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Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence

RUBEN KAREMAKER, B. DON TAYLOR III, AND THOMAS WAYDE PITTMAN*

Abstract

Witness proofing – or preparation – is an adjunct of the adversarial criminal trial process. It is also a common practice at the UN international criminal tribunals, where it has been repeatedly challenged, analysed, and endorsed. Recently, a trial chamber at the ICC prohibited the prosecutor from proofing witnesses, seemingly calling upon the institution, at an early stage, to break with the established practice of proofing at the UN international criminal tribunals. This article examines witness proofing in international criminal procedure with the aim of describing and weighing its relative merits, and arguing that proofing – as practised at the UN international criminal tribunals – appears to be a better modality for enhancing the efficiency, integrity, and legitimacy of the truth-seeking function of international criminal trials than does prohibiting the practice.

Key words

international criminal tribunals; International Criminal Court; international criminal trials; International Criminal Tribunal for the former Yugoslavia; International Criminal Tribunal for Rwanda; Special Court for Sierra Leone; witness proofing

1. Introduction

On 30 November 2007, Trial Chamber I of the International Criminal Court (ICC) conclusively prohibited the practice of witness 'proofing', as that term was defined by the ICC Prosecutor,[1] following the lead of the pre-trial chamber in a controversial decision issued over a year earlier.[2] The decisions, in the case of *Prosecutor* v. *Thomas Lubanga Dyilo* (*Lubanga*),[3] set the ICC completely at odds with the well-established international criminal tribunals which have ruled on the matter: the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL). This

* Ruben Karemaker is a lawyer from the Netherlands and B. Don Taylor III and Thomas Wayde Pittman are lawyers from the United States. All authors are legal officers in the Chambers Legal Support Section of the International Criminal Tribunal for the former Yugoslavia. The views expressed herein are solely those of the authors and do not reflect the positions or views of the International Criminal Tribunal for the former Yugoslavia or the United Nations.

1 *Prosecutor v. Lubanga*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, Case No. ICC-01/04-01/06, T.Ch. I, 30 November 2007 (hereinafter *Lubanga* Trial Decision).

2 *Prosecutor v. Lubanga*, Decision on the Practices of Witness Familiarisation and Witness Proofing, Case No. ICC-01/04-01/06, Pre-Trial Chamber I, 8 November 2006 (hereinafter *Lubanga* Pre-trial Decision).

3 *Lubanga* Trial Decision and *Lubanga* Pre-trial Decision, *supra* notes 1 and 2.

article examines the evolving practice of witness proofing within the context of international criminal procedure and in furtherance of developing an international concept of trial advocacy. The first sections describe the origins of witness proofing and define what witness proofing currently entails as practised in the ICTY, the ICTR and the SCSL. This is followed by an examination of the legal challenges to the practice raised in these tribunals and the ICC. Next, consideration is given to the rationale underlying the divergent jurisprudence in analysing the merits of the practice in international criminal trials. The article concludes with a recommendation in favour of the continued practice of witness proofing as developed and endorsed at the ICTY, the ICTR, and the SCSL.

2. The origins of witness proofing

No fair discussion of witness proofing at international criminal tribunals may begin without acknowledgement that the ICTY, ICTR, and SCSL have been primarily influenced by the Anglo-Saxon, common-law, adversarial system of justice, from which the practice originates.[4] Indeed, 'proofing' is a term used in Commonwealth adversarial systems, and is less formally known as witness 'preparation' in the United States.[5] Essentially unknown in the civil law, proofing – in one form or another – is a necessary adjunct of the adversarial criminal trial. Because the evidence presented at trial is the basis on which the fact finder will establish what happened, the manner in which that evidence is presented is of paramount importance. Without direct recourse to any dossier or other investigatory case file, judges and juries can decide the case based only upon what they see and hear in the courtroom. And because deciding what is seen and heard in the courtroom rests primarily upon the parties, preparing the presentation of evidence effectively is one of the adversarial advocate's most important tasks.

The purpose of this article, however, is not to demean the maturity of the jurisprudence of the international criminal tribunals by casting the *Lubanga* Decision in the simple terms of an 'adversarial versus inquisitorial' struggle, but rather to focus on the relative merits of proofing as analysed in the case law of the international criminal tribunals in order to arrive at a conclusion as to whether proofing is beneficial to the administration of international justice. As one author has so eloquently stated,

> [w]hile these tensions [between common-law and civil-law principles] were instrumental in the development of important aspects of international criminal law, it is now time to abandon the preoccupation of international criminal courts and tribunals with this dichotomy and embrace the newly created system of international criminal law as a jurisdiction in its own right.[6]

4 See A. Orie, 'Adversarial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICC', in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002). See also the full discourse of Senior Trial Attorney Ken Scott in *Prosecutor v. Prlić et al.*, Case No. IT-04-74-T, 19 March 2007, T.15853-4, from which the following is quoted: 'when the early Judges and the senior leaders of this institution many years ago designed the system that would be the ICTY, they put in place a system which, hybrid as it is, is decidedly more adversarial than not, decidedly more common law than not'.

5 See, e.g., J. Applegate, 'Witness Preparation', (1989) 68 *Texas Law Review* 277.

6 G. Boas, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings* (2007), at 9.

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It is for this reason that this article does not attend further to the practice of witness proofing – or lack thereof – in domestic legal systems, unless specifically relevant to a particular decision of the ICTY, the ICTR, the SCSL, or the ICC. What is important is the actual practice of proofing in the jurisdiction of this 'newly created system of international criminal law', not how that practice may compare with domestic practice.

3. The practice of witness proofing at the ICTY, the ICTR, and the SCSL

Although the practice of proofing has been firmly established since the earliest days of the ICTY,[7] it was not until 2004 – a decade after the first trial began – that a formal challenge arose.[8] Subsequent challenges were brought before other trial chambers of the ICTY,[9] the SCSL,[10] and the ICTR,[11] and the Appeals Chamber of the ICTR.[12] Prior to conducting a chronological examination of the jurisprudence brought about by these challenges to proofing, it is useful to describe what the practice entails.

Proofing in the ICTY, the ICTR, and the SCSL may be succinctly described as a practice which refers to '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 familiarise the witness with courtroom procedures and to review the witness's evidence'.[13] This description applies to both parties – prosecution and defence. More specifically, the practice involves informing the witness about the purpose of the trial and its procedure, including the role of the judges, the prosecution, the defence, and the accused, and the purpose and method of examination-in-chief, cross-examination and re-examination; the areas likely to be asked in examination-in-chief, cross-examination, and re-examination, and the form in which questions are likely to be asked and expected to be answered; and appropriate and effective witness behaviour. Proofing can also include showing the witness his or her prior statements for the purpose of refreshing recollection; showing the witness exhibits likely to be used during the witness's testimony or any other relevant material; and questioning the witness on areas relevant to his or her testimony, which should

7 'The practice of proofing witnesses, by both the Prosecution and Defence, has been in place and accepted since the inception of this Tribunal', *Prosecutor v. Limaj, Bala and Musliu*, Decision on Defence Motion on Prosecution Practice of 'Proofing' Witnesses, Case No. IT-03-66-T, 10 December 2004 (hereinafter *Limaj* Trial Decision), at 2.

8 Ibid.

9 *Prosecutor v. Milutinović et al.*, Decision on Ojdanić Motion to Prohibit Witness Proofing, Case No. IT-05-87-T, Trial Chamber III, 12 December 2006 (hereinafter *Milutinović* Trial Decision).

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

11 *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, Decision on Defence Motions to Prohibit Witness Proofing, Case No. ICTR-98-44-T, 15 December 2006 (hereinafter *Karemera* Trial Decision).

12 *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, Decision on Interlocutory Appeal Regarding Witness Proofing, Case No. ICTR-98-44-AR73.8, 11 May 2007 (hereinafter *Karemera* Appeal Decision).

13 *Prosecutor v. Haradinaj, Balaj and Brahimaj*, Decision on Defence Request for Audio-Recording of Prosecution Witness Proofing Sessions, Case No. IT-04-84-T, 23 May 2007 (hereinafter *Haradinaj* Trial Decision), at 8. The trial chamber pointed out the absence of a 'set definition of proofing at the [ICTY].' The fact that witness proofing usually takes place shortly before the witness is to testify in court has been the subject of criticism. See *Milutinović* Trial Decision, *supra* note 9, at 23.

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include questions on inconsistencies between prior statements and information provided during proofing.[14]

Other essential features include identifying fully the facts known to the witness that are relevant to the charges in the indictment, canvassing in detail the relevant recollection of a witness, examining in detail deficiencies and differences in recollection when compared with each earlier statement of a witness,[15] genuinely attempting to clarify the witness's evidence,[16] and disclosing additional information or evidence prior to the testimony of a witness.[17]

In the section that follows, it can be seen that the few legal challenges to the practice of witness proofing in the ICTY, the ICTR, and the SCSL have been uniformly raised by counsel for the defence. One can readily assume this to be a consequence of the prosecution's requirement to lead its evidence first at trial. The prosecution would certainly have little room to argue for preclusion of the practice as applied to the defence case-in-chief where it had already proofed witnesses who gave testimony.

4. Challenges to witness proofing at the UN tribunals and the ICC

4.1. *Prosecutor* v. *Limaj et al.* (ICTY trial chamber)

In November 2004 all three accused in the case of *Prosecutor* v. *Limaj, Bala and Musliu* requested the trial chamber to order that the prosecution immediately cease proofing its witnesses.[18] The defence generally asserted that the prosecution 'coached' witnesses during proofing sessions.[19]

The chamber denied the request, noting that '[t]he practice of proofing witnesses, by both the Prosecution and Defence, has been in place and accepted since the inception of [the ICTY]. It is certainly not unique to this Chamber. It is a widespread practice in jurisdictions where there is an adversarial procedure'.[20] It further noted that the practice of proofing provides a number of advantages to the trial process and assists witnesses in coping with the experience of testifying.

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

14 *Haradinaj* Trial Decision, *supra* note 13, n. 20 (citing *Prosecutor v. Milutinović et al.*, Prosecution Response to General Ojdanić's Motion to Prohibit Witness Proofing, Case No. IT-05-87-T, 29 November 2006 (hereinafter *Milutinović* Prosecution Response), n. 2.
15 *Limaj* Trial Decision, *supra* note 7, at 2.
16 *Milutinović* Trial Decision, *supra* note 9, at 16.
17 *Karemera* Trial Decision, *supra* note 11, at 15.
18 *Limaj* Trial Decision, *supra* note 7, at 1.
19 Ibid.
20 Ibid., at 2.

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> witness. Proofing will also properly extend to a detailed examination of deficiencies and differences in recollection when compared with each earlier statement of the witness. In particular, such proofing is likely to enable the more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial.[21]

The chamber also dismissed the claim that the prosecution would 'coach' its witnesses, noting that '[t]here are clear standards of professional conduct which apply to Prosecuting counsel when proofing witnesses'.[22] Moreover, the chamber held that proofing could assist witnesses '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', adding that proofing thus provides a different form of witness support not to be left to the Victim and Witness Section of the Registry.[23]

4.2. *Prosecutor* v. *Sesay et al.* (SCSL trial chamber)

In October 2005, two of the accused in *Prosecutor* v. *Sesay, Kallon and Gbao (Revolutionary United Front 'RUF' Case)*, claimed that the prosecution had knowingly or negligently destroyed handwritten notes from a proofing session they held with a witness. Consequently these accused demanded that the chamber exclude the evidence that the witness had given at trial.

Although no objection to the practice of proofing per se was raised, the trial chamber noted that the purpose of proofing was 'for counsel to discuss matters, including the witness's proposed evidence, with the witness who has little experience appearing in court'.[24] Quoting approvingly – and extensively – from the *Limaj* trial decision, the *RUF* chamber held that

> proofing witnesses prior to their testimony in court is a legitimate practice that serves the interests of justice. This is especially so given the particular circumstances of many of the witnesses in this trial who are testifying about traumatic events in an environment that can be entirely foreign and intimidating for them.[25]

4.3. *Prosecutor* v. *Lubanga* (ICC pre-trial chamber)

A little over a year later, Pre-Trial Chamber I of the ICC issued the Court's first decision on proofing in the case of *Prosecutor* v. *Lubanga*.[26] Oddly, the challenge to the practice did not originate from the defence, but rather from the pre-trial chamber itself, presided over by Judge Claude Jorda, the former president of the ICTY.[27] After

21 Ibid.
22 Ibid., at 3. It is noteworthy that the defence did not claim that any such coaching had actually occurred but that there was a danger that it might. Ibid., at 1; T. 1161 (30 November 2004). See section 5.2.3, *infra*, concerning the perceived risk of proofing. See also section 5.2.1, *infra*, for more on the distinction between proofing on the one hand and coaching or other unacceptable practices on the other.
23 *Limaj* Trial Decision, *supra* note 7, at 3. See also *Karemera* Trial Decision, *supra* note 11, at 17.
24 *RUF* Trial Decision, *supra* note 10, at 7.
25 Ibid., at 33.
26 *Lubanga* Pre-Trial Decision, *supra* note 2.
27 Ibid., at 1–2. At a status conference on 26 October 2006, the prosecution informed the pre-trial chamber that it would be conducting proofing sessions with a witness. This information prompted the single judge of the pre-trial chamber on 30 October 2006 formally to request the prosecution 'to elaborate on the content of what the prosecution means by the expression "proofing of the witness" and the specific conditions under

finding that the expression 'proofing of a witness' was not found in the Statute, Rules of Procedure and Evidence, or Regulations of the Court,[28] the pre-trial chamber divided the goals and measures of proofing, as defined by the prosecution, into two broad components. The first component concerned witness preparation for giving oral testimony and witness familiarization with the proceedings.[29] The second component concerned witness proofing in the sense of the prosecution (i) allowing a witness to read his or her statement(s) and refresh his or her memory in respect of the evidence to be given at trial; (ii) relying on the statement(s) to put questions to the witness which are intended to be asked at trial and in the order they are to be asked; and (iii) inquiring of the witness about possible additional information of an inculpatory or exculpatory nature.[30] The 'familiarization' component was found to be admissible if conducted by the Victims and Witnesses Unit rather than the prosecution, but the 'evidentiary review' component was found inadmissible and was prohibited.

In concluding that proofing was not appropriate, the pre-trial chamber reasoned that the only relevant case advanced by the prosecution to support the practice was the *Limaj* case, a case which – in its view – actually disproved the prosecution's submission that proofing was a 'widely accepted practice in international criminal law'.[31] The pre-trial chamber rejected the prosecution's proposition that the nature of the crimes tried at the ICC or the fact that they had occurred long ago supported the practice of proofing, noting that 'national jurisdictions, such as *inter alia* Spain, Belgium or Germany', had not decided to adopt the practice of proofing when implementing the Rome Statute in national legislation.[32]

Recalling Article 21(1)(c) of the Rome Statute,[33] the pre-trial chamber further suggested – without finding – that the practice of proofing might not be consistent

which the prosecution wishes to carry out the proofing of the witness; and not to undertake any proofing session until the matter is ruled on by the Chamber'. Notwithstanding this, the trial chamber appears to have taken the view that the issue was initially raised by the prosecution, see *Lubanga* Trial Decision, *supra* note 1, at 4.

28 *Lubanga* Pre-Trial Decision, *supra* note 2, at 11.

29 Ibid., at 15.

30 Ibid., at 17.

31 Ibid., at 31–3.

32 Ibid., at 34 and n. 35. Unfortunately, the pre-trial chamber in its comparison did not comment upon the seemingly critical fact that court proceedings in Spain, Belgium, or Germany are conducted in a fundamentally different manner from those at the ICC. For example, a German investigative judge would arguably not be aided by allowing the parties to proof their witnesses when he or she has examined the witnesses directly in the parties' presence prior to their testimony at trial. In other words, the usefulness or propriety of proofing is not a corollary to the nature of the crime involved, or the age of the case, so much as it is an adjunct of the adversarial criminal trial format established by the ICC's regulatory framework. To the extent that the prosecution's argument failed to focus on this important distinction, the pre-trial chamber's oversight might be understandable.

33 Art. 21 of the Rome Statute establishes the sources and hierarchy of law to be applied in the Court's decision-making. Following the formal sources of the Court's regulatory framework (Statute, Rules of Procedure and Evidence, and Elements of Crimes), and applicable treaties, principles, and rules of international law, the Court is to look to 'general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards' (Art. 21(1)(c)).

with the national laws of the Democratic Republic of the Congo.[34] The chamber (without reference) observed that proofing would be 'either unethical or unlawful in jurisdictions as different as Brazil, Spain, France, Belgium, Germany, Scotland, Ghana, England and Wales and Australia, to give just a few examples'.[35] Giving particular attention to England and Wales, the chamber was of the view that the Code of Conduct of the Bar Council of England and Wales specifically prohibited proofing.[36]

Based on the foregoing, the pre-trial chamber found that the practice of proofing 'is not embraced by any general principle of law that can be derived from the national laws of the legal systems of the world'. Thus it concluded that 'if any general principle of law were to be derived from the national laws of the legal systems of the world on this particular matter, it would be the duty of the Prosecution to refrain from undertaking the practice of witness proofing . . .'.[37]

4.4. *Prosecutor v. Milutinović et al.* (ICTY trial chamber)

One week after the *Lubanga* Pre-Trial Decision was filed it was used offensively by defence counsel at the ICTY. Relying exclusively on the decision, one of the accused in *Prosecutor v. Milutinović et al.* moved for an immediate order prohibiting the prosecution from proofing its witnesses.[38]

The trial chamber pointed out several procedural differences between the decision-making processes of the two courts. Moreover, it considered that the *Lubanga* pre-trial chamber addressed the practice of proofing in the context of a single witness set to testify at the pre-trial confirmation hearing of the first accused before the court, whereas the *Milutinović* chamber had to consider the practice in the context of numerous witnesses who had testified or would testify in an actual trial.[39]

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

> [d]iscussions between a party and a potential witness regarding his/her evidence can, in fact, enhance the fairness and expeditiousness of the trial, provided that these discussions are a genuine attempt to clarify a witness'[s] evidence. This is what the Chamber considers to be the essence of proofing conducted by the parties before the

34 *Lubanga* Pre-Trial Decision, *supra* note 2, at 35. As it provided no analysis, the pre-trial chamber left open (i) whether proofing is prohibited in the Democratic Republic of the Congo; and (ii) whether such a finding would affect the outcome of its decision, and if so, to what extent it should be determinative.

35 Ibid., at 37.

36 Ibid., at 38–9. Note, however, that this argument with regard to English law was specifically rejected by the *Milutinović* trial chamber at the ICTY, finding that proofing as practised at the ICTY was not the equivalent of the prohibited practice of rehearsing, practising, or coaching a witness; see *infra* note 40, and accompanying text.

37 Ibid., at 42.

38 The Defence 'Motion to Prohibit Witness Proofing' was filed on 15 November 2006, *Milutinović* Trial Decision, *supra* note 9, at 2.

39 *Milutinović* Trial Decision, *supra* note 9, at 11–15.

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> Tribunal and considers that this practice does not amount to 'rehears[ing,] practis[ing,] or coach[ing] a witness'.[40]

The chamber considered that the defence challenges came down to a complaint about the prosecution's practice of proofing witnesses at a late stage in the trial proceedings, leading to disclosure difficulties, rather than proofing per se. Finally, the chamber concluded that proofing did not prejudice the rights of the accused, and defence allegations that the prosecution had or would violate the 'clear standards of professional conduct which apply . . . when proofing witnesses' were dismissed.[41]

4.5. *Prosecutor v. Karemera* (ICTR)

4.5.1. The trial chamber

Five days after the *Lubanga* Pre-Trial Decision and three days after the *Milutinović* decision, two accused at the ICTR in *Prosecutor* v. *Karemera, Ngirumpatse and Nzirorera* requested an immediate order prohibiting the prosecution from any further proofing.[42]

Having no other alternative than to consider the merits of the *Lubanga* Pre-Trial Decision, the *Karemera* trial chamber examined the practice of proofing at the ICTR and the ICTY. The chamber rejected the *Lubanga* approach, noting that proofing 'not only poses no undue prejudice, but is also a useful and permissible practice'.[43] As it is common for a witness later to recall details not recorded in his or her previous statements, prior disclosure of such information before testimony in court is advantageous to the opposing party '[p]rovided that it does not amount to the manipulation of a witness'[s] evidence'.[44]

Reinforcing its view that the established practice of proofing was beneficial to the defence, the chamber remarked that the *defence* on several occasions had requested to meet with prosecution witnesses in order to better prepare its cross-examination and expedite the proceedings.[45]

Lastly, the chamber warned that proofing could not be considered 'as permission to train, coach or tamper [with] a witness before he or she gives evidence',[46] and dismissed defence claims regarding alleged manipulation of witness evidence during proofing. Such allegations had been made 'without any evidence to support or

40 Ibid., at 16; see Art. 705 of the Code of Conduct of the Bar Council of England and Wales: 'A barrister must not: (a) rehearse, practise, or coach a witness in relation to his evidence; (b) encourage a witness to give evidence which is untruthful or which is not the whole truth; and (c) except with the consent of the representative for the opposing side or of the Court, communicate directly or indirectly about a case with any witness whether or not the witness is his lay client, once that witness has begun to give evidence until the evidence of that witness has been concluded.'

41 *Milutinović* Trial Decision, *supra* note 9, at 19, 22.

42 *Karemera* Trial Decision, *supra* note 11, at 1. Joseph Nzirorera's Motion to Prohibit Witness Proofing was filed on 13 November 2006.

43 Ibid., at 10.

44 Ibid., at 15–16 (citing ICTR Prosecutor's Regulation No. 2 (1999), Standard of Professional Conduct Prosecution Counsel (hereinafter Prosecution Standards)).

45 Ibid., at 18. The defence request to do so was granted by the chamber, *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, Decision on Reconsideration of Protective Measures for Prosecution Witnesses, ICTR-98-44-T, 30 October 2006.

46 *Karemera* Trial Decision, *supra* note 11, at 12.

justify them'.[47] In fact, several witnesses had been cross-examined specifically on the conduct of the proofing process and his or her evidence provided no evidential support for the allegations.[48]

4.5.2. The Appeals Chamber

On 11 May 2007 the ICTR Appeals Chamber affirmed the *Karemera* Trial Decision. The crux of the accused's appeal was characterized by the Appeals Chamber as 'the supposition . . . that witness proofing is considered unethical and unlawful in the ICC and in most major legal systems in the world'.[49]

Examining and rejecting each of the accused's challenges, the Appeals Chamber concluded that careful cross-examination was the key tool for testing whether proofing might have improperly influenced a witness's testimony. Like the trial chamber, the Appeals Chamber warned the parties that 'intentionally seeking to interfere with a witness's testimony is prohibited, and if evidence of this comes to light, a trial chamber can take appropriate action by initiating contempt proceedings under Rule 77 of the Rules and by excluding the evidence pursuant to Rule 95 of the Rules'.[50] Citing from its 2006 *Gacumbitsi* Appeal Judgement, the Appeals Chamber recalled that 'it 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'.[51]

Thus, in an approach diametrically opposed to that adopted by the *Lubanga* pre-trial chamber, the ICTR Appeals Chamber considered that even though the approach to witness proofing might vary greatly in different national jurisdictions, this did not render the practice incompatible with the ICTR's Statute, Rules of Procedure or general principles of law.[52]

4.6. *Prosecutor v. Lubanga* (ICC trial chamber)

Owing to the pre-trial chamber's *sua sponte* inquiry into and eventual prohibition of the practice of proofing, the ICC trial chamber in *Lubanga* faced a formal request by the prosecution on 12 September 2007 to reconsider the pre-trial chamber's decision.[53] Following a hearing, the chamber prohibited any meetings between the parties and witnesses outside court beyond that which occurs during the process of witness familiarization undertaken by the Victim and Witnesses Unit to '[provide]

47 Ibid., at 22.
48 Ibid.
49 *Karemera* Appeal Decision, *supra* note 12, at 6.
50 Ibid., at 13. While the Appeals Chamber used the words 'interfering with witness' testimony', the trial chamber used the wording 'manipulation of a witness' evidence', *Karemera* Trial Decision, *supra* note 11, at 15. The specific allegation made by the Defence was that the Prosecution was 'tampering with witnesses' and 'moulding the evidence against the Accused' (at 21).
51 *Karemera* Appeal Decision, *supra* note 12, at 9.
52 Ibid., at 11.
53 *Prosecutor v. Lubanga*, Prosecution's submissions regarding the subjects that require early determination: procedures to be adopted for instructing expert witnesses, witness familiarization and witness proofing, Case No. ICC-01/04-01/06, Trial Chamber I, 12 September 2007. Unusually, the citation to this submission was omitted in the trial chamber's 'Procedural Background' and referenced only once in the Decision as a secondary source in a footnote (*Lubanga* Trial Decision, *supra* note 1, n. 9).

witnesses with an opportunity to acquaint themselves with the people who may examine them in court'.[54]

The trial chamber followed the pre-trial chamber in analysing proofing by separating the issue into two components: (i) a review of the process undertaken to 'familiarize witnesses with courtroom procedure'; and (ii) a review of the process of 'preparing a witness in a substantive way for their testimony at trial'.[55] With respect to 'witness familiarization', the chamber agreed with the pre-trial chamber that certain functions were exclusively within the purview of the Victims and Witnesses Unit.[56] Allowance was made, however, for the Victims and Witnesses Unit to 'work in consultation with the party calling the witness, in order to undertake the practice of witness familiarization in the most appropriate way'.[57]

Turning to the evidentiary review component of proofing – which it called 'substantive preparation of witnesses for trial'[58] – the chamber rejected the prosecution's argument that the practice was envisaged in the ICC Statute. It further rejected the contention that a general principle of law allowing for the practice could be derived from national legal systems worldwide. The chamber noted that the jurisprudence of the ICTY and the ICTR establishes proofing 'in the sense advocated by the prosecution in the present case' as being in common use at these tribunals, but that such precedent was non-binding on the Court[59] and that the ICC Statute 'through important advances . . . moves away from the procedural regime of the ad hoc tribunals, introducing additional and novel elements to aid the process of establishing the truth'.[60]

These elements, however, did not take into account the 'greater efficiency which might be achieved by providing past statements to a witness in advance to assist that witness with his recollection'.[61] Thus the chamber found it necessary to add to the functions of the Victims and Witnesses Unit a further task – derived from

54 *Lubanga* Trial Decision, *supra* note 1, at 53(f).
55 Ibid., at 28.
56 Ibid., at 29.
57 Ibid., at 34. Contrast this with the *Limaj* trial chamber's contrary conclusion at the ICTY: 'Also particularly relevant are the cultural differences encountered by most witnesses in this case, when brought to the Hague and required to give a detailed account of stressful events, which occurred a long time ago, in a formal setting, and doing so in response to structured precise questions, translated into a different language. Such factors also demand time in preparing a witness to cope adequately with the stress of these proceedings. *These matters, in the Chamber's view, are properly in the realm of proofing, and are not to be left to the different form of support provided by the Victims and Witnesses Section*' (*Limaj* Trial Decision, *supra* note 7, at 3 (emphasis added)). One could arguably attribute this to the differing functions of the two tribunals' victim and witness assistance roles.
58 *Lubanga* Trial Decision, *supra* note 1, at 36.
59 Ibid., at 43–4.
60 Ibid., at 45. This pronouncement may be viewed with some irony in view of the fact that the procedural regime to which the trial chamber refers as establishing 'additional novel elements' was established – and virtually set in stone – in 1998 (Rome Statute) and 2002 (Rules of Procedure and Evidence). Conversely, the procedural rules at the ICTY are continuously updated to adapt to changing circumstances and the lessons learned by experience, having been amended 28 times since 1998, and 15 times since 2002. Moreover, with specific regard to proofing, it is difficult to understand how the Rome Statute could have been 'improving' on jurisprudence not yet rendered, much less how the unexplained yet implied rejection of a practice found to be effective and appropriate at other international criminal tribunals with extraordinarily similar structures could be considered an improvement.
61 *Lubanga* Trial Decision, *supra* note 1, at 50.

the prohibited proofing process – of 'mak[ing] available to the witness a copy of any witness statement they have made in order to refresh their memory'.[62]

The chamber concluded its analysis of proofing by opining – without elaboration – that preparation of witness testimony prior to trial might diminish the 'spontaneous nature of testimony' which could be of 'paramount importance to the Court's ability to find the truth'.[63]

5. The merits of the divergent approaches

It might be argued that if either the ICC Statute or the ICC's Rules of Procedure and Evidence unequivocally dictated the result reached in the *Lubanga* Pre-Trial or Trial Chamber Decisions, there is no value to analysing the merits of the competing approaches to proofing. It is far from clear, however, that the result reached in either decision was inevitable.[64] But even were such a result demanded by the ICC's governing law, the comparative advantages of proofing would legitimize serious contemplation of legislative reform.

5.1. The witness-familiarization component of proofing

Few would quarrel with the importance of the familiarization component of proofing. Whether such familiarization should be conducted by the prosecution is a question largely subsumed within the approach taken to the evidentiary review component of proofing. Accordingly, although there is a practical case to be made that familiarization is best handled by the parties, this issue will be addressed no further.

5.2. The evidentiary review component of proofing

Measuring the relative merits of proofing against its categorical prohibition must begin with the assumption that, regardless of differing ideological, legal, or geopolitical backgrounds, all stakeholders in the nascent system of international criminal justice share at least one common goal: ascertaining objective truth – to the maximum extent possible – through effective fact-finding. The *Lubanga* trial chamber explicitly noted that one of the 'principal goals of the work of the [ICC] is to establish the truth'.[65] Thus the merits of proofing will be considered by examining the extent to which the practice promotes the truth-seeking process.

5.2.1. Proofing is not rehearsing, practising, or coaching

The *Lubanga* trial chamber opined that proofing 'could lead to a distortion of the truth and may come dangerously close to constituting a rehearsal of in-court testimony'.[66] Earlier in this article we defined what witness proofing is and what it entails.[67] It

62 Ibid., at 50, 55. The chamber placed on the party responsible for calling the witness the burden of making available to the Victims and Witnesses Unit any previous statements of a witness. No guidance was provided as to those situations where the making of a previous statement is a fact in dispute.
63 Ibid., at 52.
64 See for example, *supra* notes 32, 34, 36 and 40, and accompanying text.
65 *Lubanga* Trial Decision, *supra* note 1, at 47 (citing ICC Statute, Arts. 54(1)(a), 69(3)).
66 Ibid., at 51.
67 See section 2, *supra*.

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is also important to define what the practice is *not*. Contrary to the *Lubanga* trial chamber's perception, proofing does not include rehearsing or practising with a witness or coaching a witness in giving his or her evidence,[68] nor does it include training or tampering with a witness to mould his or her testimony, or manipulating the evidence of a witness.[69] Likewise, it does not include attempting to influence the content of the testimony of a witness in any way that shades or distorts the truth.[70] It also does not include informing a witness about the specific substance of an answer he or she is expected to give during testimony[71] or preparing a witness to recite testimony learnt from the prosecution.[72]

5.2.2. The comparative advantages of proofing

Measured solely by its relative capacity to adduce more evidence for consideration at trial, proofing witnesses is more productive than prohibiting proofing. The experience of the ICTY, the ICTR, and the SCSL has been that proofing often produces evidence unknown to either party.[73] Uncovering new probative evidence during proofing produces one of two results. Either it generates more evidence for the trial than would have been available without such proofing, or it produces the same new evidence, but without the element of surprise to the parties attending the testimonial revelation of unknown evidence from the witness box. In this regard, the *Lubanga* trial chamber's reference to 'helpful spontaneity during the giving of evidence by a witness' is puzzling.[74] If the parties are to have any meaningful role in presenting the evidence, such surprises should be avoided to the maximum extent possible.[75]

Without question the truth-seeking process is enhanced by ensuring the timely production and consideration of all available probative evidence. Judges cannot

68 *Milutinović* Trial Decision, *supra* note 9, at 16. Similarly, the practice does not include putting to the witness the exact questions to be asked during his or her testimony, *Karemera* Trial Decision, *supra* note 11, at 23.

69 *Karemera* Trial Decision, *supra* note 11, at 11–12, 15 and 21.

70 *Karemera* Appeal Decision, *supra* note 12, at 9.

71 *Haradinaj* Trial Decision, *supra* note 13, n. 20, citing *Milutinović* Prosecution Response, n. 2.

72 *Karemera* Trial Decision, *supra* note 11, at 21.

73 For example, in *Karemera* the Appeals Chamber noted Nzirorera's assertion that the prosecution's proofing practice had resulted in seven instances of new evidence (*Karemera* Appeal Decision, *supra* note 12, at 12, n. 32). Likewise, the *Milutinović* trial chamber acknowledged the defence argument that what it characterized as 'late disclosure' had occurred on *numerous* occasions (*Milutinović* Trial Decision, *supra* note 9, at 21). Due process concerns inherent in the timing of the discovery of new evidence are not considered in this article. While such concerns are extraordinarily important, they do not directly implicate the relative merits of proofing, as international judges unquestionably possess the tools to remedy any due process deprivations. See, e.g., *Karemera* Appeal Decision, *supra* note 12, at 12 (noting that the prosecution's act of disclosing new material to the defence as a result of a proofing session does not mean that the trial chamber will allow the evidence to be led or that it will ultimately credit the testimony in its final assessment of the case).

74 *Lubanga* Trial Decision, *supra* note 1, at 52.

75 In this context, it may be interesting to note the following finding of the ICTY Appeals Chamber in *Prosecutor v. Krstić*: 'in a situation where the defence is unaware of the precise nature of the evidence which a prospective witness can give and where the defence has been unable to obtain his voluntary cooperation, it would not be reasonable to require the defence to use "all mechanisms of protection and compulsion available" to force the witness to give evidence "cold" in court without first knowing what he will say. That would be contrary to the duty owed by counsel to their client to act skilfully and with loyalty' (*Prosecutor v. Krstić*, Decision on Application for Subpoenas, Case No. IT-98-33-A, AC, 1 July 2003, at 8). This finding of the Appeals Chamber in *Krstić* was later also embraced by the Appeals Chamber in *Karemera*. *Karemera* Appeal Decision, *supra* note 12, at 10.

consider what they are not provided with and even the nimblest of advocates are more effective with preparation. When probative evidence is lost or presented less effectively, it is the process itself that suffers – regardless of whether the result benefits or harms either of the parties. Pursuing justice is not a zero-sum game.

5.2.3. The perceived risk of proofing

The *Lubanga* chambers' prohibition of proofing, by contrast, suggests that concerns regarding the completeness or timeliness of evidence are subordinate to the risk that proofing may improperly influence a witness's evidence. Given the very clear parameters of the practice outlined above, it is reasonable to question the substantiality of that perceived risk. Thus, while the core concern is legitimate, it is one that cannot be considered in isolation but must be weighed in its appropriate context. As explained below, that context suggests that prohibiting proofing represents a disproportionate, counterproductive response to a remote and manageable risk.

5.3. Mitigating the perceived risk of proofing

Categorically prohibiting proofing seemingly rejects at least four principles that underlie the rationale for proofing as endorsed by the judges of the ICTY, the ICTR, and the SCSL. First, that cross-examination is an effective counterweight to any risk that proofing may improperly influence a witness's evidence. Second, that the professional judges at the international tribunals possess the tools to govern proofing appropriately and the discernment to weigh the evidence accordingly. Third, that the ethical codes governing the conduct of counsel specifically prohibit practices which may improperly influence a witness's evidence. Finally, that the contempt power effectively endows judges with the authority to punish those who would improperly influence witness evidence.

5.3.1. Cross-examination

It is something of an article of faith – at least in domestic adversarial legal systems – that cross-examination is 'the greatest legal engine ever invented for the discovery of truth'.[76] While debate has never ceased around the margins of this proposition,[77] the truism at its core is widely accepted and applied at the ICTY, the ICTR, and the SCSL. Indeed, the Appeals Chamber, in its list in the *Karemera* case of 'several ways for parties to address the possibility that witness preparation might have improperly influenced testimony', discussed cross-examination first.[78]

The right to examine the witnesses against him or her is secured to every accused person before the ICTY, the ICTR, and the SCSL, as well as before the ICC. And especially in matters going to credibility, parties are routinely given wide latitude

76 J. Wigmore, *Evidence* (1974), § 1367.

77 See, e.g., J. Epstein, 'The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination', (2007) 36 *Stetson Law Review* 727 (questioning the efficacy of cross-examination in cases involving honest mistaken identifications).

78 *Karemera* Appeal Decision, *supra* note 12, at 13.

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during cross-examination to explore a witness's discussion of the subject matter of the case with others, including opposing counsel. Virtually every aspect of such a discussion is relevant to discerning inappropriate influence: the setting in which the discussion occurred; the tenor, substance, and atmosphere of the discussion, the number, status, and roles of the persons present; the questions asked and unasked; the answers given; the advice relayed. It would be a poor advocate indeed who, despite suspecting 'rehearsal' during proofing, did not aggressively attempt to expose it to the bench, or who could not effectively challenge a 'rehearsed witness [who] may not provide the entirety or the true extent of his memory or knowledge of a subject'.[79]

5.3.2. Professional judges

The utility of cross-examination is no less important where professional judges rather than lay jurors serve as fact finders. Indeed, the capacity of professional judges to consider appropriately the evidence presented to them on any given issue is a recurring theme in the jurisprudence of the ICTY, the ICTR, and the SCSL.[80] Moreover, the judges are free to examine directly the influences on a witness, should counsel have performed less than competently.[81] Nor are the judges limited to questioning the witnesses called by the parties. Rather, they possess seemingly unlimited powers to call additional witnesses and evidence should they find it helpful.[82]

The capacity to challenge the opposing party's practices is a powerful tool, and the experience of the ICTY, the ICTR, and the SCSL demonstrates that counsel for the accused have aggressively challenged prosecution proofing – both generally and in specific instances – even before the *Lubanga* Pre-Trial Decision.[83] The cases outlined above demonstrate that the judges are not oblivious to the risk of improper influence but consider themselves well equipped to manage that risk.

Moreover, the practice of proofing at the ICTY, the ICTR, and the SCSL is not static. In a recent example, although the *Haradinaj* trial chamber at the ICTY declined a defence request to require the prosecution to audio-record its proofing sessions, the chamber warned the prosecution that it would closely govern the process and would not hesitate to intervene should it become necessary to protect the rights of the accused.[84] Under the watchful eye of the judges, proofing continues to evolve.

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79 *Lubanga* Trial Decision, *supra* note 1, at 52.

80 Of course, the role of professional judges in international tribunals extends well beyond the framework of the ICTY, the ICTR and the SCSL. See D. Terris, C. Romano, and S. Sotomayor, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (2007).

81 See, e.g., ICTY Rule 85(B), ICTR Rule 85(B), or SCSL Rule 85(B) ('a Judge may at any stage put any question to the witness'). See also ICC Rule 140(2)(c) ('the Trial Chamber has the right to question a witness before or after a witness is questioned by a participant').

82 See e.g. ICC Statute Art. 64(6)(a) ('the Trial Chamber may order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties'); ICTY Rule 98 ('a Trial Chamber may order either party to produce additional evidence and may *proprio motu* summon witnesses and order their attendance').

83 Indeed, such challenges are arguably over-utilized. One need only note the *Karemera* trial chamber's pronouncement that lodging serious allegations such as witness tampering during proofing 'without any evidence to support or justify them is discourteous at the very least', *Karemera* Trial Decision, *supra* note 11, at 22.

84 See *Haradinaj* Trial Decision, *supra* note 13, at 22–3.

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5.3.3. Codes of professional conduct

Chambers considering proofing have explicitly recognized that the practice is directly regulated by clear standards of professional conduct. The *Karemera* trial chamber noted that

> [a]ccording to the Prosecutor's Regulations No. 2, the members of the Office of the Prosecutor can be regarded as permanent officers of the court who are 'to serve and protect the public interest, including the interests of the international community, victims and witnesses, and to respect the fundamental rights of the suspects and accused' and are 'not knowingly to make an incorrect statement of material fact to the Tribunal or offer evidence which Prosecution Counsel knows to be incorrect or false'.[85]

Indeed, prosecutors before the ICTY and the ICTR are expected 'to assist the Tribunal[s] to arrive at the truth and to do justice for the international community, victims, *and the accused*'.[86] Similar standards apply to prosecutors and defence lawyers appearing before the SCSL.[87] Defence counsel before the ICTY are required at all times to 'maintain the integrity of evidence, whether in written, oral or any other form, which is or may be submitted to the Tribunal'.[88]

While it would be naive to assume that codes of professional conduct alone prevent ethical breaches, prosecutors before the ICTY and the ICTR are presumed to act in good faith and in accordance with standards of professional conduct and ethics.[89] There seems to be no principled basis on which defence counsel should be accorded any lesser presumption, either at the ad hoc tribunals or at the ICC. A fear of potential unethical behaviour should not override and reverse the presumption of good-faith compliance with professional obligations. Yet a categorical prohibition of proofing suggests that neither of the parties can be trusted to refrain from behaviour that might improperly influence a witness's evidence. The experience of the ICTY, the ICTR, and the SCSL belies this fear.

5.3.4. The contempt power

Beyond the largely self-regulatory ethical regimes, the international criminal tribunals possess the authority to punish any individual who improperly seeks to influence a witness's evidence.[90] The rule-based contempt powers of the tribunals explicitly address such practices and provide for comparatively harsh punishment.[91] Under the ICC Statute, the judges appear to be no less well equipped.[92]

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85 *Karemera* Trial Decision, *supra* note 11, at 15–16 (citing Prosecution Standards, *supra* note 44).

86 Prosecution Standards, *supra* note 44, at 2(a) (emphasis added).

87 See Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone, as amended on 13 May 2006, Arts. 5, 6, 8, and 10.

88 Code of Professional Conduct for Counsel Appearing before the International Tribunal, as amended on 29 June 2006, Art. 24.

89 *Karemera* Trial Decision, *supra* note 11, at 24 (citing *Prosecutor v. Karemera, Ngirumpatse and Nzirorera*, Decision on Joseph Nzizorera's Interlocutory Appeal, Case No. ICTR-98-44-AR73.6, 28 April 2006, at 17 and *Prosecutor v. Kordić and Cerkez*, Judgement, Case No. IT-95-14/2-A, at 183).

90 See, e.g., *Prosecutor v. Tadić*, Judgment on Allegations of Contempt against Prior Counsel Milan Vujin, Case No. IT-94-1-A-R77, 31 January 2000 (finding former defence counsel guilty of contempt for, *inter alia*, manipulating witness evidence).

91 See ICTY Rule 77(A), (G); ICTR Rule 77(A), (G); SCSL Rule 77(A), (G).

92 ICC Statute, Art. 70(1)(b) and (c). Indeed, considering Art. 70(4), the ICC judges would appear to have even greater enforcement powers in this regard than the ICTY, the ICTR, and the SCSL, which cannot require

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6. Conclusion

Considered in concert and context, the various mechanisms outlined above provide a considerable margin of protection and fully counterbalance the perceived risk of proofing underlying the *Lubanga* Trial Decision. Ultimately, that perceived risk does not outweigh the detrimental effects to the truth-seeking process of prohibiting proofing: probative evidence lost or distorted by the surprise – to both parties – inherent in sudden witness box revelations. Any diminution of effective truth-finding, especially where it can be safely avoided, simply does not meet the exceedingly high standards required to adjudicate properly the most serious crimes known to the international community.

Accordingly, proofing – as it has been developed, practised, and endorsed at the international criminal tribunals – appears to be a better modality for enhancing the efficiency, integrity, and legitimacy of the truth-seeking process than does the prohibition of proofing. The time of the existing ad hoc tribunals is coming to an end, and the ascendance of the ICC in the field cannot be denied. What remains to be seen is whether that future holds the promise of a progressive development of coherent international criminal procedure and an international concept of trial advocacy. Prohibiting proofing promotes neither goal and is, in fact, the antithesis of introducing 'additional and novel elements to aid the process of establishing the truth'.[93] While divergence in international criminal procedure is not problematic per se, this particular instance should be of concern to all with a stake in international criminal justice. Although the prosecution chose not to appeal against the *Lubanga* Trial Decision, the ICC Appeals Chamber may yet have the opportunity to consider this issue in the *Lubanga* case. In that event, it is to be hoped that the Appeals Chamber will reject the approach of the pre-trial and trial chambers and eliminate this unfortunate procedural divergence in international criminal practice.

states to criminalize domestically contempt of the tribunals, nor empower their judges to direct domestic prosecutions.

93 *Lubanga* Trial Decision, *supra* note 1, at 45.

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