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3. Witness proofing

Hannah Garry*

I. INTRODUCTION

The practice of witness proofing has been one of the more polarizing procedural issues litigated before international criminal tribunals.[1] Generally speaking, this practice encompasses preparation of witnesses for giving testimony by the parties to a case. Much of the debate over proofing has centered on *who* should be allowed access to witnesses pre-testimony and *what* should be the nature of their interaction with the witnesses before giving evidence at trial.

However, witness proofing has not always been so controversial in international criminal law. With the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and International Criminal Tribunal for Rwanda (ICTR) in 1994, parties practiced proofing as a matter of course without challenge for the first decade. It was not until

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[1] *See, e.g.*, Ruben Karemaker, B. Don Taylor III & Thomas Wayde Pittman, *Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence*, 21 LEIDEN J. INT'L L. 683 (2008); Kai Ambos, *'Witness Proofing' Before the International Criminal Court: A Reply to Karemaker, Taylor, and Pittman*, 21 LEIDEN J. INT'L L. 911 (2008); Ruben Karemaker, B. Don Taylor III, and Thomas Wayde Pittman, *Witness Proofing in International Criminal Tribunals: Response to Ambos*, 21 LEIDEN J. INT'L L. 917 (2008); Wayne Jordash, *The Practice of 'Witness Proofing' in International Criminal Tribunals: Why the International Criminal Court Should Prohibit the Practice*, 22 LEIDEN J. INT'L L. 501 (2009); Sergey Vasiliev, *Proofing the Ban on 'Witness Proofing': Did the ICC Get It Right?*, 20 CRIM. L.F. 193 (2009); WAR CRIMES RESEARCH OFFICE, AM. UNIV. WASHINGTON COLL. OF LAW, WITNESS PROOFING AT THE INTERNATIONAL CRIMINAL COURT (2009).

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2004, in the ICTY's *Limaj et al.* case, that the practice was first contested by the defense on grounds that it breached fair trial rights.[2] The Trial Chamber flatly rejected the motion, noting in particular the longstanding and widespread practice of witness proofing at the Tribunal and in adversarial jurisdictions generally.[3]

In stark contrast, Chambers in the *Lubanga* case, the first trial before the International Criminal Court (ICC), prohibited the practice in 2006,[4] finding that the ICC's Statute "moves away from the procedural regime of the ad hoc tribunals."[5] In its place, they authorized the practice of "witness familiarization," a process that retains some aspects of witness proofing practiced by the ICTY and ICTR, but only allows for the Court's Victims and Witnesses Unit (VWU) to have direct contact with the witnesses before they testify.[6] While parties in a case may meet with witnesses before giving testimony, they may only do so through the VWU, and the nature of their contact is limited for purposes of acquainting themselves.[7]

Subsequently, Trial Chambers at the ICTY, ICTR and Special Court for Sierra Leone (SCSL), as well as the ICTR Appeals Chamber, repeatedly affirmed the practice in response to defense challenges to proofing relying upon the ICC *Lubanga* decisions. Meanwhile, Chambers in other ICC cases have so far followed the *Lubanga* approach. Similarly, although no judicial pronouncement has been made on the question, parties before the Extraordinary Chambers in the Courts of Cambodia (ECCC) do not practice witness proofing.[8] This is in line with Cambodian procedural

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[2] Prosecutor v. Limaj et al., Case No. IT-03-66-T, Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses, 1 (ICTY Dec. 10, 2004) [hereinafter *Limaj et al.*, Decision on Witness Proofing].

[3] *Limaj et al.*, Decision on Witness Proofing, *supra* note 2, at 2.

[4] Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Practices of Witness Familiarisation and Witness Proofing, at 19–22 (Nov. 8, 2006) [hereinafter *Lubanga*, Pre-Trial Chamber Decision].

[5] Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ¶ 45 (Nov. 30, 2007) [hereinafter *Lubanga*, Trial Chamber Decision].

[6] *Lubanga*, Pre-Trial Chamber Decision, *supra* note 4, at 21–2; *Lubanga*, Trial Chamber Decision, *supra* note 5, ¶¶ 53–7.

[7] Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Victims and Witnesses Unit's Amended Version of the "Unified Protocol on the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial" Submitted on 22 October 2010, ¶¶ 30–31 (Dec. 7, 2010) [hereinafter Amended Unified Protocol of 7 December 2010].

[8] *See generally* ECCC Internal Rules (Rev. 8) (Aug. 3, 2011), Rules 24, 50, 55, 60, 80, 84, 91 (regarding procedures for investigations and interviewing witnesses by investigative judges and submission of the case file to the Trial Chamber, which

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law, which is directly applied in these hybrid tribunal proceedings[9] and has its roots in the French civil law tradition.[10] Finally, it remains to be seen whether witness proofing will be allowed at the Special Tribunal for Lebanon (STL).[11]

In the face of this clear divide, this chapter seeks to understand the differences in approach to witness proofing among today's international criminal tribunals. Given that tribunals largely look to national legal systems in formulating their procedural law, Part II begins by contrasting witness preparation by parties in criminal cases in adversarial or common law systems with the prohibition on meeting with witnesses pre-testimony in a number of other national legal systems, especially inquisitorial or

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reflects the civil law model, and makes witness proofing unnecessary). *See also* Rupert Skilbeck, *Frankenstein's Monster: Creating a New International Procedure*, 8 J. INT'L CRIM JUST. 451 (2010); RUTH MACKENZIE ET AL., THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS 227–8 (2d ed. 2010).

[9] *See generally* Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Art. 33 (new) (stipulating that Cambodian procedural law applies to proceedings before the ECCC and guidance may be sought in international procedure where local law does not govern a specific matter).

[10] Skilbeck, *supra* note 8, at 453; MACKENZIE ET AL., *supra* note 8 at 227–8.

[11] At the time of the writing of this chapter, no formal decision on witness proofing had been issued by the STL. It remains to be seen whether Chambers will allow it, given the particular blend of adversarial and inquisitorial procedures in its rules. *See* Explanatory Memorandum by the Tribunal's President on the Rules of Procedure and Evidence, ¶ 4 (Nov. 25, 2010); STL Statute, S/RES/1752 (2007), Art. 28(2) (stipulating that Judges of the STL shall adopt rules of procedure and evidence guided by international criminal procedure and the Lebanese Code of Criminal Procedure as appropriate); STL Rules of Procedure and Evidence (STL RPE), as amended (Feb. 8, 2012), Rule 149 (providing that in the event of a lacunae in the rules, a Chamber shall apply provisions of the Lebanese Code of Criminal Procedure in accordance with the highest standards of international criminal procedure). There is no explicit mention of the practice found in the STL's Statute, Rules or Practice Directions; however, parties to a case are responsible for investigation with direct contact with witnesses during that process under the supervision of a Pre-trial Judge. Furthermore, parties may lead and question witnesses at trial. What is clear at this point is that the VWU is responsible for witness familiarization prior to giving testimony, and the STL Code of Professional Conduct for Counsel Appearing Before the Tribunal provides rules regulating witness proofing "if allowed." *See* STL RPE, as amended (Feb. 8, 2012), Rules 50(B)(ii), 60, 68, 77, 88, 89, 91, 92, 95, 110, 112, 113, 145, 146, 150; STL Code of Professional Conduct for Counsel Appearing Before the Tribunal, STL-CC-2011-01, (Feb. 28, 2011), ¶ 6(h) ("Counsel shall . . . if allowed to proof a witness, avoid exercising improper influence over the witness's recollection of events.").

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civil law systems. Part III then provides an overview of the adaptation of national approaches into the procedural framework of international criminal tribunals, particularly the ICTY/ICTR and ICC. Part IV proceeds to critique these approaches from a human rights perspective, noting the rights at stake and the extent to which each upholds those rights. Finally, Part V concludes by way of offering some preliminary observations.

II. WITNESS PROOFING IN NATIONAL LEGAL SYSTEMS

A survey of witness proofing in national criminal legal systems reveals that there is a broad spectrum of approaches as well as varying terms and definitions describing the practice. In addition, there is lack of agreement on whether the practice should be allowed in the first place and, if so, to what extent.[12] The reason for this disagreement stems in part from fundamental differences in perspective over the role and purpose of witness testimony and the rules surrounding its production and presentation at trial.[13]

In general, it may be concluded that some form of witness proofing whereby there is "discussion on the substance of the testimony to be given by a witness is either allowed or encouraged" between the parties and the prospective witnesses in systems that are more adversarial in nature.[14] In

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[12] *Lubanga*, Pre-Trial Chamber Decision, *supra* note 4, ¶¶ 36–37; Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ¶ 14 (Nov. 24, 2010) [hereinafter Ozaki Dissenting Opinion].

[13] Kai Ambos, *"Witness Proofing" Before the ICC: Neither Legally Admissible nor Necessary, in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 606 (Carsten Stahn & Göran Sluiter, eds., 2009).

[14] Ozaki Dissenting Opinion, *supra* note 12, ¶ 14 (citing *New South Wales Barristers' Rules 2001* (NSW) Rules 43, 44 (Austl.); *Crown Policy Manual—Witness 2005* (Can.); *Law Society of Upper Canada, Rules of Professional Conduct 2000*, Rules 4.03, 4.04 (Can.); *The Crown Prosecution Service—Pre-Trial Witness Interviews, Guidance for Prosecutors* (Eng. & Wales); The Rt. Hon. The Lord Goldsmith QC, *Pre-Trial Witnesses Interviews by Prosecutors Report 2004* (Eng. & Wales); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS: INTERVIEWING AND PREPARING A PROSPECTIVE WITNESS § 116 (2000) (U.S.); Legal Practitioners Act—Rules of Professional Conduct in the Legal Profession (1980) 67:5 O.G. § 20 (Nigeria); Rules of Conduct and Client Care for Lawyers 2008 reg. 13.10 (N.Z.); Rules of Criminal Procedure, Rules of the Supreme Court, No. 32 of 1948, art. 191-3 (Japan)). *See also* Prosecutor v. Haradinaj et al., Case No. IT-04-84-T, Decision on Defence

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these systems, witnesses are understood to belong to the parties to the proceedings.[15] As such, the parties are primarily responsible for calling and questioning witnesses in support of the presentation of their cases,[16] while the judge acts as a neutral umpire maintaining order and fairness in the courtroom.[17] In these systems, "in-court oral testimony of witnesses plays a central role in the evaluation of the evidence"[18] and the critical means for determining reliability and credibility of witness testimony is through cross-examination by the opposing side.[19] Consequently, the decision-maker, often a lay jury, is "unlikely to believe a witness who goes *off piste* during the course of giving evidence" especially because the decision-maker may not have the ability to seek further clarification.[20] The underlying belief of the adversarial or common law approach is that the best means for ascertaining truth is through this competitive presentation and cross-examination of evidence by opposing parties before a neutral decision-maker exposed to the evidence for the first time.[21] As a result, in such a system, witness proofing is deemed to be of critical importance such that failure to exercise it would be unethical and contrary to the best interests of the client.

While the common purposes of witness proofing in adversarial jurisdictions are to refresh a witness's memory and check the witness's evidence for relevance, accuracy and completeness prior to testifying, there is divergence in the rules governing proofing and providing safeguards from

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Request for Audio-Recording of Prosecution Witness Proofing Sessions, ¶ 17 & n. 69 (ICTY May 23, 2007) [hereinafter *Haradinaj et al.*, Decision on Witness Proofing Sessions] (noting that Australia, Canada, India, Pakistan, South Africa, Tanzania, England and Wales and the United States of America permit witness preparation by parties); Ambos, *supra* note 13, at 605; Albin Eser, *Procedural Structure and Features of International Criminal Justice: Lessons from the ICTY*, *in* THE LEGACY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 127 (Bert Swart, Alexander Zahar & Göran Sluiter, eds., 2011); Vladimir Tochilovsky, *The Nature and Evolution of the Rules of Procedure and Evidence*, *in* PRINCIPLES OF EVIDENCE IN INTERNATIONAL CRIMINAL JUSTICE 177 (Karim A.A. Khan, Caroline Buisman & Christopher Gosnell, eds., 2010).

15 Ambos, *supra* note 13, at 605; Eser, *supra* note 14, at 127.

16 JOHN D. JACKSON & SARAH J. SUMMERS, THE INTERNATIONALISATION OF CRIMINAL EVIDENCE: BEYOND THE COMMON LAW AND CIVIL LAW TRADITIONS 122–3 (2012).

17 Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic Criminal Procedure Realism*, 59 DUKE L. J. 637, 695 (2010).

18 Ozaki Dissenting Opinion, *supra* note 12, ¶ 14.

19 Bibas & Burke-White, *supra* note 17, at 700–701.

20 Skilbeck, *supra* note 8, at 458–9.

21 *See generally* JACKSON & SUMMERS, *supra* note 16, at 127–9.

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improper conduct during the sessions.[22] For example, in England and Wales, there is a "formal separating of pre-trial and trial functions between solicitors and barristers."[23] A barrister as in-court advocate is strictly forbidden from speaking with a witness prior to giving evidence[24] "save for a pep-talk in order to familiarize the witness with the procedure and to calm the nerves."[25] That said, under new procedures, a barrister may conduct video-taped preparatory sessions where exceptional circumstances require it and certain safeguards are followed.[26] In addition, solicitors in a case are allowed to "see proposed defence witnesses to prepare a proof of evidence from which the court advocate will work" and may also interview prosecution witnesses.[27] When attorneys are interviewing a witness regarding the substance of forthcoming testimony, they may not train or practice with the witness.[28] On the other hand, witness familiarization, which involves simply informing witnesses about the layout of the court and procedure at trial so as to prevent them from being taken by surprise, is welcome.[29]

In contrast, in the United States, there is no clear distinction with respect to which advocates may meet with witnesses before they testify. Furthermore, witness proofing encompasses a wide range of measures including substantive discussion of forthcoming testimony, rehearsal and witness familiarization techniques.[30]

The only exception to this variance in approach on proofing in common

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[22] *Lubanga*, Pre-Trial Chamber Decision, *supra* note 4, ¶ 12; *Lubanga*, Trial Chamber Decision, *supra* note 5, ¶¶ 39–42; Ozaki Dissenting Opinion, *supra* note 12, ¶ 14. *See also* Ambos, *supra* note 13, at 606–11.

[23] Ambos, *supra* note 13, at 606 (citing *inter alia* F. LYALL, AN INTRODUCTION TO BRITISH LAW 42 (2d ed. 2002)).

[24] Code of Conduct of the Bar of England & Wales, 8th ed., Oct. 31, 2004, as amended in 2012, ¶ 705; Written Standards for the Conduct of Professional Work, § 6.3 (implementing the Code of Conduct of the Bar of England & Wales), *available at* http://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/written-standards-for-the-conduct-of-professional-work/.

[25] *See* Skilbeck, *supra* note 8.

[26] *Id.* at 457–8.

[27] *Id.*; *see generally* Solicitors Regulation Authority Code of Conduct, Oct. 6, 2011, Chap. 5, *available at* http://www.sra.org.uk/solicitors/handbook/code/content.page.

[28] Code of Conduct of the Bar of England & Wales, 8th ed., Oct. 31, 2004, as amended in 2012, ¶ 705(a); Crown Prosecution Service, Code of Practice, February 2008, *available at* http://www.cps.gov.uk/victims_witnesses/resources/interviews.html#a01; R v. Momodou, [2005] EWCA Crim 177, ¶ 61.

[29] *Momodou supra* note 28, ¶ 62.

[30] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §116(1) and cmt. b (2000) (allowing for witness preparation before testifying and stipulating that permissible techniques include:

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law systems appears to be the rule that measures taken during witness proofing will be prohibited that have the potential to taint or influence the evidence, such as witness coaching; manipulating the evidence; or encouraging a witness to testify in a way that will obscure or distort the truth.[31] What exactly those measures are, however, varies by jurisdiction.

On the other hand, national legal systems based in the inquisitorial or civil law tradition largely do not allow for the discussion of evidence or even contact between witnesses and the parties before testimony.[32] Some legal systems of mixed legal traditions, not strictly based in the civil law, are included in this group on the understanding that such practice is either unethical or unlawful.[33] This is due to the fact that in such systems, witnesses do not belong to the parties but are "witnesses of the Court or the truth."[34] Under the inquisitorial framework, both inculpatory and exculpatory evidence is gathered and led by an investigative judge who thoroughly interviews and questions witnesses prior to their

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Discussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness's observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness's meaning clear).

[31] Ozaki Dissenting Opinion, *supra* note 12, ¶ 14. *See, e.g.*, Code of Conduct of the Bar of England & Wales, 8th ed., October 31, 2004, as amended in 2012, ¶ 705; Solicitors Regulation Authority Code of Conduct, *supra* note 27; Crown Prosecution Service, Code of Practice, February 2008, *supra* note 28; *Momodou supra* note 28, ¶ 61; American Bar Association Model Rules of Professional Conduct (2010), Rule 3.3(a)(3) and 3.4(b) (prohibiting a lawyer from presenting evidence known to be false and stating that lawyers must not "falsify evidence, counsel or assist a witness to testify falsely . . ."). *See also* Shannon M. Awsumb, *Avoiding a Career-Ending Mistake: The Line Between Witness Preparation and Coaching*, THE HENNEPIN LAWYER, Feb. 20, 2007.

[32] Bibas & Burke-White, *supra* note 17, at 696. SEE Skilbeck, *supra* note 8.

[33] *Lubanga*, Pre-Trial Chamber Decision, *supra* note 4, ¶ 37 (noting that the witness proofing advanced by the prosecution would be unethical or unlawful in countries such as Brazil, Spain, France, Belgium, Germany, Scotland, and Ghana); *Haradinaj et al.*, Decision on Witness Proofing Sessions, *supra* note 14, ¶ 17 & n. 69 (noting that Argentina, Austria, Belgium, Cameroon, Chile, Croatia, Denmark, France, Germany, Italy, The Netherlands, Norway, Peru, Serbia, Spain, Sweden and Switzerland do not use witness proofing).

[34] Ambos, *supra* note 13, at 605.

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testimony.[35] Subsequently, the statements taken from witnesses in the investigative stage are included in the case file as highly probative evidence and are read by the trial judges prior to their testimony "thus logically rendering witness proofing by the parties unnecessary and irrelevant."[36] At trial, witness testimony does not play as central a role for evaluating the evidence as it does in the adversarial framework, judges lead the questioning,[37] and cross-examination is not a common practice.[38] In this context, the judges "will be far less bothered by the demeanour and poise of the witness than by the truths perhaps revealed"[39] particularly as a result of "helpful spontaneity" during trial testimony.[40] Under the inquisitorial approach, this focus on neutral judges actively and methodically gathering evidence and leading the questioning of witnesses at trial is perceived as the best means for arriving at the truth.[41]

III. WITNESS PROOFING IN INTERNATIONAL CRIMINAL PROCEEDINGS

A. The Differing Approaches

1. The ICTY, ICTR and SCSL

In the beginning, the procedural framework of both the ICTY and ICTR was largely adversarial or common law in nature[42] and, in that context, witness proofing was widely practiced.[43] However, in the absence of deci-

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35 Bibas & Burke-White, *supra* note 17, at 695.

36 Ozaki Dissenting Opinion, *supra* note 12, ¶ 20.

37 *See* Skilbeck, *supra* note 8.

38 Ambos, *supra* note 13, at 606.

39 *See* Skilbeck, *supra* note 8.

40 Ambos, *supra* note 13, at 613.

41 Bibas & Burke-White, *supra* note 17, at 695.

42 ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 428 (2d ed. 2010); Bibas & Burke-White, *supra* note 17, at 694; JACKSON & SUMMERS, *supra* note 16, at 122. It is important to note that over the years, the procedural framework for the *ad hoc* tribunals has been amended to incorporate more rules that have civil law aspects. *See, e.g.*, Daryl Mundis, *From "Common Law" Towards "Civil Law": The Evolution of the ICTY Rules of Procedure and Evidence*, 14 LEIDEN J. INT'L L. 367 (2001); Fausto Pocar, *Common and Civil Law Traditions in the ICTY Criminal Procedure: Does Oil Blend with Water?*, 49 S.C.L.R. (2d) 439–41 (2010); Tochilovsky, *supra* note 14, at 161–74.

43 Prosecutor v. Karemera et al., Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, ¶¶ 8–10 (May 11, 2007) [hereinafter *Karemera et al.*, Appeal Decision on Witness Proofing]; *Limaj et al.*, Decision

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sions from Chambers or explicit rules on the procedure,[44] the exact definition or parameters of the practice remained unclear.[45] This changed with the rendering of the first decision on witness proofing in 2004 by the ICTY Trial Chamber in *Limaj et al.*, followed by further decisions on witness proofing in cases before the ICTY, ICTR and SCSL.

In *Limaj et al.*, the Trial Chamber did not expressly define witness proofing or its exact parameters when affirming the practice as one that is "widespread . . . in jurisdictions where there is an adversary procedure."[46] Nevertheless, it may be inferred that the Chamber considered that proofing entails a detailed meeting or series of meetings by the prosecution or defense with witnesses who are going to testify at trial.[47] Those meetings are specifically directed towards: 1) "identifying fully the facts known to the witness that are relevant to the charges in the actual Indictment"; 2) comparing a witness' recollection of relevant facts with earlier statements given by the witness during investigations in order to examine any "deficiencies and differences" between the two; 3) identifying any additional recollections which are to be disclosed to the other party; and 4) preparing a witness to cope adequately with the stress of international criminal proceedings.[48]

Two years later, in *Milutinović et al.*, another ICTY Trial Chamber considered a challenge to witness proofing. When assessing the merits of the motion, the Chamber analyzed witness proofing as composed of two

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on Witness Proofing, *supra* note 2, at 2; Prosecutor v. Karemera et al., Case No. ICTR-98-44-T, Decision on Defence Motions to Prohibit Witness Proofing, ¶¶ 9–15 (Dec. 15, 2006) [hereinafter *Karemera et al.*, Decision on Witness Proofing]; *Haradinaj et al.*, Decision on Witness Proofing Sessions, *supra* note 14, ¶ 8.

[44] *Karemera et al.*, Appeal Decision on Witness Proofing, *supra* note 43, ¶ 8; Prosecutor v. Milutinović et al., Case No. IT-05-87-T, Decision on Ojdanić Motion to Prohibit Witness Proofing, ¶ 5 (ICTY Dec. 12, 2006) [hereinafter *Milutinović et al.*, Decision on Witness Proofing].

[45] *See, e.g.*, *Haradinaj et al.*, Decision on Witness Proofing Sessions, *supra* note 14, ¶ 8 (noting that with respect to the ICTY, "[d]espite the fact that the practice of proofing witnesses, by both the Prosecution and the Defence, has been in place since the inception of the Tribunal, there is no set definition of proofing at the Tribunal").

[46] *Limaj et al.*, Decision on Witness Proofing, *supra* note 2, at 2.

[47] *Id.*

[48] *Id.* at 2–3. The Chamber noted that proceedings at the ICTY could be particularly stressful for witnesses due to "the cultural differences encountered by most witnesses . . . when brought to The Hague and required to give a detailed account of stressful events, which occurred a long time ago, in a formal setting, and doing so in response to structured precise questions, translated from a different language." *Id.* at 3.

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distinct parts: "[t]he practice of witness familiarisation and then the practice of a party reviewing a witness' evidence prior to his/her testimony."[49] This bi-furcated definition was drawn from a previously rendered decision in the ICC *Lubanga* case. The Trial Chamber appeared to accept that witness proofing consists of "a series of arrangements to familiarise the witnesses with the layout of the Court, the sequence of events that is likely to take place when the witness is giving testimony, and the different responsibilities of the various participants at the hearing."[50] However, the Chamber rejected the approach taken by the ICC that witness familiarization should be limited to the Tribunal's Victims and Witnesses Section rather than conducted by the parties to a case.[51] With respect to the practice of "discussions between a party and a potential witness regarding his/her evidence," the Chamber also rejected the approach taken by the ICC in prohibiting it.[52] However, the Chamber stressed that these discussions are to be a "genuine attempt to clarify a witness' evidence" that does not amount to "'rehears[ing], practis[ing], or coach[ing] a witness.'"[53]

Finally, in *Haradinaj et al.*, the ICTY Trial Chamber expressly defined proofing. Although noting that "there is no set definition of proofing at the Tribunal,"[54] the Chamber broadly defined the practice 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."[55]

The question of the definition of witness proofing was explicitly addressed by the ICTR for the first time in 2006 in the *Karemera et al.* case. When affirming the practice, the Trial Chamber articulated its definition as follows:

> [p]rovided that it does not amount to the manipulation of a witness' evidence, this practice may encompass preparing and familiarizing a witness with the proceedings before the Tribunal, comparing prior statements made by a witness, detecting differences and inconsistencies in recollection of the witness, allowing

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[49] *Milutinović et al.*, Decision on Witness Proofing, *supra* note 44, ¶ 4. The Trial Chamber divided witness proofing into these two separate practices following the lead of the ICC Pre-Trial Chamber in *Lubanga*. *Id.*

[50] *Id.* ¶ 6 (quoting the *Lubanga* Pre-Trial Chamber Decision, *supra* note 4, ¶ 15).

[51] *Id.* ¶ 10.

[52] *Id.* ¶¶ 16, 20–22.

[53] *Id.* ¶ 16 (quoting Article 705 of the Code of Conduct of the Bar Council of England and Wales).

[54] *Haradinaj et al.*, Decision on Witness Proofing Sessions, *supra* note 14, ¶ 8.

[55] *Id.*

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a witness to refresh his or her memory in respect of the evidence he or she will give, and inquiring and disclosing to the Defence additional information and/or evidence of incriminatory or exculpatory nature in sufficient time prior to the witness' testimony.[56]

With respect to witness familiarization as a component of witness proofing, the Chamber also noted the definition in *Lubanga*.[57] However, like the *Milutinović et al.* Trial Chamber, the Chamber rejected the holding in *Lubanga* that familiarization should be limited to the Witnesses and Victims Support Section of the Tribunal.[58] The Chamber also made clear that witness proofing does not allow for training, coaching or tampering with the evidence against an accused when dismissing the defense allegation that the prosecution had, in that case, been putting to a witness "the exact questions to be asked during his or her testimony" which was "not in conformity with established practice."[59]

On interlocutory appeal, the *Karemera* Appeals Chamber affirmed the Trial Chamber's definition of witness proofing as being in line with the approach previously sanctioned by the Appeals Chamber in the *Gacumbitsi* case whereby the Chamber found that discussing prior statements and the content of forthcoming testimony is not *per se* inappropriate.[60] In its decision, the Chamber also concluded that "'[i]t is not inappropriate *per se* for the parties to discuss the content of testimony and witness statements with their witnesses, unless they attempt to influence that content in ways that shade or distort the truth'" such as by coaching a witness.[61]

Finally, the SCSL considered and upheld the practice of witness proofing in the *Sesay et al.* case. In its decisions, the Trial Chamber consistently relied on the definition of proofing found in the ICTY's *Limaj et al.* case.[62]

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56 *Karemera et al.*, Decision on Witness Proofing, *supra* note 43, ¶ 15.

57 *Id.* ¶ 4 (quoting the *Lubanga* Pre-Trial Chamber Decision, *supra* note 4, ¶ 15).

58 *Id.* ¶ 10 (citing the *Milutinović et al.* Decision on Witness Proofing, *supra* note 44, ¶ 10).

59 *Id.* ¶¶ 21–4.

60 *See* Gacumbitsi v. The Prosecutor, Case No. ICTR-2001-64-A, Judgment, ¶ 74 (July 7, 2006) [hereinafter *Gacumbitsi*, Appeals Judgment] (rejecting the defense's argument that a witness' testimony lacked credibility because the witness was allegedly coached and holding that discussing the content of testimony and witness statements with a witness prior to giving testimony is not *per se* inappropriate).

61 *Karemera et al.*, Appeal Decision on Witness Proofing, *supra* note 43, ¶ 9 (quoting *Gacumbitsi*, Appeals Judgment, *supra* note 60, ¶ 74).

62 *See, e.g.*, Prosecutor v. Sesay et al., Case No. SCSL-04-15-T, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, ¶¶ 30, 33 (Oct. 26, 2005) [hereinafter *Sesay et al.*, Decision on Exclusion of Testimony]. *See also* Wayne Jordash, *The Practice of 'Witness Proofing' in*

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In sum, given that the ICTY and ICTR share the same Appeals Chamber,[63] witness proofing is now a firmly accepted practice in both Tribunals following the Appeals Chamber's affirmation of the practice in 2007 in the *Karemera et al.* case. Furthermore, the definition and parameters of the practice have been clarified through judicial examination to encompass meeting(s) between the parties to a case and prospective witnesses who will give evidence at trial. Those meetings may consist of measures to familiarize a witness with the organization of the proceedings as well as to substantively discuss the forthcoming testimony of the witness.

With respect to familiarization, logistical matters are covered such as: the layout of the Court, the roles of the various participants in the proceedings and the sequence of events that are to take place in the hearings. As for substantive discussion of the witness' testimony, it may involve: 1) refreshing a witness' memory with respect to evidence to be given; 2) comparing a witness' prior statements; 3) detecting any differences or inconsistencies in the witness' recollection; 4) asking the witness about any additional information and/or evidence of an incriminatory or exculpatory nature; and 5) disclosing any new information to the defence in a timely manner prior to the witness' testimony.[64]

However, witness proofing seems to preclude putting "to the witness the exact questions to be asked during his or her testimony."[65] More generally, it does not involve any measures that could improperly influence the content of the witness testimony "in ways that shade or distort the truth"[66] such as those that would effectively "train, coach or tamper a witness before he or she gives evidence"[67] and thereby "amount to the manipulation of the witness' evidence . . . ."[68] The SCSL has followed the same approach to witness proofing although nothing in the jurisprudence specifically addresses whether putting to the witness the questions to be asked during testimony is permissible.

International Criminal Tribunals: Why the International Criminal Court Should Prohibit the Practice, 22 LEIDEN J. INT'L L. 501, 509–10 (2009).

[63] Statute of the International Criminal Tribunal for Rwanda, Art. 13, Jan. 31, 2010.

[64] *Karemera et al.*, Appeal Decision on Witness Proofing, *supra* note 43, ¶ 4 (quoting *Karemera et al.*, Decision on Witness Proofing, *supra* note 43, ¶ 15).

[65] *Id.* ¶ 23.

[66] *Id.* ¶ 9 (quoting *Gacumbitsi*, Appeals Judgment, *supra* note 60, ¶ 74).

[67] *Id.* ¶ 12.

[68] *Id.* ¶ 4 (quoting *Karemera et al.*, Decision on Witness Proofing, *supra* note 43, ¶ 15).

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2. The ICC

In contrast to the ad hoc criminal Tribunals, ICC Chambers have explicitly prohibited many aspects of witness proofing as defined in the ICTY and ICTR jurisprudence and do not allow for direct contact between parties to a case and prospective witnesses pre-testimony.

The ICC first addressed the issue of witness proofing in depth in 2006 during its inaugural trial in the *Lubanga* case, when the prosecution informed the Pre-Trial Chamber in a status conference that it would be conducting proofing sessions with a witness in the coming week.[69] The prosecution was requested to refrain from undertaking any proofing until the Chamber determined whether it was permissible.[70] Subsequently, the Pre-Trial Chamber rendered its decision on the matter, first addressing the specific question of what is meant by witness proofing, noting that national jurisdictions use various terminology "in connection with those practices followed to prepare a witness to give oral testimony before a court."[71]

Ultimately, the Pre-Trial Chamber settled on a narrower definition of witness proofing than that applied in the ad hoc jurisprudence. According to the Chamber, proofing consists of meetings between parties and prospective witnesses encompassing the following practices: 1) allowing a witness to read his/her statement and refresh his/her memory with respect to the evidence he/she will give; 2) putting to the witness questions that a party intends to ask in the order in which they will be asked during the witness's testimony; and 3) inquiring about any further information that the witness may potentially give at trial, incriminatory or exculpatory.[72] That definition excludes other measures such as: 1) providing the witness an opportunity to become acquainted with those who will examine him/her in Court; 2) familiarizing the witness with the courtroom, proceedings and participants in the proceedings; 3) reassuring the witness about his/her role in the proceedings; 4) discussing matters related to safety and security with the witness; 5) reinforcing the witness's obligation to tell the truth during testimony; and 6) explaining the process of examination-in-chief, cross-examination and re-examination.[73] With regard to these other measures, the Pre-Trial Chamber held that they constitute a separate practice, which it labeled "witness familiarisation."[74]

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69 *Lubanga*, Pre-Trial Chamber Decision, *supra* note 4, ¶ 1.
70 *Id.* ¶ 2.
71 *Id.* ¶ 12.
72 *Id.* ¶ 17.
73 *Id.* ¶ 14.
74 *Id.* ¶ 23.

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Having established that distinction, the Pre-Trial Chamber turned to consider the admissibility of both witness proofing and witness familiarization, as it had defined them. In the end, it concluded that witness proofing is not authorized in ICC proceedings under the Statute, Rules or Regulations of the Court or under any other applicable law outlined within the ICC's Statute.[75] In contrast, witness familiarization is in fact *mandated* under specific provisions of the Statute and Rules of the Court.[76] Furthermore, under a plain reading of the Statute and Rules and in light of their object and purpose, the Court's VWU should, in consultation with the relevant party, be solely responsible for witness familiarization.[77]

Subsequently, the prosecution raised the issue of witness proofing again before the Trial Chamber who agreed with the Pre-Trial Chamber's decision. This was despite the fact that the prosecution stressed that, contrary to the Pre-Trial Chamber's definition of witness proofing, it "would not constitute a rehearsal of the questions that would be asked in court."[78] Rather, witness proofing would constitute:

> providing written statements to a witness a few days prior to their testimony; meeting with the witness at that time to remind the witness of their duty to tell the truth; discussing with the witness during this meeting information which may inform a decision about the protection of the witness; addressing the area of the witness statement that will be dealt with in Court; and showing the witness any potential exhibits for his comment prior to testimony.[79]

The Chamber first agreed with the Pre-Trial Chamber in separating out witness familiarization measures from "the practice of substantive preparation of a witness for their in-court testimony."[80] Furthermore, it found the Pre-Trial Chamber's outline of witness familiarization measures to be appropriate and clarified further the process of assisting witnesses to fully understand the court proceedings.[81] It also emphasized that familiarization should be undertaken by the VWU so long as it works "in consultation with the party calling the witness, in order to undertake the practice . . . in the most appropriate way" with respect to any special characteristics or vulnerabilities of the witness.[82] In addition, the Chamber noted that

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75 *Id.* ¶¶ 28, 33–4, 42.
76 *Id.* ¶¶ 20–23.
77 *Id.* ¶¶ 24–27.
78 *Lubanga*, Trial Chamber Decision, *supra* note 5, ¶ 14.
79 *Id.* ¶ 48.
80 *Id.* ¶ 28.
81 *Id.* ¶¶ 30–2.
82 *Id.* ¶¶ 33–4.

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two of the measures within the prosecution's definition of witness proofing were already appropriately provided for in this familiarization process – reminding witnesses of their obligation to tell the truth and the implementation of any necessary protective measures.[83]

With respect to substantive preparation of a witness for giving testimony, or witness proofing, the Chamber agreed with the Pre-Trial Chamber that there is no legal basis for it generally before the ICC, and that prohibited it in the *Lubanga* proceedings.[84] It nevertheless concluded that one aspect of proofing should be part of the witness familiarization process: provision of past statements made by a witness to that witness prior to giving in-court testimony.[85] However, the Chamber stressed that provision of these statements should be transmitted by the VWU after receiving them from the party calling the witness and shall be "for the sole purpose of refreshing memory"[86] such that there shall not be "any discussion on the topics to be dealt with in court or any exhibits which may be shown to a witness in court."[87] In addition, while "witnesses will be allowed to meet the advocates who are to examine them in court" during familiarization, it will only be "under the supervision of the staff of the VWU . . . [and] the VWU will not facilitate any further contact between the witness and the party calling him or her until their [sic] testimony is complete."[88]

Finally, the Chamber concluded that the prohibition of witness proofing does not apply to expert witnesses[89] such that "discussion between the parties and their experts may take place at any stage prior to calling the witness."[90] The Chamber agreed with the prosecution that "the importance of lack of rehearsal and the need for spontaneity do not apply" to expert witnesses, and that it would be helpful for the parties "to meet their experts in conference to discuss the relevant scientific and technical issues" "thereby leading to a focussed and accurate presentation of the evidence" at trial.[91] As such, in the *Lubanga* case, parties were allowed to

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83 *Id.* ¶ 49.
84 *Id.* ¶¶ 35–45, 57.
85 *Id.* ¶ 50.
86 *Id.* ¶¶ 55, 57.
87 *Id.* ¶ 51.
88 Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-1351, Decision Regarding the Protocol on the Practices to Be Used to Prepare Witnesses for Trial, ¶ 5 (May 23, 2008) [hereinafter *Lubanga*, Decision Regarding Protocol to Prepare Witnesses for Trial].
89 Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Transcript of Jan. 16, 2009 Hearing at 29:3–11 (Jan. 16, 2009) (No. ICC-01/04-01/06-T-104-ENG).
90 Amended Unified Protocol of 7 December 2010, *supra* note 7, ¶ 32.
91 Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Transcript of Jan.

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jointly proof expert witnesses or separately where joint instruction was not possible.[92]

Subsequent to the Trial Chamber's decision in *Lubanga,* Trial Chamber II implicitly adopted that approach in the *Katanga and Ngudjolo* case[93] "by adopting Unified Protocols for witnesses' familiarisation in which no provisions for witnesses' preparation by the parties, or proofing" were included.[94] In addition, Trial Chamber III in the *Bemba* case explicitly adopted the *Lubanga* approach.[95] While other Trial Chambers have made some adjustments to the *Lubanga* approach for their specific proceedings through adoption of Unified Protocols for preparing witnesses for trial, these have been limited to relatively minor variations or added clarifications to the *Lubanga* approach.[96]

In sum, the current approach taken by Trial Chambers at the ICC is as follows. Witness proofing, defined as a party meeting with its witness to discuss substantively that witness' evidence by, for example, examining any past witness statements that will be dealt with in court or any potential exhibits that may be submitted during the witness' testimony (but not rehearsing the questions that will be asked of the witness in court), is prohibited.[97] On the other hand, the VWU is allowed to meet with witnesses for purposes of witness familiarization, which commences once a "witness arrives in the Netherlands, or at the location of testimony where different from the seat of the Court, prior to giving evidence."[98] During

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16, 2009 Hearing at 28:22–25; 29:3–11 (Jan. 16, 2009) (No. ICC-01/04-01/06-T-104-ENG).

[92] Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Procedures to be Adopted for Instructing Expert Witnesses, ¶ 12 *et seq.* (Dec. 10, 2007) (finding that Regulations 44 (2) and (4) and 54 (m) of the Court, ICC-BD/01-01-04 (May 26, 2004) allow for the Trial Chamber to direct the instruction of expert witnesses jointly or separately by the participants in a case).

[93] Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07-1134, Decision on a Number of Procedural Issues Raised by the Registry, ¶ 18 (May 14, 2009) [hereinafter *Katanga & Ngudjolo*, Decision on Procedural Issues].

[94] Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision on the Unified Protocol on the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ¶ 34 (Nov. 18, 2010) [hereinafter *Bemba*, Decision on Unified Protocol].

[95] *Id.*

[96] *See generally Lubanga*, Decision Regarding Protocol to Prepare Witnesses for Trial, *supra* note 88; *Katanga & Ngudjolo*, Decision on Procedural Issues, *supra* note 93; *Bemba*, Decision on Unified Protocol, *supra* note 94.

[97] *Lubanga*, Trial Chamber Decision, *supra* note 5, ¶¶ 51–7.

[98] Amended Unified Protocol of 7 December 2010, *supra* note 7, ¶ 28.

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that process, the party calling the witness is not allowed to meet with the witness unsupervised outside of court until after testimony is given.[99] Witness familiarization consists of the following measures intended for preparing witnesses:

(a) Assisting the witness to understand fully the court's proceedings, its participants and their respective roles;
(b) Reassuring witnesses about their role in proceedings before the court;
(c) Ensuring that witnesses clearly understand that they are under a strict legal obligation to tell the truth when testifying;
(d) Explaining to the witnesses the process of examination;
(e) Discussing matters relating to the security and safety of witnesses in order to determine the necessity of applications for protective measures;
(f) Providing witnesses with an opportunity to acquaint themselves [briefly] with the people who may examine them in court;
(g) "Walking witnesses through" the courtroom and its procedure prior to the day of their testimony in order to acquaint them with the layout of the court, and particularly where the various participants will be seated and the technology that will be used in order to minimize any confusion or intimidation.[100]

During familiarization, the VWU will also "make available to the witness a copy of any witness statement they may have made in order to refresh their memory"[101] as well as "any document or information generated or provided by the witness when giving any of his/her previous statements"[102] as provided by the calling party, but may not discuss the statements or information substantively with the witness.[103] Consequently, "[t]he VWU will not be in a position to answer any legal or factual questions that might arise in relation" to the statements and must "remind the witness that any such questions should be ventilated in Court."[104] Finally, the prohibition against witness proofing or meeting with witnesses at any stage prior to

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[99] *Id.* ¶¶ 30, 31, 104. After a witness gives testimony, a Chamber may still prevent that witness and the calling party from meeting if the circumstances of the case require it. *Id.* ¶ 104.
[100] *Lubanga*, Trial Chamber Decision, *supra* note 5, ¶ 53.
[101] *Id.* ¶ 55.
[102] Amended Unified Protocol of 7 December 2010, *supra* note 7, ¶ 83.
[103] *Id.* ¶¶ 91–3.
[104] *Id.* ¶ 92.

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giving testimony in order to substantively discuss their evidence generally does not apply to expert witnesses.[105]

B. The Rationales for the Approaches

So how is it that Chambers at the ICTY, ICTR, SCSL and ICC have arrived at such different positions on witness proofing in international criminal proceedings, thereby mirroring the variance found in national legal systems? As reflected in the various holdings just summarized, the different choices made by Chambers at the tribunals on these two issues flow from their perception of their hybrid procedural framework as being more adversarial or inquisitorial in nature. Indeed, there is an "underlying 'system dimension' of proofing" and, as noted previously, the rules and underlying philosophies of the adversarial and inquisitorial systems divide sharply with respect to the production, presentation and primary purpose of witness testimony as evidence.[106] Consequently, in order to understand the various rationale offered by tribunals in support of these two approaches, it is important to note how they perceive themselves procedurally and how this then results in them being at odds on the following interrelated issues: 1) *who* should be allowed to be in contact with witnesses pre-testimony; and 2) *what* should be the nature of their contact.

1. Who may contact witnesses

On the first issue, as detailed previously, Chambers at the ICTY, ICTR and SCSL have concluded that *parties* to a case may engage with witnesses. In contrast, at the ICC, any such direct contact by parties with witnesses is strictly prohibited; instead, only VWU officers may meet with witnesses directly.[107]

Justification for the ICTY/ICTR/SCSL approach is based primarily on the nature of their procedural framework and the understanding that "[i]t is 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.[108]

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[105] *Id.* ¶¶ 32, 35.

[106] Ambos, *supra* note 13, at 606.

[107] *Lubanga*, Trial Chamber Decision, *supra* note 5, ¶¶ 53, 55–6. However, the VWU may arrange for brief, supervised meetings between witnesses and the parties for purposes of allowing witnesses to know ahead of time who will be examining them in court. Amended Unified Protocol of 7 December 2010, *supra* note 7, ¶¶ 30, 31, 69–73.

[108] *Limaj et al.*, Decision on Witness Proofing, *supra* note 2, at 2 (cited with

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In this context, parties have both a right[109] and a duty to hold these meetings.

In previous cases, the ICTY Appeals Chamber has looked to specific provisions in the Statute and Rules explicitly giving the prosecution the power to question potential witnesses during investigations as a legal basis for proofing.[110] These include: Article 18(2) of the ICTY Statute, which gives the prosecution "the power to question suspects, victims and witnesses";[111] Rule 39 of the ICTY Rules of Procedure and Evidence (RPE), which allows the prosecution in conducting an investigation to "summon and question suspects, victims and witnesses";[112] and Rule 54 of the ICTY RPE, which allows a Judge or Trial Chamber to issue an order or subpoena as may be necessary for the preparation or conduct of the trial,[113] including to require a prospective witness to attend at a designated place and time in order to be interviewed by a party.[114] On the basis of these provisions, the ICTY Appeals Chamber concluded that "both sides have the right to interview" witnesses on grounds that "[w]itnesses to a crime are the property of neither the Prosecution nor the Defence" but are shared between them.[115] Both parties may have a legitimate need for interviewing a witness in order to procure important information for building their cases, and each party has the right to do so in order to avoid the opposing party having an unfair advantage at trial.[116] Finally, not only do parties have this right, but the Appeals Chamber found that "it would be contrary to the duty owed by counsel to their client to act skillfully and

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approval in *Sesay et al.*, Decision on Exclusion of Testimony, *supra* note 62, ¶ 30; *Milutinović et al.*, Decision on Witness Proofing, *supra* note 44, ¶¶ 16, 18–19; *Karemera et al.*, Decision on Witness Proofing, *supra* note 43, ¶¶ 13, 15); *Haradinaj et al.*, Decision on Witness Proofing Sessions, *supra* note 14, ¶ 17.

109 *Karemera et al.*, Decision on Witness Proofing, *supra* note 43, ¶ 9 (finding that the practice of witness proofing "is in accordance with the Appeals Chamber's finding that each party has the right to interview a potential witness").

110 *See, e.g.*, Prosecutor v. Mrksić, Case No. IT-95-13/1-AR73, Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party (ICTY July 30, 2003) [hereinafter *Mrksić*, Decision on Communication with Potential Witnesses].

111 ICTY Statute, Art. 18(2).

112 ICTY RPE, Rule 39.

113 *Id.*, Rule 54.

114 Prosecutor v. Krstić, Case No. IT-98-33-A, Decision on Application for Subpoenas, ¶ 10 (ICTY July 1, 2003).

115 *Mrksić*, Decision on Communication with Potential Witnesses, *supra* note 110.

116 Prosecutor v. Halilović, Case No. IT-01-48-AR73, Decision on the Issuance of Subpoenas, ¶¶ 12–15 (ICTY June 21, 2004).

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with loyalty" to participate in a trial without first knowing what witnesses will say.[117] As such, it would be *unethical* for a party to fail to meet with prospective witnesses before they give evidence. This reasoning clearly is based in the adversarial systems' philosophy that the best means for ascertaining truth is through presentation and cross-examination of evidence by opposing parties bringing their case on a "fair playing field" before an impartial decision-maker exposed to the evidence for the first time.

Furthermore, the ICTY/ICTR Chambers have allowed contact between parties and witnesses on grounds that there are several safeguards in place to mitigate any risk of improper influence by a party on the forthcoming testimony of a witness. First, under the Tribunals' rules, "intentionally seeking to interfere with a witness's testimony is prohibited,"[118] and there are "clear standards of professional conduct" that govern when counsel meet with witnesses.[119] Second, through careful cross-examination, an opposing party may "explore the impact of preparation on the witness's testimony and use this to call into question the witness's credibility."[120] Third, where evidence of any impropriety comes to light, the Tribunals' rules allow for Chambers to take appropriate action through initiating contempt proceedings and excluding tampered evidence.[121] As noted previously, most adversarial models of justice at the national level have similar safeguards in place and have considered that witness preparation for trial is so important that this outweighs any potential for abuse of the proofing process.

In contrast, the ICC approach has been based, primarily, on a belief that from a systemic perspective, the ICC procedural framework requires no direct contact between witnesses and parties pre-testimony. Indeed, the *Lubanga* Trial Chamber found that under the ICC Statute, certain provisions depart from that of the more adversarial model found in the ad hoc Tribunals,[122] towards a mixed model that features more civil law

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[117] *Karemera et al.*, Appeal Decision on Witness Proofing, *supra* note 43, ¶ 10 (citing Prosecutor v. Krstić, Case No. IT-98-33-A, Decision on Application for Subpoenas, ¶ 8 (ICTY July 1, 2003)).

[118] *Id.* ¶ 13

[119] *Limaj et al.*, Decision on Witness Proofing, *supra* note 2, at 3; *Karemera et al.*, Decision on Witness Proofing, *supra* note 43, ¶¶ 16, 24.

[120] *Karemera et al.*, Appeal Decision on Witness Proofing, *supra* note 43, ¶ 13.

[121] *Id.*

[122] *Lubanga*, Trial Chamber Decision, *supra* note 5, ¶ 45 (reasoning that under the ICC procedural framework, the prosecution is tasked with investigating both exculpatory and incriminatory evidence; the Bench is allowed to have greater intervention; and victims are allowed to participate). *See also Lubanga*, Pre-Trial Chamber Decision, *supra* note 4, ¶ 26 & nn. 29–30 (noting its past decisions

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notions, "introducing additional and novel elements to aid the process of establishing the truth."[123] Consequently, "the procedure of preparation of witnesses before trial is not easily transferable into the system of law created by the ICC Statute and Rules."[124] Underlying this conclusion is the ICC's understanding as to whom the witnesses "belong" in a criminal proceeding. As stated by the *Lubanga* Pre-Trial Chamber, the no-contact rule for parties "is consistent with the principle that witnesses to a crime are the property neither of the Prosecution nor of the Defence . . . but [are] *witnesses of the Court,*"[125] a principle directly found in inquisitorial national systems.

As such, a further reason for the no-contact rule is an ethical one. The *Lubanga* Pre-Trial Chamber found that under the object and purpose of the ICC Statute and Rules, only the VWU should be allowed direct access to a witness in order to ensure "thorough and *objective* preparation of witnesses."[126] In this way, any risk of witnesses being exposed to a biased interpretation of ICC applicable law or of witness' testimony being improperly influenced in some way is minimized as much as possible.[127] This is important according to the *Lubanga* Trial Chamber in order to preserve "helpful spontaneity during the giving of evidence by a witness" which is "of paramount importance to the Court's ability to find the truth."[128] Again, this emphasis on eliminating any potential risk of taint of witness testimony so as to preserve its objectivity and spontaneity for ascertaining truth is grounded in the inquisitorial approach.

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regulating parties' contact pre-confirmation hearing with witnesses that the other party intends to rely upon at the hearing, and Rule 140 of the ICC Rules, which refers to "question the witness" or "examine the witness" with respect to the parties' questioning of witnesses at trial rather than "examination-in-chief," "cross-examination" and "re-examination").

123 *Lubanga*, Trial Chamber Decision, *supra* note 5, ¶ 45.

124 *Id.*

125 *Id.* ¶ 26 (emphasis added). *See also id.* ¶ 34. While the ICTY Appeals Chamber has also confirmed that witnesses are not property of one party over the other, it has stated that they are shared between the parties such that each has the right to interview all witnesses in a case. *Mrksić*, Decision on Communication with Potential Witnesses, *supra* note 110.

126 *Lubanga*, Pre-Trial Chamber Decision, *supra* note 4, ¶ 27 (emphasis added).

127 *Id.*

128 *Lubanga*, Trial Chamber Decision, *supra* note 5, ¶ 52.

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2. The nature of witness contact

Turning to the second issue, what should be the nature of interaction with witnesses before testifying, the ICTR Appeals Chamber has approved of witness proofing and stipulated that the practice broadly involves preparation of witnesses to testify at trial both with respect to the substance of their testimony as well as with respect to certain logistical matters surrounding the proceedings.[129] As in the United States, the exact measures to be taken or number of meetings to be held[130] for purposes of proofing are largely left to the discretion of the parties according to the circumstances required by a particular case, except that they may not compromise or manipulate the evidence of a witness leading to distortion of the truth.[131] One such prohibited measure explicitly highlighted by the ICTR is that of rehearsing or practicing with a witness the exact questions to be asked during testimony at trial,[132] similar to the approach found in England and Wales.[133]

ICTY and ICTR Trial Chambers have reasoned that witness proofing, broadly defined, is appropriate first, because it upholds certain rights of the defense, including the rights to an expeditious and fair trial. On the right to an expeditious trial, one ICTY Trial Chamber reasoned that the essence of witness proofing is a "genuine attempt to clarify a witness' evidence" in order to facilitate a smooth and orderly trial[134] which, as in adversarial systems generally, is led by the parties. As such, witness proofing allows for: 1) identifying in full all of the facts known to the witness that are relevant to the indictment given that earlier interviews took place during the investigative phase before confirmation of the indictment by investigators with a different professional perception on what is relevant; 2) refreshing the witness's recollection given that interviews with investigators often take place long before giving evidence at trial; and 3) identifying any deficiencies and differences in a witness's recollection as compared to earlier statements thereby enabling the witness to provide a "more accurate, complete, orderly and efficient presentation of the evidence" at trial.[135]

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129 *Karemera et al.*, Appeal Decision on Witness Proofing, *supra* note 43, ¶ 9.

130 *Limaj et al.*, Decision on Witness Proofing, *supra* note 2, at 3.

131 *Karemera et al.*, Appeal Decision on Witness Proofing, *supra* note 43, ¶¶ 4, 9.

132 *Karemera et al.*, Decision on Witness Proofing, *supra* note 43, ¶ 23.

133 Code of Conduct of the Bar of England & Wales, 8th ed., October 31, 2004, as amended in 2012, ¶ 705(a); Crown Prosecution Service, Code of Practice, *supra* note 28; *Momodou*, *supra* note 28, ¶ 61.

134 *Milutinović et al.*, Decision on Witness Proofing, *supra* note 44, ¶ 16.

135 *Limaj et al.*, Decision on Witness Proofing, *supra* note 2, at 2; *see also Karemera et al.*, Decision on Witness Proofing, *supra* note 43, ¶ 17; *Milutinović et al.*, Decision on Witness Proofing, *supra* note 44, ¶ 20.

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As for the defense's right to a fair trial, the ICTR Appeals Chamber in *Karemera et al.* noted that the practice of witness proofing by Chambers is permissible under Rule 89(B) of the Tribunal's Rules, which "generally confers discretion on the Trial Chamber to apply 'rules of evidence which will best favour a *fair* determination of the matter before it.'"[136] Specifically, witness proofing was found to facilitate fairness because it provides notice to the defense of any different or additional recollections of a witness compared to earlier statements made during the investigative phase so as to avoid undue surprise.[137] Witness proofing therefore fulfills disclosure obligations[138] and allows for the defense to prepare sufficiently for cross-examination.[139] This emphasis on upholding fairness in particular reflects the adversarial law understanding that it is necessary at trial to establish a fair playing field on which two competing parties lead evidence and verify the authenticity of that evidence through rigorous cross-examination as they work to prove their case.

ICTY and SCSL Chambers have further justified witness proofing as necessary for protecting the rights of witnesses. Chambers have noted that proofing assists witnesses in "cop[ing] with the process of giving evidence" before international tribunals, in a way that is different from the support provided by the Victims and Witnesses Section.[140] Through proofing sessions, witnesses are prepared to: face cultural differences; provide a detailed account of facts occurring long ago; testify about stressful events; give evidence in a structured and formal setting; testify with the use of translators; and deal with the overall stress of the proceedings generally.[141] Again, this emphasis on helping witnesses to cope with the stress of adversarial proceedings generally is also found in the system in England and Wales,[142] which allows for barristers as in-court advocates to meet with

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[136] *Karemera et al.*, Appeal Decision on Witness Proofing, *supra* note 43, ¶ 8 (emphasis added).

[137] *Limaj et al.*, Decision on Witness Proofing, *supra* note 2, at 2; *see also Karemera et al.*, Decision on Witness Proofing, *supra* note 43, ¶ 17; *Milutinović et al.*, Decision on Witness Proofing, *supra* note 44, ¶ 20.

[138] *Karemera et al.*, Decision on Witness Proofing, *supra* note 43, ¶¶ 11–12.

[139] *Id.* ¶ 18.

[140] *Limaj et al.*, Decision on Witness Proofing, *supra* note 2, at 3. *Cf. Milutinović et al.*, Decision on Witness Proofing, *supra* note 44, ¶ 10; *Karemera et al.*, Decision on Witness Proofing, *supra* note 43, ¶ 10.

[141] *Limaj et al.*, Decision on Witness Proofing, *supra* note 2, at 3; *Sesay et al.*, Decision on Exclusion of Testimony, *supra* note 62, ¶ 33. *See also Milutinović et al.*, Decision on Witness Proofing, *supra* note 44, ¶ 9.

[142] *Momodou*, *supra* note 28, ¶ 62.

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witnesses before giving testimony for this purpose as an exception to the general rule against such meetings.[143]

Finally, it was reasoned by the *Karemera et al.* Trial Chamber that widespread practice of proofing is "justified by the particularities of these proceedings that differentiate them from national criminal proceedings."[144] For example, as just noted, witnesses before international tribunals often must give testimony in stressful circumstances given cultural, legal and linguistic differences; furthermore, many witnesses must testify about quite traumatic events occurring long ago.[145] In addition, the factual complexity of proceedings at the international tribunals and the difficulties in gathering evidence results in the fact that:

> crimes charged in the indictment occurred many years ago and, in many cases, witness interviews took place a long time ago; matters that were relevant during the course of the investigations may need to be reviewed in light of the case that the Prosecution intends to present; . . . [and] the duration of the proceedings and the time elapsed between prior testimonies may require further interviews with a witness before he or she testifies and reduce the effect of surprise to the Defence in cases where the witness recollects elements that were not previously disclosed.[146]

On the other hand, the ICC Trial Chambers have so far rejected witness proofing as a proper practice before the ICC with respect to most witnesses,[147] insofar as it consists of any substantive discussion with witnesses regarding their forthcoming testimony.[148] Interestingly, however, the ICC has adopted witness familiarization measures often found in adversarial systems as part of the proofing process, so long as only the VWU has direct contact with the witnesses and does not discuss with the witness any prior statements or documentation obtained by parties during the investigation stage.[149] Such witness familiarization has been justified under the Court's rules, even at the risk of tainting the witness's testimony at trial, because they stipulate that the Court "take appropriate measures to protect the safety, physical and psychological well-being, dignity and

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143 *See* Skilbeck, *supra* note 8.

144 *Karemera et al.*, Decision on Witness Proofing, *supra* note 43, ¶ 8.

145 *Limaj et al.*, Decision on Witness Proofing, *supra* note 2, at 3; *Sesay et al.*, Decision on Exclusion of Testimony, *supra* note 62, ¶ 33. *See also Milutinović et al.*, Decision on Witness Proofing, *supra* note 44, ¶ 9.

146 *Karemera et al.*, Decision on Witness Proofing, *supra* note 43, ¶ 17.

147 As noted earlier, expert witnesses are excluded from this rule.

148 *Lubanga*, Trial Chamber Decision, *supra* note 5, ¶¶ 51–7.

149 *Id.* ¶¶ 53–7; Amended Unified Protocol of 7 December 2010, *supra* note 7, ¶¶ 91–3.

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privacy of victims and witnesses."[150] In so doing, the VWU is encouraged to "work in consultation with the party calling the witness" given that it is "likely to have greater insight into the background and particular facets of the witness."[151] Furthermore, familiarization is allowed because it prevents "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 of the process of giving oral testimony before the Court,"[152] a reason proffered in favor of familiarization in England and Wales particularly with respect to the adversarial nature of its criminal proceedings.[153]

Witness proofing is prohibited at the ICC on the basis that "it could lead to a distortion of the truth and may come dangerously close to constituting a rehearsal of in-court testimony."[154] However, the *Lubanga* Trial Chamber was not convinced that it is practically feasible to take steps to mitigate the danger of rehearsal.[155] Consequently, the Chamber would be prevented from hearing the "totality of an individual's recollection" given that "[a] rehearsed witness may not provide the entirety or the true extent of his memory or knowledge of a subject."[156] Similarly, drawing upon a civil law premise, the Chamber noted that proofing could diminish the spontaneity of the testimony, which could "be of paramount importance to the Court's ability to find the truth."[157] Finally, the *Lubanga* Trial Chamber found that the "pro-active role" of Judges under the ICC's procedural framework would help to prevent witnesses from being "re-victimized" by giving testimony or from being improperly influenced during the trial.[158]

In sum, the inquisitorial law "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 familiarization by one party" at the ICC.[159] However, unlike in a purely inquisitorial model, the ICC allows for familiarization of a witness even at the risk of tainting the forthcoming evidence, which it mitigates by having familiarization conducted according to detailed regulations by the VWU

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150 *Lubanga*, Pre-Trial Chamber Decision, *supra* note 4, ¶ 21(ii).
151 *Lubanga*, Trial Chamber Decision, *supra* note 5, ¶ 34.
152 *Lubanga*, Pre-Trial Chamber Decision, *supra* note 4, ¶ 20.
153 *Momodou*, *supra* note 28, ¶ 62.
154 *Lubanga*, Trial Chamber Decision, *supra* note 5, ¶ 51.
155 *Id.*
156 *Id.*
157 *Id.* ¶ 52.
158 *Id.*
159 Ambos, *supra* note 13, at 602.

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as a neutral third party. This approach results from the explicit requirements under the ICC Statute and Rules for upholding the rights of witnesses and is a prime example of the ICC's *sui generis* approach to criminal procedure.[160]

IV. AN INTERNATIONAL HUMAN RIGHTS CRITIQUE

The previous sections have laid out the ICTY/ICTR/SCSL approach to witness proofing as compared to the ICC approach and their underlying rationale flowing from their mixed adversarial and inquisitorial procedural structures. It is also important to examine the soundness of each from an international human rights perspective. All international and hybrid criminal tribunals are obligated under their Statutes, either explicitly or implicitly, to respect certain international human rights norms codified in the 1966 International Covenant on Civil and Political Rights (ICCPR) while exercising their criminal jurisdiction.[161]

In the context of witness proofing, the rights of two key players in a criminal trial are at stake: the defendant and the witnesses. Article 14 of the ICCPR provides for the following defense rights that pertain to the issue of witness proofing specifically: 1) the right to a fair trial; 2) the right to adequate time for preparation of a proper defense; 3) the right to be tried without undue delay; 4) the right to effective assistance of counsel; and 5) the right to examine or have examined witnesses brought either for or against the defense.[162] Furthermore, Articles 6, 9 and 17 of the ICCPR protect individual rights that are relevant for witnesses who testify in international criminal proceedings: 1) the right to life; 2) the right to liberty and

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[160] Fatou Bensouda, *The ICC Statute—An Insider's Perspective on a* Sui Generis *System for Global Justice*, 36 N.C.J. INT'L L. & COM. REG. 277, 285 (2011).

[161] *See, e.g.*, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, Arts. 20–22, Sept. 2009; Statute of the International Criminal Tribunal for Rwanda, Arts. 19–21, *as amended* Jan. 31, 2010; Statute of the Special Court for Sierra Leone, Art. 17, Jan. 16, 2002; Rome Statute of the International Criminal Court, Arts. 64, 67–68, July 17, 1998, 2187 U.N.T.S. 38544 (entered into force July 1, 2002) [hereinafter ICC Statute]; Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, Arts. 33(new), 35(new), *with inclusion of amendments as promulgated on* Oct. 27, 2004, NS/RKM/1004/006; Statute of the Special Tribunal for Lebanon, Arts. 15–17, 21, 28, June 10, 2007.

[162] International Covenant on Civil and Political Rights (ICCPR), Arts. 14(1), (3)(b)–(d), (3)(e), *adopted* December 16, 1966 (entered into force Mar. 23, 1976).

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security of person; and 3) the right to be free from arbitrary or unlawful interference with privacy, family, honor and reputation.[163]

Turning first to protection of witness's rights, both the ICTY/ICTR/SCSL and ICC approaches to witness proofing seek to address the physical and psychological needs of witnesses before, during and after giving evidence at trial. Safety and privacy are addressed by discussing with the witness any need to apply to a Chamber for protective measures. Psychological well-being and dignity are addressed by explaining and acquainting a witness with the details of an international criminal trial, including: the courtroom setting; participants and their respective roles; the structure and format of the trial; technology; translation and any other issues that might contribute to overall stress in giving evidence before an international criminal tribunal. Furthermore, care is taken to discuss with witnesses any cultural differences, trauma or stress that they may experience when testifying about difficult and complicated past events.

However, the ICC approach, drawing from the inquisitorial model, seems limited in its ability to fully care for the physical and psychological needs of a witness given the prohibitions on direct contact with witnesses by the parties and on discussion about the substance of the prospective testimony. This is due to the presence of adversarial procedures in the ICC's mixed framework for production and presentation of evidence whereby the parties are still primarily responsible for calling witnesses and leading their questioning at trial.[164] For example, with respect to protective measures, it could prove difficult to assist a witness with an application to the relevant Chamber where the prospective testimony is the basis for the application. While the VWU is supposed to liaise with the party calling the witness on such matters, there is potential for oversight due to lack of communication or understanding.

In addition, it is not clear if the ICC approach effectively assists a witness in dealing with the psychological stress of testifying about extremely traumatic events occurring long ago. This is especially true when considering that a number of witnesses are so-called "vulnerable" witnesses. They may be victims of charged international crimes such as rape, they may be minors, or they may come from very different cultural and educational backgrounds.[165] Again, it would seem difficult to address potential trauma or any potential misunderstanding caused by

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[163] ICCPR, Arts. 6, 9, 17.

[164] ICC Statute, Art. 69(2)–(3); ICC Rules of Procedure and Evidence (ICC RPE), Rule 140(2). Jackson & Summers, *supra* note 16, at 140–41.

[165] *See* War Crimes Research Office, Am. Univ. Washington Coll. of Law, Witness Proofing at the International Criminal Court 1, 5, 38–9 (2009).

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a witness's background without going into the substance of his or her forthcoming testimony. Furthermore, one might query whether giving the witness his or her past statements without discussing them is sufficient for assisting that witness with recall at trial. If not, there is a danger, in a predominately adversarial system for calling and examination of witness testimony at trial, that perfectly relevant testimony is thrown out on the basis that it comes across as not credible. Finally, with the emphasis at the ICC on spontaneous testimony, there is a risk that questioning could quickly become a form of re-traumatization for a witness, threatening his or her privacy and dignity. This danger is especially relevant during the adversarial, cross-examination phase. While it is true that more proactive Judges found at the ICC may help to mitigate such questioning, the same Judges may unwittingly be the cause of the questioning or fail to effectively deter it without a full understanding of the witnesses' background because *they were called by the parties*. Consequently, "the opportunity for a witness to tell his/her story to the party calling him/her prior to giving evidence in Court may prove comforting, or at least, serve as a very beneficial, substantive preparation for what will occur in Court."[166]

As for defense rights, it is important to note that the exercise of witness proofing such as at the ICTY/ICTR/SCSL has potential to lead to infringement of defense rights, particularly, the rights to a fair trial, time to prepare a proper defense and to a trial without undue delay.[167] Indeed, under the adversarial procedures found for production and presentation of evidence at the ICTY/ICTR/SCSL, witness proofing has, at times, resulted in: "late proofing" just before trial;[168] late disclosure of "new material, and a failure to provide signed statements of new or changed evidence";[169] several disclosures of new material from proofing sessions bringing a witness's testimony in line with other prosecution evidence in a case;[170] "excessive proofing" of some witnesses either in the number or duration of sessions;[171] discrepancies between proofing notes disclosed by the prosecution to the defense and in-court testimony

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166 Ozaki Dissenting Opinion, *supra* note 12, ¶ 24.

167 Ambos, *supra* note 13, at 614.

168 *Milutinović et al.*, Decision on Witness Proofing, *supra* note 44, ¶ 21.

169 *Limaj et al.*, Decision on Witness Proofing, *supra* note 2, at 3; *Milutinović et al.*, Decision on Witness Proofing, *supra* note 44, ¶ 21; *see also Karemera et al.*, Decision on Witness Proofing, *supra* note 43, ¶ 19.

170 *Karemera et al.*, Appeal Decision on Witness Proofing, *supra* note 43, ¶ 12.

171 *Limaj et al.*, Decision on Witness Proofing, *supra* note 2, at 3.

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of witnesses;[172] and "admission of evidence outside of the scope of the Indictment."[173]

The ICC's approach may better contribute to fairness and efficiency at trial. This approach is an absolute safeguard against the prosecution using proofing unfairly by influencing or manipulating its case against the defense such that "rather than promoting the establishment of truth" actually counteracts it.[174] Further, it prevents the prosecution from conducting a "*de facto* delayed investigation,"[175] whereby the defense is overwhelmed with newly disclosed information from proofing sessions just prior to or even during trial. Although a Chamber may mitigate such unfairness by allowing the defense further time to review the new disclosures, or decide to exclude the additional information at trial, this may still result in infringement on the defense's right to a trial without undue delay.

That noted, the ban on witness proofing by the ICC also has the potential to undermine fairness and efficiency of international criminal proceedings, particularly where oral testimony is central to the proceedings as at the ICTY/ICTR/SCSL, and is primarily led by the parties. In this context, it is worth pointing out that while a ban on witness proofing prevents the parties from unfairly manipulating proceedings, it may nevertheless lead to an inability to identify improper influence on witnesses by non-parties to a case. This situation arose in the *Lubanga* case with the use of "intermediaries" who assisted the ICC with the logistics of locating and contacting witnesses during investigations.[176] As argued by one author:

> a competent and honest Prosecutor allowed to proof witnesses due to testify – and recording such sessions – would have found out, and alerted Judges and the Defence about, any suggestion that some intermediaries had exerted improper influence on witnesses, thus benefiting the search for the truth and saving the court time and resources.[177]

In addition, emphasis on having spontaneous testimony and probing the totality of an individual's recollection in the search for truth may increase the "likelihood that the evidence given by the witness will be

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172 *Haradinaj et al.*, Decision on Witness Proofing Sessions, *supra* note 14, ¶ 2.
173 *Karemera et al.*, Decision on Witness Proofing, *supra* note 43, ¶ 19.
174 Eser, *supra* note 14, at 127.
175 Ozaki Dissenting Opinion, *supra* note 12, ¶ 23.
176 Guido Acquaviva, *The* Lubanga *Trial Comes to an End—Reflections on the First Conviction by the International Criminal Court*, J. INT'L CRIM JUST at 3, Advance Access published online August 8, 2012, doi:10.1093/jicj/mqs047.
177 *Id.* at 4.

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incomplete, confused and ill-structured."[178] Why? Because of the reality of international criminal proceedings where: 1) witnesses often give their initial statements during the investigative phase long before the indictment is confirmed and the trial commences; and 2) those statements are taken by investigators who may have a very different professional perception as compared to the attorney at trial on what is relevant for a case.[179] Consequently, in these circumstances, witness proofing is crucial for refreshing the witness's recollection; identifying differences between a witness's present-day recollection as compared to earlier statements made long ago; identifying in full all the relevant facts known to a witness vis-à-vis the confirmed indictment; and avoiding undue delay caused by the party calling the witness not knowing what the witness is going to say.[180] Otherwise, a party "must utilize the skill of using non-leading questions to take the witness through their evidence as if blind-folded, but with the added difficulties of translation and, perhaps, a significant cultural chasm."[181]

Furthermore, witness proofing may prove particularly helpful for preparing witnesses to deal with the "magnitude and complexity" of international criminal proceedings, wherein they are asked to testify with respect to international crimes and modes of liability that often "necessitate the review of a large number of complicated and detailed exhibits, which may include various types of documents, audio-video records, different kinds of communications from governments or other entities, maps, and pictures."[182] In addition, witnesses in international criminal proceedings are often giving evidence not only in a criminal justice process that is foreign to them but also while having to use translation services. In the face of these challenges that flow from the nature of international criminal trials, proofing can assist the "smooth conduct of the proceedings by enabling a more accurate, complete, methodical and efficient presentation of the evidence."[183]

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[178] Ozaki Dissenting Opinion, *supra* note 12, ¶ 21.

[179] *Limaj et al.*, Decision on Witness Proofing, *supra* note 2, at 2; *see also Karemera et al.*, Decision on Witness Proofing, *supra* note 43, ¶ 17; *Milutinović et al.*, Decision on Witness Proofing, *supra* note 44, ¶ 20.

[180] *But see* Acquaviva, *supra* note 176, at 4 ("In general, and despite initial fears by many, decisions to bar proofing have arguably not had a great impact on the quality of the evidence led at trial or the length of the examination of witnesses" in the *Lubanga* case.), Advance Access published online August 8, 2012, doi:10.1093/jicj/mqs047.

[181] Skilbeck, *supra* note 8, at 459.

[182] Ozaki Dissenting Opinion, *supra* note 12, ¶ 22.

[183] *Id. But see Lubanga*, Pre-Trial Chamber Decision, *supra* note 4, ¶ 34 & n. 38

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Finally, the ICC approach may hinder the rights of the defense to effective assistance of counsel, to examine the witnesses brought against him or her, and to prepare a proper defense. Because the ICC approach prevents the defense from having notice of any different or additional recollections of a witness compared to earlier statements made during the investigative phase, it may not have time to prepare sufficiently for examination of witnesses on the basis of this new exculpatory or inculpatory information. While a Chamber may prevent any injustice in such a scenario by adjourning in order to allow the defense sufficient time to respond, this then results in delay of proceedings. Furthermore, under the ICC approach, defense witnesses may be deemed to lack credibility in the giving of evidence, or that evidence may be rejected for failure to be probative or relevant.

V. CONCLUDING OBSERVATIONS

From a human rights perspective, it would seem that the ICC's approach of banning witness proofing, insofar as it consists of direct pre-testimony contact between witnesses and parties and substantive discussion of the evidence, applies a hammer where a scalpel would suffice. As intimated earlier in this chapter, a number of problems with witness proofing have clearly developed over the years at the ICTY/ICTR/SCSL in the practice of witness proofing impacting negatively on defense rights in particular. However, it is important to note that these issues resulted from *how* proofing was conducted by the prosecution rather than the practice itself. Similarly, in none of those cases was proofing found to allow or lead to unfair coaching, training or otherwise influencing the evidence of a witness by definition.[184]

While the ICC approach eliminates the possibility of such prejudice to defense rights or unethical behavior resulting from the use of witness proofing, it may nevertheless still lead to infringement of those same rights by prohibiting the practice, as detailed previously. Indeed, as acknowledged by the defense in the ICTR *Karemera et al.* trial, witness proofing serves to assist the defense in better preparing its cross-examination and

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(dismissing this argument by the Prosecution on grounds that under the principles of complementarity or universal jurisdiction, national legal systems with jurisdiction over international crimes have not changed their approach to witness proofing as an unethical or unlawful practice).

[184] *See, e.g.*, *Limaj et al.*, Decision on Witness Proofing, *supra* note 2, at 1, 3; *Karemera et al.*, Decision on Witness Proofing, *supra* note 43, ¶¶ 17–24.

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expedites the proceedings.[185] In addition, the ICC approach could jeopardize effective protection of the rights and interests of witnesses in its proceedings, particularly vulnerable witnesses. Consequently, on balance, it would appear that the ICC approach has the potential to undermine more rights than it upholds.

The reason for this result, it seems, is because although the ICC procedural framework does perhaps reflect more of a blending of the common and civil law than the ICTY, ICTR or SCSL,[186] it is still primarily adversarial in nature when it comes to the procedure for submission and examination of evidence at trial.[187] At the ICC, similar to the ad hoc Tribunals: (1) oral evidence is central to the proceedings;[188] (2) witnesses are, for the most part, called by the parties;[189] and (3) in-court evidence results primarily from the questioning of the witnesses by the parties and Judges.[190] Consequently, "such a system . . . is different from the practice of many civil law jurisdictions, where witnesses have been thoroughly questioned by a judge (*juge d'instruction*) mandated to instruct the case, and where statements produced by such examination are automatically included in the case file, as highly probative evidence at the trial stage."[191] As noted previously, such a system is found in the ECCC and, logically, witness proofing is not found to be necessary before that tribunal.[192] Therefore, in this context, contrary to the view of the ICC *Lubanga* Trial

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185 *Karemera et al.*, Decision on Witness Proofing, *supra* note 43, ¶ 18.

186 *Lubanga*, Trial Chamber Decision, *supra* note 5, ¶ 45 (reasoning that under the ICC procedural framework, the prosecution is tasked with investigating both exculpatory and incriminatory evidence; the Bench is allowed to have greater intervention; and victims are allowed to participate). *See also Lubanga*, Pre-Trial Chamber Decision, *supra* note 4, ¶ 26 & nn. 29–30 (noting its past decisions regulating parties' contact pre-confirmation hearing with witnesses that the other party intends to rely upon at the hearing, and Rule 140 of the ICC Rules, which refers to "question the witness" or "examine the witness" with respect to the parties' questioning of witnesses at trial rather than "examination-in-chief," "cross-examination" and "re-examination.").

187 Ozaki Dissenting Opinion, *supra* note 12, ¶ 20. *See also* JACKSON & SUMMERS, *supra* note 16, at 140–41.

188 ICC Statute, Art. 69(2).

189 ICC Statute, Art. 69(3).

190 ICC RPE, Rule 140(2).

191 Ozaki Dissenting Opinion, *supra* note 12, ¶ 20.

192 *See generally* ECCC Internal Rules (Rev. 8) (Aug. 3, 2011), Rules 24, 50, 55, 60, 80, 84, 91 (regarding procedures for investigations and interviewing witnesses by investigative judges and submission of the case file to the Trial Chamber, which reflects the civil law model, and makes witness proofing unnecessary). *See also* Skilbeck, *supra* note 8; MACKENZIE ET AL., *supra* note 8, at 227–8.

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Chamber,[193] transposition of the more adversarial approach to witness proofing at the *ad hoc* Tribunals to ICC proceedings may well have been quite appropriate.

In conclusion, an alternative approach that the ICC could have taken would have been to allow witness proofing as necessary for its more adversarial approach to production and presentation of evidence at trial, but actively and systematically to regulate the practice in such a way as to avoid abuse of the process by the parties or better safeguard against any risk of taint or unethical tampering of the evidence.[194] Instead, through this "pick and mix" approach to building a new hybrid international criminal justice system, there is a danger that the ICC, with respect to the issue of witness proofing, has "a system that contains none of the checks and balances that bring order to a national system."[195] Only time will tell whether the ICC's prohibition of witness proofing within its procedural framework leads to the infringement of defense and witness rights described above and, if so, whether ICC Chambers are able to find ways to prevent that infringement, perhaps through a more inquisitorial approach to collecting and leading the evidence at trial. It is suggested that careful attention should be paid to the application of this approach at the ICC and adjustments made where necessary for ensuring full respect for the rights of defendants and witnesses in the process.

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193 *Lubanga*, Trial Chamber Decision, *supra* note 5, ¶ 45.

194 *See, e.g.*, Ozaki Dissenting Opinion, *supra* note 12, ¶¶ 26–7 (suggesting the following safeguards: creating clear guidelines that provide a definition and detailed guidance on the practice of proofing, including a list of recommended, acceptable, and prohibited conduct, together with a strict code of conduct applicable to all counsel; video-audio recording of proofing sessions; allowing the presence of a neutral third-party at proofing sessions such as someone from the VWU; fixing a cut-off date for witness proofing before trial; or training counsel on the purpose of witness proofing).

195 *See* Skilbeck, *supra* note 8.