that has been made is that because proofing is a necessary part of adversarial procedure, it did not need to be authorised by the *ad hoc* Statutes.<sup>28</sup> But as the ICC Statute does not constitute such an adversarial system and is more mixed, proofing would only be warranted before the ICC if it were provided for in its governing law, which is not the case. Leaving aside the fact that the Kenya decisions found authority for such a practice in Article 64 as already mentioned, the underlying assumption that ICC and the *ad hoc* tribunals procedures are structurally so very different is, as we have seen, debatable.<sup>29</sup>

While it is true that proofing is essentially unknown in the civil law, the argument that there is a systemic divide between common law and civil law attitudes towards proofing seems somewhat overdrawn. Until recently the professional codes of a number of common law countries including England & Wales expressly took a much more restrictive approach towards proofing, prohibiting discussion of proposed testimony between counsel and witness with an exemption for lay clients and character and expert witnesses.<sup>30</sup> However, the difficulty with these systemic arguments is that they proceed upon the debatable premise that it is possible to link certain features universally to an adversarial format and contrast other features to a mixed or inquisitorial format. Many years ago Damaška illustrated how problematic it can be to use historically-based taxonomies in order to determine whether a system is ‘adversarial’ or ‘inquisitorial’.<sup>31</sup> In his view, the concepts of continental and Anglo-American legal traditions are too vague and open-ended to determine what is fundamental to the accusatorial/adversarial and inquisitorial type. It would seem more productive to consider the merits of witness preparation within the parameters of the actual systems in place rather than as practices necessarily connected to ideal systems.

### 3. Principled Disagreement over Witness Proofing

While, as discussed above, the etymology of the term ‘witness proofing’ is unclear, it has given rise to such heated debate that it would seem profitable to begin any discussion of its merits by avoiding its use and unpicking those measures that are controversial and those that are less so from the range of practices that have been deployed to prepare witnesses for trial.<sup>32</sup> The *ad hoc*

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<sup>27</sup> See, e.g. Karemaker et al, *supra* note 25, at 683, Ambos, *supra* note 15 and R. Karemaker, B. D. Taylor and T. W. Pittman, ‘Witness Proofing in International Criminal Tribunals: A Response to Ambos’, 21 *Leiden Journal of International Law* (2008) 917.

<sup>28</sup> Ambos, *supra* note 15.

<sup>29</sup> See also Karemaker et al, *supra* note 25.

<sup>30</sup> Vasiliev, *supra* note 5.

<sup>31</sup> M. Damaška, ‘Adversary System’, in S. H. Kadish (ed.), 1 *Encyclopaedia of Crime and Justice* (London: MacMillan, 1983) 24; M. Damaška, *The Faces of Justice and State Authority* (Yale University Press, 1986) 4-6; M. Damaška, ‘Models of Criminal Procedure’, 51 *Zbornik* (2001) 477, at 478-482.

<sup>32</sup> Interestingly, the judges in the Kenyan cases avoided defining the term ‘proofing’ and confined themselves to defining ‘witness preparation’ and ‘witness familiarisation’. See *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* ICC-01/09-02/11, *Prosecutor v. William*



tribunals have consistently taken the view both before and after the *Lubanga* decisions in the ICC that what the ICC called ‘substantive preparation’ of witnesses for trial is permissible.<sup>33</sup> As the Trial Chamber in the *Limaj* decision put it, the ‘process of human recollection is likely to be assisted ... by a detailed canvassing during the pre-trial hearing of the relevant recollection of a witness ... In particular, such proofing is likely to enable the more accurate, complete, orderly and efficient presentation of the evidence in the trial.’<sup>34</sup> The ICTY and ICTR have endorsed in particular:

- Preparing and familiarising a witness with the proceedings before the Tribunal;<sup>35</sup>
- Showing the witness prior statements and exhibits likely to be used and questioning the witness on areas relevant to his or her testimony, including inconsistencies between prior statements and anything said during proofing;<sup>36</sup>
- Identifying fully the facts known to the witness relevant to the charges, canvassing the relevant recollection of a witness;<sup>37</sup>
- Examining in detail deficiencies and differences in recollection when compared with each earlier statement;<sup>38</sup>
- Genuinely attempting to clarify the witness’s evidence;<sup>39</sup> and
- Disclosing to the defence additional information or evidence prior to the testimony of a witness.<sup>40</sup>

The *ad hoc* tribunals, however, have drawn the line at rehearsing, practising or coaching a witness in giving his or her evidence, at training or tampering with a witness to mould his or her testimony, or manipulating the evidence of a witness, or influencing the content of the testimony of a witness in a way that shades or distorts the truth, or informing a witness about the specific substantive answer

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*Samoei Ruto and Joshua Arap Sang*, Decision on Witness Preparation, ICC-01/09-01/11, Trial Chamber, 2 January 2013, para. 4.

<sup>33</sup> 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; *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, 26 October 2005; *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, 26 October 2005. See also Karemaker et al, *supra* note 25.

<sup>34</sup> *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, para. 2.

<sup>35</sup> *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, Decision on Defence Motions to Prohibit Witness Proofing, ICTR-98-44-T, 15 December 2006, para. 15.

<sup>36</sup> *Prosecutor v. Milutinovic et al*, Prosecution Response to General Ojdanic’s Motion to Prohibit Witness Proofing, IT-05-87-T, 29 November 2006, *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, IT-04-84-T, 23 May 2007.

<sup>37</sup> *Prosecutor v. Limaj, Bala and Musliu*, Decision on Defence Motion on Prosecution Practice of ‘Proofing’ Witnesses, IT-03-66-T, 10 December 2004.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Prosecutor v. Milutinovic et al*, Prosecution Response to General Ojdanic’s Motion to Prohibit Witness Proofing, IT-05-87-T, 29 November 2006.

<sup>40</sup> *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, Decision on Interlocutory Appeal Regarding Witness Proofing, ICTR-98-44-AR73.8, 11 May 2007.

he or she is expected to give, or preparing a witness to recite testimony learnt from the prosecution.<sup>41</sup>

One 'grey area' that it has been argued was never satisfactorily resolved in the *ad hoc* tribunals is whether it is permissible to take a witness through the exact questions which are likely to be asked about in examination, cross-examination and re-examination.<sup>42</sup> This practice would seem to have been approved in the prosecution's *Proofing Guidelines* that were disclosed in the *Haradinaj* trial but no consistent view appears to have been taken across the *ad hoc* tribunals on it.<sup>43</sup> This is illustrative of the tribunals' failure to take an agreed uniform approach to proofing and prompted Jordash to remark that:

Unfortunately, in the unquestioning acceptance of the value of proofing, the ad hocs have neglected to provide any meaningful guidance on an acceptable and uniform practice, leaving the parties to define its content and ethical parameters on a case-by-case basis...<sup>44</sup>

The Pre-Trial and Trial Chamber in *Lubanga* took an altogether more critical approach towards proofing practices, making a clear distinction between the practice of 'witness familiarisation' and 'substantive preparation' of a witness. The Pre-Trial Chamber endorsed a set of 'familiarisation' measures, which the Office of the Prosecutor (OTP) described as 'assisting the witness testifying with the full comprehension of the court proceedings, its participants and their respective roles, freely and without fear'.<sup>45</sup> The specific practices mentioned by the OTP in the 'Prosecution Information' endorsed by the Pre-Trial Chamber were:<sup>46</sup>

- Providing the witness with an opportunity to acquaint him/herself with the prosecution lawyer;
- Familiarising the witness with the Courtroom, the Participants to the Court proceedings and the court proceedings;
- Reassuring the witness about his/her role in the Court proceedings;
- Discussing matters that are related to the security and safety of the witness;
- Reinforcing to the witness that he/she is under a strict obligation to tell the truth;

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<sup>41</sup> See Karemaker et al, *supra* note 26, at 694. A clear warning was issued by the Appeals Chamber in *Prosecutor v. Karemera, ibid.*, at para. 13 that intentionally seeking to interfere with a witness's testimony is prohibited.

<sup>42</sup> See W. Jordash, 'The Practice of 'Witness Proofing' in International Criminal Tribunals: Why the International Criminal Court Should Prohibit the Practice', 22 *Leiden Journal of International Law* (2009) 501.

<sup>43</sup> See Prosecution Response to *Haradinaj* Submissions on the Procedure for the Proofing of Prosecution Witnesses, 21 March 2007, para. 44 and Annex: Proofing Guidelines. This practice seems to have disapproved of in the *Karemera* trial decision, *supra* note 34, at para. 23 but there is no constant line taken by the other tribunals.

<sup>44</sup> Jordash, *supra* note 42, at 504.

<sup>45</sup> *Prosecutor v. Thomas Lubanga*, Decision on the Practices of Witness Familiarisation and Witness Proofing, ICC-01/04-01/06, Pre-Trial Chamber, 8 November 2006, para. 14.

<sup>46</sup> *Ibid.*

- Explaining the process of examination-in-chief, cross-examination and re-examination.

Interestingly, these measures were permissible on the ground that they were a set of activities undertaken in order to assist the witness in the experience of giving oral evidence and the Pre-Trial Chamber did not view them, as the *ad hoc* tribunals have done, as part of a wider package of measures designed to produce effective testimony for the benefit of the proceedings as a whole. Indeed, the Pre-Trial Chamber considered that these measures were not only permissible but were mandatory in accordance with the ICC Statute and the Rules of Procedure.<sup>47</sup> The Pre-Trial Chamber also diverged from the *ad hoc* practice in considering that these measures were more appropriately the responsibility of the Victims and Witness Unit (VWU)<sup>48</sup> than that of the party or its counsel and considered it was not appropriate to label them as ‘proofing measures’.

Both the Pre-Trial Chamber and Trial Chamber, however, drew the line at any ‘substantive preparation’ of witnesses for trial. The Trial Chamber, which was presided over by an English judge (Fulford J), stated that whilst accepted practice in England and Wales allowed a witness for the sole purpose of refreshing memory to read his witness statement prior to giving evidence, it permits neither substantive conversations between the prosecution or the defence and a witness nor any type of question and answer session to take place prior to the witness giving evidence.<sup>49</sup> In following this approach it considered that allowing a witness to read his past statements would aid the efficient presentation of the evidence but that any discussion on the topics to be dealt with in court or on any exhibits that may be shown in court would not aid greater efficiency or the establishment of the truth.<sup>50</sup> Rather, it was the opinion of the Trial Chamber that this could lead to a distortion of the truth that may come dangerously close to constituting a rehearsal of in-court testimony. Before the Trial Chamber, the prosecution seemed to backtrack on the guidelines it had adopted in the *ad hoc* tribunals, which appeared to approve of taking witnesses through the questions likely to be asked. It assured the Trial Chamber that any questioning would not constitute a rehearsal of the questions that would be asked in court. But the Trial Chamber did not see how this was practically achievable. Even if there is no intent to coach or rehearse, the difficulty lies in preventing any questioning of the witness inadvertently modifying the witness’s testimony and interfering with the spontaneity of the witness’s evidence. The

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<sup>47</sup> Art. 57(3)(c) which imposes on the Chamber a duty to provide for the protection of victims and witnesses; Art. 68(1) which imposes on the Court a duty to take appropriate measures to protect the safety, physical and physical well-being, dignity and privacy witnesses and Rules 87 and 88 which provide for a series of measures for the protection of witnesses.

<sup>48</sup> Art. 43 of the ICC Statute establishes the Victims and Witnesses Unit whose responsibilities include providing protective measures and security arrangements, counselling and other appropriate assistance to victims and witnesses who are at risk because of testifying.

<sup>49</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06, Trial Chamber, 30 November 2007, para. 42.

<sup>50</sup> *Ibid.*, at para. 51.

Pre-Trial Chamber relied specifically on the English Court of Appeal decision in *R v. Momodou (Henry)*:<sup>51</sup>

... [T]he 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.

This principled objection to counsel engaging in any questioning of a witness seemed to lie at the heart of the ICC's consistent prohibition on any 'substantive preparation' of witnesses for trial until the Kenya cases.<sup>52</sup>

#### 4. Moving towards Principled Pragmatism

The context for understanding why the Kenya cases took a different approach towards witness preparation stems from the numerous allegations of witness tampering in Kenya generally, and in respect of the cases against Muthaura, Kenyatta, Ruto, and Sang the Prosecution had consistently warned of the fact that witnesses had been intimidated and/or interfered with.<sup>53</sup> The four prominent Kenyans had been accused of interfering or tampering directly or indirectly with witnesses that were to attend hearings in person. In the light of the 'acute witness management challenges' arising from these cases, the Prosecution sought modification of the prohibition on witness proofing.<sup>54</sup> Thus, Trial Chamber V came to re-consider the question of witness proofing, and 'whether the practice should be adopted' and in doing so, weigh up its 'potential merits and risks'.<sup>55</sup> In terms of the applicable law for sanctioning witness preparation, the Chamber confirmed it had the flexibility to 'confer with the

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<sup>51</sup> [2005] EWCA Crim 177 [61]. It is worth noting that there is quite an extensive body of experimental, social psychological evidence to support the fear that attorneys can and do influence witness testimony via pre-trial interactions. See e.g. B.H Sheppard and N. Vidmar, 'Adversary Pretrial Procedures and Testimonial Evidence: Effects of Lawyer's Role and Machiavellianism', 39 *Journal of Personality and Social Psychology* (1980) 320; N. Vidmar and N. Mac Donald Laird, 'Adversary Social Roles: Their Effects on witnesses' communications of evidence and the assessments of adjudicators', 44 *Journal of Personality and Social Psychology* (1983) 888.

<sup>52</sup> See *Prosecutor v. Katanga Ngudjolo*, Decision on a Number of procedural issues raised by the Registry, ICC-01/04-01/07-1134, TC II, 14 May 2009, *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, ICC-01/05-01/08-1016, TC III, 18 December 2010.

<sup>53</sup> See generally B. Momanyi and S. Jennings, 'Kenya Witnesses Face Harassment', International Justice - ICC, ACR Issue 350, 5 June 2013, <https://iwpr.net/global-voices/kenya-witnesses-face-harassment>; R. Cryer, 'Witness Tampering and International Criminal Tribunals', 27 *Leiden Journal of International Law* (2014) 191.

<sup>54</sup> *Prosecution v. William Samoei Ruto and Joshua Arap Sang*, Prosecution Motion Regarding the Scope of Witness Preparation, ICC-01/09-01/11-446, 13 August 2012, para. 2; See also Prosecution's Compendium of authorities in support of Prosecution Motion Regarding the Scope of Witness Preparation, 13 August 2012, ICC-01/09-01/11-447.

<sup>55</sup> *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* ICC-01/09-02/11, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Witness Preparation, ICC-01/09-01/11, Trial Chamber, 2 January 2013, paras. 34 and 30 respectively.

parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct' of trial proceedings.<sup>56</sup> After establishing that Article 64 empowered the Chamber with the ability to ensure that 'a trial is fair and expeditious and conducted with full respect for the rights of the accused and due regard for the protection of victims and witness', the Trial Chamber went on to take the position that 'judicious witness preparation aimed at clarifying a witness's evidence' and 'carried out with full respect for the rights of the accused is likely to enable a more accurate and complete presentation of the evidence' and assist the 'Chamber's truth finding function'.<sup>57</sup> Witness preparation would 'enhance the efficiency, fairness and expeditiousness'<sup>58</sup> of the trial as well as 'enhance the protection and well-being of the witnesses' as per Article 68.<sup>59</sup>

We would argue that the decisions of the Trial Chamber in the Kenya cases demonstrate the opportunity to develop an approach based on our concept of principled pragmatism. 'Pragmatism' is not a notion that is etymologically neutral in either legal or social terms, as there can be much contest over what is required in a particular set of circumstances. We would argue that pragmatism should be guided by a set of governing principles. Principled pragmatism then considers the relative advantages and disadvantages of a practice by reference to how these principles can best operate in a specific system rather than basing the reasoning on pre-existing beliefs about an ideal system. Thus, rather than approach the question of proofing from a set *a priori* systemic or cultural preferences, it would seem better to try to look at the practical advantages and disadvantages of witness preparation from the perspective of the guiding principles of the well-being of the witness and the integrity of the evidence to be given in court.

This would appear to be the stance taken by the Trial Chamber in the Kenya decisions. It is not suggested that the judges involved set aside all their cultural and ideological preferences. As judges migrate from one international criminal

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<sup>56</sup> *Ibid.*, at paras. 30 -34 and 26-30 respectively. The relevant parts of the ICC Statute, Article 64, as quoted in the decision are worth repeating here:

2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:

a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings;  
(b) Determine the language or languages to be used at trial; and  
(c) Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.

See generally, Finnin, *supra* note 14.

<sup>57</sup> *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* ICC-01/09-02/11, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Witness Preparation, ICC-01/09-01/11, Trial Chamber, 2 January 2013, paras. 52 and 50 respectively.

<sup>58</sup> *Ibid.*, at paras 39 and 35 respectively.

<sup>59</sup> *Ibid.*, at paras. 41 and 37 respectively.

tribunal to another, it would not be surprising if they did not form a preference for a particular way of doing things. Two of the judges in these cases held judicial positions in the ICTY and ICTR before they migrated to the ICC and they might have been disposed to favour the proofing practices permitted in these tribunals. The presiding judge, Judge Ozaki, had already taken a strong dissenting position in the *Bemba* decision when the other judges followed the ICC line taken in the *Lubanga* decisions.<sup>60</sup> The point is rather that the arguments in the decisions are shaped around the experience of international criminal practice rather than rooted in the need to conform to some ideal systemic preference.

### **1. Principle I: Well-Being of the Witness**

The ICC Statute provides an elaborate framework regarding the witness protection and the cornerstone of this is Article 68. It imposes a mandatory duty on the Court to provide the appropriate measures for the protection of the safety, psychological well-being, dignity and privacy of the victims and witnesses. Indeed, one of the judges, Judge Van den Wyngaert characterized the ICC regime by its 'victim-friendliness' and a welcomed improvement as compared with the *ad hoc* tribunals.<sup>61</sup> In terms of our concept of principled pragmatism, we would consider that the Court must consider what is required to ensure the physical, emotional and psychological well-being of the range of witnesses that come before it. While our definition is consistent with the ICC Statute, it uses broader terms to describe what is specified in the Statute.<sup>62</sup> The investigation and prosecution of large scale crimes may necessitate the inclusion of evidence from certain categories of witnesses, for instance, victims of sexual violence, children and insider witnesses and their well-being must be considered in the pre-testimony phase of the proceedings.

In the Kenya decisions, partly dissenting Judge Eboe-Osiji aptly referred to the enhanced 'ordeal' factor that such witnesses experience when they testify before the ICC.<sup>63</sup> He quotes from a Canadian book on witness preparation that:

A tribunal is a foreign and hostile environment for the inexperienced witness. The formality of the setting and the unaccustomed procedures will cause anxiety and induce an inability to communicate effectively.<sup>64</sup>

This observation had even greater force in relation to the average witness that comes to testify before the ICC. The Chamber considered that the 10-minute courtesy meeting provided for in the Familiarisation Protocol does not best serve the Chamber's duty to take appropriate measures to protect the well-being

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<sup>60</sup> *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-1016, Decision on the Unified Protocol on the practices used to prepare and familiarize witnesses for giving testimony at trial (18 November 2010), TC III, paras 4 and 25.

<sup>61</sup> C. Van den Wyngaert, 'Victims Before the International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', 44 *Case Western Journal of International Law* (2011), 475, 479

<sup>62</sup> For instance, 'emotional well-being' would incorporate what the ICC Statute describes as the dignity and privacy of witness in Article 68.

<sup>63</sup> Partly Dissenting Opinion of Judge Eboe-Osuji, *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* ICC-01/09-02/11, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Witness Preparation, ICC-01/09-01/11, Trial Chamber, 2 January 2013, para. 11.

<sup>64</sup> B. Finlay, T. A. Cromwell and N. Iatrou, *Witness Preparation – A Practical Guide* (Canada Law Book, 2010), at 7.

and dignity of witnesses.<sup>65</sup> Witnesses' concerns extend beyond the individual protective measures accorded to them or the logistics of trial proceedings such as the layout of the courtroom and the role of parties and participants. Their concerns may also result from anxiety about giving evidence, a lack of confidence in articulating their experiences and apprehension about cross-examination. This is supported by a recent report published by the Human Rights Center at UC Berkeley based on data collected in an interview survey of 109 witnesses who had testified in the trials of *Lubanga* and *Katanga*.<sup>66</sup> One of the findings of the report was that despite the familiarization process a few witnesses still felt unprepared when they took the stand.<sup>67</sup> In the view of Trial Chamber in the Kenya decisions, witness preparation can help ensure that witnesses fully understand what to expect during their time in court and that they are able to communicate any concerns to the calling party. Prior preparation could particularly help vulnerable witnesses to reduce the stress of giving testimony as they may face unique difficulties in being questioned about traumatic events. Interaction with counsel on the substantive aspects of their evidence could reduce their reluctance to reveal sensitive information and this was particularly true in the Kenya cases.

There is an important connection here between protecting the well-being of witnesses and the truth-finding functions of the Chamber. Protecting witness well-being is an explicit mandate of the Chamber but there is an instrumental as well as intrinsic value to this as it can assist the truth finding function of the ICC by eliciting testimony that might not otherwise be forthcoming. Some respondents in our research believed that proofing played an important role in mitigating the risk of witnesses recanting on their original statements. As one put it:

If I cannot proof a witness then I don't know if a witness has been threatened ... You need to take time with the witness and ask 'What the hell is going on? You're changing your story to the one you told previously, you're saying this but you're not saying that.'<sup>68</sup>

Of course, these matters may be able to be put directly to the witnesses at trial. But adversarial justice has traditionally put severe constraints on the extent to which a party is able to cross-examine or impeach the credibility of his own witness.<sup>69</sup> In certain situations a witness may be declared 'hostile' in which case

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<sup>65</sup> *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* ICC-01/09-02/11, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Witness Preparation, ICC-01/09-01/11, Trial Chamber, 2 January 2013, paras. 41 and 37 respectively. See also Victims and Witness Unit's Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, ICC-01/05-01/08-972 and public Annex, ICC-01/05-01/08-972-Anx (22 October 2010).

<sup>66</sup> Human Rights Center, University of California, Berkeley, *Bearing Witness at the International Criminal Court: An Interview Survey of 109 Witnesses* (Berkeley, California, June 2014).

<sup>67</sup> Indeed the report quotes one witness who says: 'I should have been better prepared by the party that called me.' *Ibid.*, at 22.

<sup>68</sup> Respondent 12, Prosecutor, The Hague, 23 September 2011.

<sup>69</sup> See generally P. Roberts and A. Zuckerman, *Criminal Evidence* (2<sup>nd</sup> edn., Oxford University Press, 2010) 338.

a previous statement, which is inconsistent with his or her present testimony may be admitted.<sup>70</sup> Although the international tribunals would seem to have displayed more flexibility on whether witnesses must be declared hostile before they may be questioned on prior inconsistent statements, the decision whether a party will be allowed to put a previous statement to its own witness is one for the Trial Chamber and not for the calling party.<sup>71</sup> There are undoubted advantages in terms of expediency and the witness's well-being in court if these matters can be ironed out before the trial.

## **2. Principle II: The Integrity of the Evidence**

Although they refrain from linking the ICC with any particular domestic legal tradition, the Kenya decisions draw attention to the principle of the primacy of oral evidence established in Article 69(2). Damaška has commented that the ICC gives Chambers considerable freedom to choose the proper way of organizing the production of evidence: they may let the parties question witnesses without interference from the bench, but they may also examine witnesses on their own – even prior to interrogation by the parties.<sup>72</sup> Whatever method is chosen, however, the Kenya decisions make the point that the live testimony of witnesses, elicited through questioning by the parties, participants and the Chamber, is likely to constitute the most significant body of evidence in the case and as a result the manner in which witness testimony is presented to the Chamber is of particular significance:

A witness who testifies in an incomplete, confused and ill-structured way because of a lack of preparation is of limited assistance to the Chamber's truth finding function.<sup>73</sup>

The integrity of the evidence speaks to the circumstances that enable the witness to give their best evidence possible in a relevant, accurate and structured manner without being overridden or corrupted by counsel. There are examples dating back to Nuremberg which point to the dangers that pre-testimonial contacts with counsel pose to the integrity of the evidence.<sup>74</sup> But one must acknowledge the fact that a witness does not come into the courtroom completely free of any contact or influence, having already been in contact with investigators, registry officials, and the relevant calling party to say the least.

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<sup>70</sup> See *Prosecutor v. Limaj*, Decision on the Prosecution's Motions to Admit Prior Statements as Substantive Evidence, Case no. IT-03-66-T, T. Ch., 25 April 2006. These rules derive from section 3 of the English Criminal Procedure Act 1865.

<sup>71</sup> See *Prosecutor v. Popović*, Decision on Appeals Against Decision on Impeachment of a Party's Own Witness, Case no. IT-05-88-AR73.3, A.C., 1 February 2008; *Prosecutor v. Katanga* Transcript, ICC-01/04-01/07,64-9, 9 February 2010.

<sup>72</sup> M. Damaška, 'Problematic Features of International Criminal Procedure' in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (OUP, 2009), 175, 176. See ICC Statute Art 64(8), RPE 140(1).

<sup>73</sup> *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* ICC-01/09-02/11, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Witness Preparation, ICC-01/09-01/11, Trial Chamber, 2 January 2013, paras. 35, 31 respectively.

<sup>74</sup> See A. Sarvarian, 'Ethical Standards for Prosecution and Defence before International Courts: The Legacy of Nuremberg', 10 *Journal of International Justice* (2012) 423, 439-440.



Critically, integrity is not solely equated with the spontaneity of evidence given. Proofing is often characterized as a corruption of witness evidence, detracting from its integrity or spontaneity. The idea is that there is a fixed reality of what a witness saw or heard which has to be conveyed to the court in pristine form. As the Trial Chamber pointed out, however, by the time a witness comes to testify at trial, he or she has already told his story to a variety of actors, including investigators and lawyers, producing written statements, so the notion of there being spontaneity in any absolute sense is 'misplaced'.<sup>75</sup> The truth is, of course, that giving evidence is a process of communication and interaction and the environment in which it is elicited inevitably plays a role. What is important is to create an environment in which witnesses are able to give their best account of what they believe happened.

In order to elicit focused and structured testimony and to ensure that all probative evidence is presented, the Chamber considered that it was important that counsel are well prepared and fully acquainted with each witness's evidence. A pre-testimony meeting between the calling party and the witness was a 'last opportunity for the calling party to determine the most effective way to question its witnesses and which topics will elicit the most relevant and probative evidence [...]'.<sup>76</sup> The Chamber referred to the *ad hoc* procedures and a number of largely common law systems such as Australia, Canada, England & Wales, the US, New Zealand (but also Japan) where questioning is dominated by the parties.<sup>77</sup> However, it also made reference to the specific circumstances of international criminal litigation, which would appear to favour witness preparation.<sup>78</sup> In particular:

...[T]he crimes under the jurisdiction of this Court are complex, both as regards the factual circumstances and legal issues involved. Consequently, witnesses may have to give complicated and delicate evidence in the courtroom. At the same time, many of the witnesses have no experience in a courtroom, come from places far from the seat of the Court and come from a variety of cultural and linguistic backgrounds. They are often unfamiliar with the Court's system of questioning and cross-examination. In addition, witnesses testifying before this Court are often asked to recount events that occurred many years ago. As a result, there is an increased likelihood that witnesses will give testimony that is incomplete, confused or ill-structured.<sup>79</sup>

These were factors that a number of professionals who had experience of litigating in the international tribunals mentioned in our study. While we are not suggesting a comprehensive view from the field, within our sample there was a

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<sup>75</sup> *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* ICC-01/09-02/11, Trial Chamber, 2 January 2013, para. 43. See also Karemaker et al, *supra* note 28, 921, describing the notion of absolute spontaneity as 'imaginative'.

<sup>76</sup> *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* ICC-01/09-02/11, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Witness Preparation, ICC-01/09-01/11, Trial Chamber, 2 January 2013, paras. 38 and 44 respectively.

<sup>77</sup> *Ibid*, paras. 39 and 35 respectively.

<sup>78</sup> *Ibid*, paras. 40 and 36 respectively.

<sup>79</sup> A number of these factors were also mentioned in the decisions of the *ad hoc* tribunals. See e.g. *Prosecutor v. Karemera et al*, Decision on Defence Motions to Prohibit Witness Proofing, ICTR-98-44-T, para. 17.

division of opinion as to the merits of witness preparation – one respondent considered it was problematic philosophically<sup>80</sup> – but there was an acceptance that within the context of international practice it had many advantages. Due to some of the poor ways in which many witness statements had been prepared, proofing could clarify whether in fact a witness statement was going to be useful for the trial. Often it transpired that witnesses had not themselves seen the events they testified to but had merely received information about them second hand. As one prosecutor put it:

Let's say my basic witness is an uneducated farmer that had just been a survivor or perhaps a perpetrator in prison. My rough experience was that every three witnesses I met, one was useful for trial, and so 67% of my pre-trial preparation was meeting witnesses who were not really helping to prove my case.<sup>81</sup>

What is useless for one party, however, may be useful for another. As well as filtering out non-useful witnesses, witness preparation can enable new facts to be revealed and what are called 'will-say' statements to be disclosed to the other parties so that an opportunity is given to them to make use of a witness whom the prosecutor has found useless.<sup>82</sup>

[T]here's nothing to refresh the memories of the witnesses in court so all you do is you go to court hoping that your witness remembers as much as possible events that happened. Now I think that is where the prosecutor's role is so fundamentally important, helping the witness to remember the facts as best as they could.<sup>83</sup>

Of course, all these matters could come to light in the courtroom – but inevitably this would waste court time or lead to the trial having to be adjourned in order to investigate new facts that had come to light.

All this is not to deny that witness preparation can be abused and the Kenya decisions expressed a keen desire to obviate these dangers. The TC considered that given the costs to truth finding when witnesses are required to take the stand 'cold', any spontaneity lost in the course of witness preparation is considerably outweighed by the gains of preparation.<sup>84</sup> It did nevertheless consider the need for safeguards to deal with the risks, adverted to by the defence, that witness preparation could improperly influence the testimony of a witness, that it could be used as a substitute for thorough pre-trial investigations and that it could result in late disclosure. These risks could be mitigated by

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<sup>80</sup> Respondent 6, Prosecutor, The Hague, 21 September 2011.

<sup>81</sup> Respondent 18, Prosecutor, The Hague, 17 April 2012.

<sup>82</sup> See V. Tochilovsky, *Jurisprudence of the International Criminal Courts and the European Court of Human Rights: Procedure and Evidence* (Martinus Nijhoff, 2008), 464 where he describes a *will say* as follows: 'A *will say* statement is a communication from one party to the other party and the Chamber anticipating that a witness will testify about matters that were not mentioned in the previously disclosed witness statements.', See also *Prosecutor v. Simba*, Decision on the Admissibility of Evidence of Witnesses KDD, Case No. ICTR-01-76-T, Trial Chamber I, 1 November 2004, para. 9.

<sup>83</sup> Respondent 28, Prosecutor, Arusha, 19 September 2012.

<sup>84</sup> *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on Witness Preparation, ICC-01/09-01/11, Trial Chamber, 2 January 2013, para. 43.

establishing clear guidelines establishing permissible and prohibited conduct and it appended a Witness Preparation Protocol as an Annex to its decision.

## 5. The Witness Preparation Protocol

Beyond the overarching question of whether witness preparation should be sanctioned based on its advantages and disadvantages, the protocol provided a list of permitted and prohibited conduct, along with rules governing logistical matters and disclosure. In our view, the content of the protocol is a welcome starting point for the ICC to delineate ‘the boundaries of effective preparation of witnesses on one end and inappropriate preparation leading to untruthful testimony on the other end’<sup>85</sup> and the ‘grey areas’ of discretion’ where, as Jordash has warned, the potential conflict - between the duty to represent their client or case zealously and the duty to present only that which is believed to be the truth - must be reconciled.’<sup>86</sup>

The protocol states that the aims of witness preparation are:

- (1) To assist the witness who will be giving evidence:
  - To help ensure that the witness gives relevant, accurate and structured testimony;
  - to help ensure the well-being of the witness.
- (2) To assist the calling party to assess and clarify the witness’s evidence in order to facilitate focused, efficient and effective questioning.

One can see from the outset that the principal actors addressed by the protocol are the witnesses themselves and the calling party to whom they ‘belong’. While this may appear to betray an ideological preference for an adversarial type of system, it may rather be seen as an expression of the pragmatic benefits for witnesses in devolving responsibility to the calling party within a system that remains substantially party-driven. Consider the following passage from the decision:

Witness preparation can help to ensure that witnesses fully understand what to expect during their time in court and that they are able to communicate any concerns to the calling party, including case-specific questions which the VWU would be unable to address [...] Enabling interaction with counsel on the substantive aspects of their evidence may help to increase witnesses’ confidence and may reduce their reluctance to real sensitive information on the stand.<sup>87</sup>

Implicitly, the protocol reflects the Chamber’s view of the limitations of the VWU in these matters and consequently the Familiarisation Protocol in preparing a

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<sup>85</sup> G. L. Shargel, ‘Federal Evidence Rule 608(B): Gateway to the Minefield of Witness Preparation’ (2007) 76 *Fordham Law Review* 1263, 1271.

<sup>86</sup> Jordash, *supra* note 42, at 512.

<sup>87</sup> *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* ICC-01/09-02/11, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Witness Preparation, ICC-01/09-01/11, Trial Chamber, 2 January 2013, paras 41, 37 respectively.

witness for trial. The Witness Preparation Protocol recognises the need for calling parties to coordinate ‘practical arrangements’ with the VWU, and when it comes to vulnerable witnesses, the VWU are required to ‘be available to assist with vulnerable witnesses if necessary’.<sup>88</sup> We would argue that coordination with the VWU is critically important for the wellbeing of the witness. However, there remains scope for confusion on the part of witnesses, the parties and the VWU between the responsibilities of the VWU, as *per* the Familiarisation Protocol and those of the calling party, as *per* the Witness Preparation Protocol.

The Witness Preparation Protocol provides further operational guidance in respect of location, timing and record keeping. Preparation sessions have the flexibility to take place either at the seat of the Court in the Hague or elsewhere where the testimony is taking place. This is consistent with the possibility for the Court to sit outside of the Hague as provided in Article 3 of the Rome Statute.<sup>89</sup> However, the overriding factor that determines the location of a witness preparation session is the security of the witness, and it again falls on the calling party to decide the location.<sup>90</sup> Such an undertaking, in our view, would necessitate coordination between the VWU which not only has the statutory mandate to provide protection, support and other appropriate assistance, but also has the appropriate skills and expertise to deal with the safety and security procedures of witnesses. Again it would have been prudent for the Trial Chamber to have explicitly included the need for such coordination in the protocol.

With reference to timing, the protocol states that sessions must only begin after witness statements have been taken and disclosure has taken place.<sup>91</sup> The protocol further provides that completion of the preparation sessions must take place ‘as early as possible’ and at least ‘24 hours before the witness’s testimony is due to commence.’<sup>92</sup> But one question is whether this does enough to discourage what Jordash has referred in the *ad hoc* context to as the ‘unhealthy acceptance of poor investigative processes and unsatisfactory disclosure practices’ on the part of the prosecution, blurring the line between the investigative phase and the pre-trial preparation phase.<sup>93</sup> The negative impact this can have upon the defence was highlighted by a defence counsel respondent in our study, who when talking about preparing a defence case made the following observations:

[It] is a combination of the material you’re getting from the Prosecution, but obviously your client [...] has his version of the events and the first thing is to understand how the client’s version differs from the Prosecutor’s version, and then the main focus of preparation is on witnesses [...] [T]he most practical thing to do is immediately strike an understanding of who’s going to testify and what they’re going to testify about [...] [S]o our biggest challenge was how to understand what these witnesses had said before, how

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<sup>88</sup> *Ibid.* Witness Preparation Protocol, paras. 5, 6, and 7.

<sup>89</sup> Para 8 of the Witness Preparation Protocol.

<sup>90</sup> Para. 9 of the Witness Preparation Protocol.

<sup>91</sup> Para. 10 of the Witness Preparation Protocol.

<sup>92</sup> Para. 11 of the Witness Preparation Protocol.

<sup>93</sup> Jordash, *supra* note 42, at 518.

their versions might or might not be contradicted and that's basically how we started to prepare.<sup>94</sup>

If preparation sessions are allowed to take place in the period after witness statements and initial disclosure right up until the 24 hours deadline before the witness is due to testify, this can have a serious prejudicial effect on defence counsel's preparation of the case and raises some significant concerns regarding the fairness of proceedings and the equality of arms. These concerns are compounded by the fact that as the complexity of the trial unfolds, defence counsel may be left in position where they are faced with frequent late disclosure of information throughout the Prosecution case. Returning to the overall aims of witness preparation and the context in which the conduct above takes place, the protocol explicitly states that witness preparation should not be conducted for the purpose of seeking new evidence or continuing the calling party's investigations.<sup>95</sup> The defence in the *Ruto* and *Kenyatta* cases were concerned that witness preparation could be used by the prosecution to continue its investigations during the trial stage and certainly there have been cases in the *ad hoc* tribunals where the new information has been disclosed at the last minute limiting the defence opportunity to prepare its defence.<sup>96</sup> The Trial Chamber made it clear that the defence is not to be prejudiced by late proofing sessions when it stated that:

[W]itness preparation is to be used to review and clarify the witness's evidence. It is not meant to function as a substitute for thorough investigations, nor as a way to justify late disclosure[...] The Chamber is of the view that such pre-testimony disclosure is preferable to requiring the opposing party to react to new evidence only when the witness is on the stand[...] the use of such additional evidence will be controlled by the Chamber in order to ensure that defence is not prejudiced.<sup>97</sup>

It is regrettable that the Trial Chamber did not use the opportunity of the protocol to move away from the negative *ad hoc* tribunal experience of late disclosure by stipulating a more concrete timetable that would significantly mitigate the shortfalls experienced by the *ad hoc* tribunals and encourage improved investigative processes and case preparation by the calling parties. Instead, the only mention of disclosure is in the final paragraph of the protocol, where it is stated that information that is subject to disclosure that emerges from the preparation session must be disclosed 'as soon as practicable, and in any event before the witness begins his or her examination in chief'.<sup>98</sup> The failure by

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<sup>94</sup> Respondent 20, Defence Counsel, The Hague, 18 April 2012.

<sup>95</sup> Para. 2 of the Witness Preparation Protocol.

<sup>96</sup> See e.g. *Prosecutor v. Limaj et al.*, Decision on Joint Defence Motion on Prosecution's Late and Incomplete Disclosure, Case No. IT-03-66-T, 7 June 2005; *Prosecutor v. Sesay, Kallon and Gbao*, Decision on Defence Motion for Exclusion of Evidence arising from the Supplemental Statements of Witnesses TF1-113, TF1-108, TF1-330, TF1-041 and TF1-288, Case No. SCSL-04-15-7, 27 February 2007. For a robust critique of the late disclosure practices accepted by the *ad hoc* tribunals, see Jordash, *supra* note 42, at 515-520.

<sup>97</sup> *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* ICC-01/09-02/11, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Witness Preparation, ICC-01/09-01/11, Trial Chamber, 2 January 2013, paras. 46 and 42 respectively.

<sup>98</sup> Para. 30, Witness Preparation Protocol.

the Trial Chamber to address this issue in a more detailed fashion was, in our view, a lost opportunity and is likely to lead within the ICC to the kind of reactive measures that were used in the *ad hoc* practice to remedy late disclosure, such as adjournments or postponements of proceedings where the witness is due to testify.

Moving on to the substantive content of what conduct is involved in the preparation sessions and where the permissible boundaries of preparation lie, the protocol sets out a list of permitted and prohibited conduct.<sup>99</sup> *Permissible conduct* includes reviewing earlier statements and questioning on any inconsistencies; explaining the topics intended to be covered in examination in chief and which may be covered during cross-examination; showing the exhibits and asking for comment on them. *Prohibited conduct* includes seeking to influence the substance of the witness's answers, undertaking to train the witness or practice the questions and answers and inform the witness of the evidence of other witnesses. Here the protocol offers some helpful guidance and paves the way towards identifying best practice and achieving consistency of approach. It gives the calling party an understanding of how to meet the needs of witnesses, treating them appropriately, professionally and with respect at all times and of what can be ethically expected in preparing the witness for trial.

At the same time, there would appear to be a number of 'grey areas' that remain unresolved between what is permissible and what is prohibited conduct. It will be recalled that one issue that was unresolved by *ad hoc* tribunals was whether it was permissible to take parties through the questions they are to be asked. Paragraphs 20 and 21 of the protocol permit the parties to explain 'in general terms' what topics are likely to be covered while paragraph 28 prohibits the practising of the questions and answers expected. But it may not be easy to draw a clear line between these two types of conduct. Partly dissenting Judge Eboe-Osuji referred to the boundaries between preparation/practising/rehearsing and expressed some 'slight' disagreement with the other Chamber judges on the matter.<sup>100</sup> Notably, he disagreed that practising or 'rehearsing' should, as a general proposition, be considered to be 'necessarily incompatible with the ethics and the more welcome aspects of witness preparation' and he went on to say:

Practising the testimony can be a sensible and quite practical way of not only imbuing the witness with some measure of confidence, but also to identify and possibly tease out problem spots with delivery for purposes of enhancing efficiency in court-room testimonies.<sup>101</sup>

At same time, Judge Eboe-Osuji was not unaware of the risks that may be associated with rehearsing or practicing and he reflected that:

the main problem with [it] lies in the risk that it could be overdone - to the point of encouraging witnesses to memorise veritable scripts in terms of the anticipated

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<sup>99</sup> Paras. 15-29, Witness Preparation Protocol.

<sup>100</sup> Partly dissenting decision, para. 49.

<sup>101</sup> Partly dissenting decision, para. 50.

substance of the testimony as well as the sequence of how the testimony should unfold. Even so, this is not ethically problematic, if no perjury is involved.<sup>102</sup>

But this only serves to blur the boundaries further between what ‘practising’ should be acceptable and what should be considered ‘overdone’. Any discussion about the substantive content of witness preparation must address the boundaries between practising/rehearsing/coaching in substantive terms.

There remains the central concern raised by the *Lubanga* decisions of unintended influence where there may be no intention to plant ideas in the head of the witness but the witness mistakenly perhaps takes certain cues from counsel and alters his or her testimony accordingly. In the *Ruto* and *Kenyatta* decisions the Trial Chamber considered that this was a risk that was just as prevalent during the investigation phase and it did not think that witness preparation, properly conducted, was likely to result in substantive alterations to a witness’s testimony.<sup>103</sup> It pointed to the protocol prohibition on giving a witness any information during preparation concerning the testimony of other witnesses and pointed to the safeguard of cross-examination.<sup>104</sup> One of the further safeguards set out in the protocol is that the calling party is required to video-record the preparation session and keep a log of each preparation session informing other parties of the log. The *Ruto* and *Kenyatta* decisions also explain that a non-calling party may require the Chamber to order the disclosure of the video where there is a concrete and credible basis for the request.<sup>105</sup> This is a valuable safeguard that was made the subject of an order in the *ad hoc Haradinaj* trial.<sup>106</sup> However, one can question why the other parties need to provide a ‘concrete and credible’ basis for the request to view the video. There may be issues of privilege to protect but if one of the aims of keeping a record is to try to uncover whether there has been any unintended influence on the witness, there is no basis for considering that this may have happened until one is able to view the video. It is interesting that in this connection the Code for Pre-Trial Witness Interviews in England and Wales states that all interviews must be audio-recorded and that, subject to the application of public interest immunity, the recording will be supplied automatically to the defence as unused material.<sup>107</sup>

Finally, to guard against preparation abuse, there clearly need to be sanctions for non-compliance, yet the sanctions provided for the breach of the protocol are not clearly set out.<sup>108</sup> It is unclear who is to be charged with investigating and prosecuting any misconduct and whether sanctions are available. Defence and victims counsel are governed by the ICC Code of Professional Conduct for Counsel which provides sanctions for violation by these counsel of any

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<sup>102</sup> Partly dissenting decision, para. 51.

<sup>103</sup> *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* ICC-01/09-02/11, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Witness Preparation, ICC-01/09-01/11, Trial Chamber, 2 January 2013, paras. 44, 39 respectively.

<sup>104</sup> *Ibid.*, at paras. 44, 39 and paras. 48, 45 respectively.

<sup>105</sup> *Ibid.*, at paras. 50, 47 respectively.

<sup>106</sup> *Prosecutor v. Haradinaj*, Decision on Defence Request for Audi-Recording of Prosecution Witness Proofing Sessions, IT-04-84-T, 23 May 2007, \_

<sup>107</sup> Crown Prosecution Service, *Pre-Trial Witness Interviews: Code of Practice* (2008).

<sup>108</sup> See International Bar Association, *Witnesses before the International Court* (2013), 24.

provisions of the Code, the Statute, the Rules of Procedure and Evidence or Regulations of the Court.<sup>109</sup> Although such a Code does not extend to the OTP, Trial Chamber V ruled in the Kenyatta case that the Code should apply to the members of the Prosecution.<sup>110</sup> The OTP has since adopted its own Code which includes a prohibition on corruptly influencing a witness.<sup>111</sup> The Witness Protocol is a more detailed document setting out clearer lines between prohibited and permitted conduct. But if it cannot be enforced it clearly has more limited efficacy.

## 6. Conclusion

It is not suggested that the Kenya decisions will draw a line under the proofing controversy. Citing these decisions among others, the STL Trial Chamber has stated that the practice of witness preparation 'forms part of international criminal law procedure' and is used in the ICTY, the ICTR and the ICC.<sup>112</sup> The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals promulgated by the International Law Association in 2010 permits the practice, subject to such rules as the international court or tribunal may have adopted.<sup>113</sup> But the position in the ICC is far from settled. The defence appealed for leave to appeal the decisions which was rejected with the result that there is as yet no definitive ruling from ICC Appeals Chamber on the matter. Moreover, the main safeguards in the form of the Witness Preparation Protocol are only applicable in the Kenya cases and there is uncertainty therefore about the practice in other Chambers. However, the emphasis in these cases on how witness preparation may assist the well-being of witnesses and the integrity of the evidence in the unique circumstances that many witnesses face in international proceedings, along with an appreciation of the risks involved, provided a focused cost benefit analysis of the practice within the international setting which may help to mitigate the kind of 'systemic' arguments which it has been suggested have not helped towards finding consensus. The decisions accord with the views expressed in our own interviews where most, though not, all practitioners considered that within the particular context of international proceedings the balance of advantage favoured proofing, provided there were sufficient safeguards built into the process. Despite its weaknesses, the Witness Preparation Protocol is an important first step in delineating exactly where the boundaries should lie and what the safeguards should be. The challenge for the Court will be to develop these further in the spirit of 'principled pragmatism'.

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<sup>109</sup> Art. 31 of the Code of Professional Conduct for Counsel, ICC-ASP/4/Res 1-Ann. Art 70(1) of the ICC Statute makes it an offence for counsel to influence a witness or other evidence in an impermissible manner. See T. Gut, *Counsel Misconduct before the International Criminal Court* (Hart, 2012) 238.

<sup>110</sup> *Prosecutor v. Uhuru Mugai Kenyatta*, Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, ICC-01/09-02/11-747. 31 May 2013.

<sup>111</sup> See Code of Conduct for the Office of the Prosecutor, OTP2013/024322, 5 September 2013.

<sup>112</sup> *Prosecutor v. Salim Jamil Ayyash, Mustafa Amire Badreddine, Hussein Hassan Oneissi and Assad Hassan Sabra*, Directions on the Conduct of the Proceedings, STL-11-01/TC, 16 January 2014, para 18 (n. 4).

<sup>113</sup> Principle 6.2. See 10 *The Law and Practice of International Courts and Tribunals* (2010) 1 -15 and Saravanian, *supra* note 74.



