

‘Witness Proofing’ before the International Criminal Court: A Reply to Karemaker, Taylor, and Pittman

KAI AMBOS*

Abstract

This paper was written at the request of the LJIL editorial board as a reply to the article by Karemaker, Taylor, and Pittman published in the previous issue. It is argued that their position starts from incorrect assumptions and that their overall assessment of proofing is flawed, especially with regard to the risks for fair trial. As to the law of the international tribunals it is acknowledged, however, that there is a structural and normative difference between the ICTY (as the most important ad hoc tribunal) and the ICC. While the former still follows, despite some normative changes, a predominantly adversarial procedure, the ICC Statute provides for a mixed adversarial–inquisitorial procedure. Such a procedural model is not compatible with the adversarial origins of witness proofing and it is therefore not surprising that the ICC Statute does not provide for this technique. As a consequence, at the ICC proofing is neither legally admissible nor necessary.

Key words

International Criminal Court; international criminal procedure; international criminal tribunal; witness proofing

The editors of this journal have asked me to write a short reply to Karemaker Taylor, and Pittman.¹ Although I have already explained my position with respect to the subject under dispute elsewhere,² I have accepted this invitation given the importance of the topic and the great influence of the *Leiden Journal* in international criminal law circles. I have some serious objections with regard to the position echoed by Karemaker et al., since it starts in some parts from incorrect assumptions and it is, in the overall assessment of proofing, seriously flawed and unconvincing. My remarks will focus on the legality and necessity of this practice with regard to the International Criminal Court (ICC).

1. At the beginning of their paper (section 2) the authors consider proofing as ‘a necessary adjunct of the adversarial criminal trial’: ‘[b]ecause the evidence presented

* Professor of Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at the Georg-August Universität Göttingen; Judge at the District Court (*Landgericht*) Göttingen (kambos@gwdg.de).

1 R. Karemaker, B. D. Taylor, and T. W. Pittman, ‘Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence’, (2008) 21 LJIL 683.

2 K. Ambos, ‘Witness Proofing’ before the ICC: Neither Legally Admissible nor Necessary’, in C. Stahn and G. Sluiter (eds.), *The ICC at Five Years: The Court’s Emerging Practice* (2008, forthcoming).

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.' While it is true that proofing is unknown in civil law systems and while one may even argue that, in turn, this practice is a necessary ingredient of adversarial criminal proceedings, the importance of the (public) trial with respect to the assessment of the evidence by the judges (or jurors) as to the facts before them is common to both systems. Thus the reason that proofing exists in the one system but not in the other does not hinge on the importance of the trial but can only be explained by the *structural difference* of these systems with regard to the production and presentation of evidence. While in an adversarial system the evidence is produced and presented by the parties, civil law systems are essentially judge-led and, in this sense, rather inquisitorial in nature.³ For such systems any preparation of witnesses with regard to the presentation of evidence – that is, proofing – would be a structural contradiction, since they do not know witnesses of either party but only witnesses of the truth.⁴ This is what I call the underlying 'system dimension' of proofing. We shall come back to this point (*infra*, 3).

2. Turning to the international criminal tribunals this means that proofing would certainly produce no structural frictions if these tribunals followed a purely adversarial system. While this is certainly true for the ad hoc tribunals (the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL)), which, despite important amendments to the Rules of Procedure and Evidence (RPE) with a view to a more 'inquisitorial' procedure, are still adversarial in nature and practice and therefore wholeheartedly approve the practice of witness proofing, the drafters of the ICC Statute always wanted to create a truly *mixed procedure*, taking in elements from both systems, and they indeed succeeded in doing so. This may be demonstrated, as I have done elsewhere,⁵ by examining various provisions of the Statute and by an analysis of the structure of the pre-trial and trial procedure. It is not clear what position Karemaker et al. take in this respect. While they rightly recognize the adversarial origins of the ad hoc tribunals (section 2), they do not explicitly characterize the ICC's procedure in one way or the other. Their reference to proceedings in Spain, Belgium, and Germany as 'fundamentally different' from the ICC (n. 33)⁶ at least seems to imply that they do not consider the ICC procedure to be an inquisitorial one. In fact, it seems as if they do not really care what the

3 On the difficult terminology see K. Ambos, 'International Criminal Procedure: Adversarial, Inquisitorial or Mixed?' (2003) 3 *International Criminal Law Review* 1, at 2 ff. For an innovative comparative analysis of both the 'inquisitorial' and 'adversarial' traditions, see R. Vogler, *A World Wide View of Criminal Justice* (2005), 1 ff.

4 See correctly *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on the practices of witness familiarisation and witness proofing, 8 November 2006 (*Lubanga* Pre-trial Decision), para. 26, referring to 'witnesses of the Court' in contrast to 'witnesses of either party'; concurring *Prosecutor v. Lubanga*, ICC-01/04-01/06-1049, Decision regarding the practices used to prepare and familiarise witnesses for giving testimony at trial, 30 November 2007 (*Lubanga* Trial Decision), paras. 33–34.

5 K. Ambos, 'The Structure of International Criminal Procedure: Adversarial, Inquisitorial or Mixed?', in M. Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (2007), 431 and *passim*, with further references.

6 In this same note they refer to a 'German investigative judge', overlooking the fact that the investigative function rests in the German system – contrary to the French with its *juge d'instruction* – exclusively with the prosecutor, and the so-called *Ermittlungsrichter* of the German *Strafprozessordnung* (Criminal Procedure

existing law of the ICC says, since this law is, in their view, inconclusive as to our question⁷ and, even if it clearly prohibited proofing, 'the comparative advantages of proofing would legitimize serious contemplation of legislative reform' (section 5; we shall turn to this argument *infra*, 4.b).⁸

3. It is not possible, however, to push the legal questions involved aside so lightly. In fact, the contention within the ICC has been one of both legal and policy considerations and, indeed, the Office of the Prosecutor (OTP) has tried to demonstrate, albeit with unconvincing arguments, that proofing has a *legal basis* in the Statute.⁹ The reason for this struggle between the OTP and the (pre-trial and trial) chambers about a possible legal basis of proofing in the Statute is linked to the above-mentioned system dimension of proofing. If proofing is only possible in purely adversarial systems and the ICC Statute does not constitute such a system (but a mixed one), proofing is only possible before the ICC if it is provided for, at least implicitly, in its governing law. As this is not the case, not even on the basis of a general principle according to Article 21(1)(c) of the ICC Statute, as demonstrated elsewhere¹⁰ and correctly asserted by the pre-trial and trial chambers,¹¹ the discussion is over at this point with respect to the *lex lata*. All that follows is a pure policy discussion *de lege ferenda* with a view to possible reforms of the ICC Statute.

4. As has been said, Karemaker et al. are essentially concerned with these *de lege ferenda* policy considerations. Yet in this respect also their arguments are partly flawed and partly simply unconvincing.

4.a. They argue that proofing is not rehearsing, coaching, and so on (section 5.2.1). Yet the experience in common law jurisdictions shows that such a clear-cut distinction between the permitted and the prohibited witness preparation does not work in practice. Thus in the United States the difficult question of where to draw the line between permitted preparation (in the sense of familiarization) and prohibited coaching (in the sense of altering 'a witness's story about the events in question'¹²) has generated an intense debate about the ethical limitations of witness

Code, explicitly mentioned only in §169 and §304(5)) is merely a *juge de garanties/juez de garantias*, who does not investigate but only authorizes certain coercive measures.

7 See Karemaker et al., *supra* note 1, at s. 5, for the full quote of the relevant part: '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*' (note omitted, emphasis added).

8 *Ibid.*, cont.: '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' (emphasis added).

9 The concrete technical arguments are of no importance here; for a further discussion see Ambos, *supra* note 2, s. II.1.a.

10 See *ibid.*, s. II.1.

11 *Lubanga* Pre-trial Decision and *Lubanga* Trial Decision, *supra* note 4.

12 See, e.g., R. C. Wydick, 'The Ethics of Witness Coaching', (1995) 17 *Cardozo Law Review* 1, at 2, further distinguishing between three grades of coaching according to the lawyer's *mens rea* and his acting overtly or covertly (at 3–4, 18 ff.). All these grades interfere with the truth-seeking function of the court but grades one and two even amount to inducing the witness to false testimony and to perjury.

preparation,¹³ a debate which goes back to the famous *dictum* of Judge Francis Finch of the New York Court of Appeals in 1880, when it was held:

While a discrete and prudent attorney may very properly ascertain from witnesses in advance of the trial what they in fact do know, and the extent and limitations of their memory, as a guide for his own examinations, he has no right, legal or moral, to go further. His duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know.¹⁴

It is puzzling that Karemaker et al. ignore this practice, given that the United States is the most important and probably the only (common law) jurisdiction where proofing is practised on a daily basis and without a comprehensive set of rules (as, for example, exists in England and Wales).¹⁵ In fact, the practice has for some scholars touched upon the very foundations of the US criminal justice system:

In recent years, the American legal profession's reputation has suffered because lay people do not trust lawyers, and they believe that all attorneys are crooks who will tell their witnesses and clients to say anything in order to win a lawsuit.¹⁶

4.b. In fact, the practical experiences with proofing in common law jurisdictions, especially the United States, also raise doubts as to the 'comparative advantages of proofing' adduced by Karemaker et al. (section 5.2.2). The argument that proofing produces more complete and comprehensive evidence is highly questionable, given the serious risks of manipulation involved in this practice. Obviously, a well-prepared witness who only repeats the statement previously trained *in extenso* with the prosecutor or the defence lawyer will probably produce more evidence in quantitative terms and her presentation may also appear comprehensive and consistent, but this does not say anything about the quality of this evidence, especially with a view to the truth-seeking function of the trial. In other words, the *prima facie* convincing, because well presented, evidence of a proofed witness may after a more detailed examination of her statement readily turn into pseudo-evidence, since it does not tell the truth but rather manipulates the facts. But how will the judges find out whether the proofing of such a witness was excessive or whether she was just well prepared? How will they find out the truth of her statement if she presents it without contradictions and gaps in such a perfect manner? In fact, precisely with a view to the truth of a witness statement, beyond all show elements of US jury trials, the spontaneous witness is much more useful than the proofed witness since

13 See J. S. Applegate, 'Witness Preparation', (1989) 68 *Texas Law Review* 277, at 281 and *passim*; Wydick, *supra* note 12, at 1 ff.; L. R. Salmi, 'Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial', (1999) 18 *Review of Litigation* 136, at 136 ff.; A. Watson, 'Witness Preparation in the United States and England & Wales', (2000) 164 *Justice of the Peace* 816, at 818 ff.; P.J. Kerrigan, 'Witness Preparation', (1999) 30 *Texas Tech Law Review* 1367, at 1369 ff.; F. C. Zacharias and S. Martin, 'Coaching Witnesses', (1999) 87 *Kentucky Law Journal* 1001, at 1011 ff.

14 *In re Eldridge*, 37 NY 161, 171 (NY 1880), quoted according to Wydick, *supra* note 12, at 52.

15 For a more detailed analysis see Ambos, *supra* note 2, s. II.1.(b)(2). As to the situation in other common law jurisdictions see, e.g., for Canada, L. McGowan, 'Prosecution Interviews of Witnesses: What More Will Be Sacrificed to "Narrow the Justice Gap"?', (2006) 70 *Journal of Criminal Law* 351, at 352 ff.; CPS, Pre-Trial-Witness Interviews by Prosecutors – A Consultation Paper, paras. 12 ff., available at www.cps.gov.uk/publications/docs/pre-trial-wit-consult.pdf.

16 Salmi, *supra* note 13, at 178.

spontaneity guarantees authenticity. This is the very reason why the trial chamber refers to the 'helpful spontaneity during the giving of evidence by a witness'¹⁷ and this is, contrary to Karemaker et al., not 'puzzling' (section 5.2.2) but in full harmony with a concept of 'witnesses of the court' instead of 'witnesses of either party'.¹⁸

4.c. The risks involved in proofing, also acknowledged by Karemaker et al. (section 5.2.3), may be mitigated by the factors suggested by the authors (section 5.3), but they cannot be outweighed to such a degree that proofing can be considered to be an acceptable practice. Admittedly, this is a value judgement strongly influenced by the legal background of each author (including this one), but I simply fail to see that the objective risks of proofing are counterbalanced by its suggested advantages because I do not see these advantages; on the contrary, I think the practice presents serious disadvantages (*supra*, 4.b). In addition, Karemaker et al. expect too much from their suggested *mitigating factors*:

4.c.i. The efficacy of *cross-examination* (section 5.3.1) to verify the authenticity of a statement of a proofed witness is, to say the least, doubtful;¹⁹ for some common law scholars this expectation is 'nothing more than an article of faith'.²⁰ Be that as it may, cross-examination is not common practice before an international criminal tribunal that, like the ICC, has a mixed procedure, and it will only be practised efficiently by common lawyers who are familiar with this practice. Consequently, to require cross-examination as a method to control proofing would limit this control to one group of lawyers appearing before the ICC.

4.c.ii. The *superiority of professional judges* over lay jurors (section 5.3.2) as to the *verification of the authenticity of a witness statement* – that is, a question of fact – is also highly doubtful. In fact, the involvement of lay persons in the criminal justice process, be it as jurors or as members of a mixed bench, rests on the belief that these persons are, due to their professional or social background, often in a better position to judge the veracity of a witness statement.²¹ In addition, the superiority argument rests on the false assumption that the judges of international criminal tribunals are all professional judges. The sad reality is, however, that too many judges have no judicial background at all and only pass the eligibility test (Art. 36(3)(b) ICC Statute) because of an all-too-generous interpretation of the requirement of 'competence in relevant areas of international law' (Art. 36(3)(b)(ii) ICC Statute).²²

17 *Lubanga* Trial Decision, *supra* note 4, para. 52.

18 See *supra* note 4 with references.

19 Cf. Applegate, *supra* note 13, at 307 ff. (311); criticized also in Salmi, *supra* note 13, at 142–3.

20 J. H. Langbein, 'The German Advantage in Civil Procedure', (1985) 52 *University of Chicago Law Review* 823, 833 n.31; concurring Applegate, *supra* note 13, at 311.

21 Cf. F. Feeney and J. Hermann, *One Case – Two Systems: A Comparative View of American and German Criminal Justice* (2005), at 427.

22 The most recent example is the election as judge of Fumiko Saiga from Japan. This 'judge' may have long diplomatic experience, but she does not even have a law degree. In diplomatic circles her election has been justified by the fact that in Japan even persons without legal education are, under certain conditions, eligible to the Supreme Court, so that Art. 36(3)(a) ICC Statute – (only) requiring that the candidates 'possess the qualifications required in their respective States for appointment to the highest judicial offices' – is applicable. However, this is unconvincing, given that subpara. (a) does not stand alone but must be read in conjunction with the following subpara. (b), which qualifies the eligibility requirements and, in any case, requires 'extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court' (subpara. (b)(ii)). Indeed, subparagraph (b) has been the object of fierce discussions in Rome and

4.c.iii. *Codes of professional conduct* (section 5.3.3) may help, but they do not, as correctly argued by Karemaker et al., ‘alone prevent ethical breaches’. Again, the problem lies in the problematic distinction between permitted and prohibited witness preparation. Codes that want to grasp this fine distinction must be very specific and precise (as the English experience shows) or they contain provisions that are too general (as, e.g., the American Bar Association’s *Model Rules of Professional Conduct*) really to serve as clear guidance.²³

4.c.iv. Finally, the *contempt power* (section 5.3.4) is a typical adversarial feature which goes hand in hand with the prominent role of the parties in producing evidence. It does not fit well in a mixed procedure as the one before the ICC, and, indeed, Article 70(1) of the ICC Statute does not provide for a contempt power, as incorrectly suggested by Karemaker et al. (n. 92), but only for the Court’s jurisdiction with regard to offences against the administration of justice. These offences are part and parcel of any national criminal justice system and therefore Article 70(4) obliges the states parties to extend the scope of their (national) offences to the acts mentioned in Article 70(1) if committed on their territory or by one of their nationals. Also, the commission of one of the offences under Article 70(1) will lead to an autonomous investigation, prosecution, and trial (cf. Rule 165 of the ICC’s RPE), i.e., contrary to the contempt of court procedure, the sanction will not be imposed by the same trial chamber. In this respect, Article 71 of the ICC Statute, providing for sanctions for misconduct before the Court, is rather comparable to the ad hoc tribunals’ contempt of court power, but it is, in terms of the sanctions (basically administrative measure to preserve the order of the proceedings), not as far-reaching as this power.

5. In conclusion, all these arguments demonstrate that witness proofing is, before the ICC, neither legally admissible nor a necessary and useful practice. As to the necessary preparation of witnesses to enable them to give oral evidence at trial in a satisfactory manner – that is, preparation in the sense of *familiarization*²⁴ – the ICC’s Victims and Witnesses Unit can adequately fulfil this task.²⁵

New York. Apart from that, while it is true that in Japan even a diplomat without formal legal education can become a judge of the Supreme Court, he or she is one of 15 judges and all the others have a qualification as a lawyer (apart from the diplomat there are six judges, four practising lawyers, two prosecutors, one civil servant, and one professor of law; I am grateful to Professor Dr Makoto Tadaki, Chuo-University, Tokyo, for this information).

23 See for detailed references Ambos, *supra* note 2, s. II.1(b)(2) with n. 50, 57 ff., 81.

24 For a definition see *Lubanga* Pre-trial Decision, *supra* note 4, para. 27.

25 For the functions of this unit see Arts. 57(3)(c), 68(1) ICC Statute, Rules 16(2), 17(2)(b), 87, 88 RPE; see also *Lubanga* Pre-trial Decision, *supra* note 4, para. 22; concurring *Lubanga* Trial Decision, *supra* note 4, para. 29.