

# WITNESS PROOFING AT THE INTERNATIONAL CRIMINAL COURT



**WAR CRIMES RESEARCH OFFICE**  
**International Criminal Court**  
**Legal Analysis and Education Project**  
**July 2009**

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## **ABOUT THE WAR CRIMES RESEARCH OFFICE**

The core mandate of the War Crimes Research Office is to promote the development and enforcement of international criminal and humanitarian law, primarily through the provision of specialized legal assistance to international criminal courts and tribunals. The Office was established by the Washington College of Law in 1995 in response to a request for assistance from the Prosecutor of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), established by the United Nations Security Council in 1993 and 1994 respectively. Since then, several new internationalized or “hybrid” war crimes tribunals—comprising both international and national personnel and applying a blend of domestic and international law—have been established under the auspices or with the support of the United Nations, each raising novel legal issues. This, in turn, has generated growing demands for the expert assistance of the WCRO. As a result, in addition to the ICTY and ICTR, the WCRO has provided in-depth research support to the Special Panels for Serious Crimes in East Timor (Special Panels), the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC).

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### **COVER PHOTOGRAPHS** (from left)

*A Darfuri rebel fighter sets aside his prosthetic legs. Abeche, Chad, 2007, courtesy Shane Bauer*

*The International Criminal Court building in The Hague, courtesy Aurora Hartwig De Heer*

*A village elder meets with people from the surrounding area. Narkaida, Darfur, Sudan, 2007, courtesy Shane Bauer*

*Archbishop Desmond Tutu and Minister Simone Veil at the second annual meeting of the Trust Fund for Victims, courtesy ICC Press Office*

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## **EXECUTIVE SUMMARY**

On 28 January 2009, the first witness to testify in the first trial being held at the International Criminal Court (ICC) took the stand. The witness, a former child soldier, was called by the Prosecution to testify against Thomas Lubanga Dyilo, alleged leader of a militia group active in the Democratic Republic of Congo who is charged with the war crimes of recruiting, enlisting, and using children under the age of fifteen in armed conflict. Upon taking the stand, the witness, who was given the pseudonym “Dieumerci,” testified that when in fifth grade he, along with other school children, was kidnapped by soldiers and taken to a military camp. As the session progressed, however, he seemingly took fright and eventually recanted his testimony entirely, stating that an unnamed non-governmental organization had instructed him to testify falsely about being kidnapped and taken to a military camp. The witness was then dismissed at the request of the Prosecution. Two weeks later, Dieumerci took the stand again and repeated his initial testimony regarding being kidnapped and taken to a military camp. With regard to his earlier change of story, the witness explained that, the first time he took the stand, a lot of things went through his mind, he was angry, and found himself unable to testify.

Although it is difficult to say what caused the contradictory testimony Dieumerci gave on the witness stand, the incident raises the question of what impact the Trial Chamber’s bar against “witness proofing” will have on witnesses before the court, particularly children and other vulnerable witnesses. The Prosecution had requested permission to conduct proofing of its witness prior to the *Lubanga* trial, which would involve allowing witnesses to read their statements and refresh their memories in respect of the evidence they would give; putting questions to witnesses that the examining lawyer intends to ask at trial; and inquiring about possible additional information of both potentially incriminatory and potentially exculpatory nature. Significantly, witness proofing has consistently been conducted by both the prosecution and the defense at other international criminal bodies, including the International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the

Special Court for Sierra Leone (SCSL). In addition, a significant number of national jurisdictions characterized as predominantly “adversarial” in nature – meaning that, like at the ICC, evidence is primarily adduced by the parties through the examination and cross-examination of witnesses, rather than through a “dossier” given to the judge – allow some form of witness proofing. Yet both the Pre-Trial Chamber and the Trial Chamber overseeing the *Lubanga* case held that witness proofing cannot be conducted at the ICC for lay – as opposed to expert – witnesses. Importantly, the Chambers did not base their decisions on the merits of witness proofing. Rather, both Chambers declined to authorize witness proofing based on a finding that the practice is not authorized under any of the sources of law to which the Court is bound. Surprisingly, however, the same Trial Chamber that found no legal basis for witness proofing generally later authorized proofing for *expert* witnesses, without any discussion of the legal basis for its allowing expert witnesses as opposed to lay witnesses to be proofed.

This report contends that the practice of witness proofing can and should be extended to include meetings between the parties and lay witnesses prior to trial, particularly in the case of vulnerable witnesses. Our recommendations may be briefly summarized as follows:

- 1. The Trial Chamber Would Benefit from a Re-examination of Witness Proofing Under the Chamber’s Authority to Adopt Procedures Necessary to Facilitate the Fair and Expeditious Conduct of the Proceedings*

#### Article 64(3)(a)

As an initial matter, it should be stressed that no governing provision of the ICC prohibits the practice of witness proofing. Moreover, the practice may be permitted by any Trial Chamber of the Court under Article 64(3)(a) of the Rome Statute establishing the ICC, which expressly authorizes the Trial Chamber to “adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings.” Neither the Pre-Trial Chamber nor the Trial Chamber considered this possibility in the earlier decisions finding there was no legal basis for witness proofing under the Rome Statute. Notably, the

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*Lubanga* Trial Chamber has authorized the proofing of *expert* witnesses, which has no more of an express legal basis in the Rome Statute or ICC Rules of Procedure and Evidence than does the practice of proofing *lay* witnesses. While the Trial Chamber did not discuss the legal basis for distinguishing between lay and expert witnesses, its justification for allowing proofing of expert witnesses suggests that the decision may have been based on the fact that the proofing of expert witnesses would contribute to the fair and expeditious conduct of proceedings. Furthermore, none of the other international criminal bodies that allow the parties to engage in witness proofing – the ICTY, the ICTR, and the SCSL – have an express provision in their statutes or rules of procedure authorizing the practice, meaning that each has presumably permitted the practice pursuant to those bodies’ equivalent to the Rome Statute’s Article 64(3)(a).

That witness proofing is a procedure that encourages fairness and expeditiousness is supported by the fact that the ICTY, the ICTR, the SCSL, and a significant number of national jurisdictions that conduct trials through the direct and cross-examination of witnesses make use of the practice. Indeed, both the ICTY and the ICTR have expressly recognized that proofing can enhance the fairness and expeditiousness of the trial. While it is true that the practices of the ICTY, ICTR, and SCSL, as a whole, are not easily transferable to the ICC system, the process of examining witnesses is virtually the same in the ICC as it is in these other bodies. In other words, while the ICC has adopted certain aspects of both the common law and Romano-Germanic legal traditions, the delivery of testimony by witness *via* direct and cross-examination, as in the ICTY, ICTR, and SCSL, is conducted in the vein of the adversarial, common law tradition. Furthermore, despite the differences between the ICC and these other international criminal bodies, there are also significant *similarities* that are relevant in this context. In particular, each of these other bodies has jurisdiction over the same types of crimes as the ICC and, like the ICC, often has to rely on testimony from victims of heinous crimes who have had to travel far from their current homes to testify under a legal system that is foreign to them.

### Witness Proofing Likely to Encourage Fair and Expeditious Conduct of Proceedings

In terms of fairness, witness proofing not only enables a more accurate and complete presentation of the evidence at trial, but also allows for differences in recollections to be identified and shared between the parties before the evidence is given at trial, thereby reducing the prospect of either party being taken by surprise. In addition, the process of proofing in the ICTY, ICTR, and SCSL has contributed to the fairness of proceedings by generating new probative evidence previously unknown to either party. Witness proofing also increases the fairness of proceedings for the witnesses, most of whom will have traveled a great distance to The Hague in order to deliver a detailed account of stressful events that occurred some time ago, and to do so in an unfamiliar setting in response to structured precise questions, translated from a different language. Furthermore, proofing may reduce the risk of re-traumatization during cross-examination and the risk that witnesses will be discredited if their testimony comes across as confused or diverges from statements originally recorded years ago.

At the same time, any risk that proofing could *decrease* fairness through improper influencing of witnesses may be overcome through various safeguards. As an initial matter, nothing inherent in witness proofing as proposed by this report permits influencing a witness. Additionally, lawyers who are governed by the profession's rules and codes of ethics should not be presumed to unduly influence witnesses. Indeed, any lawyer who does not live up to the high standards of the profession is subject to the threat of punishment under Article 70 of the Rome Statute for corruptly influencing a witness. Notably, those jurisdictions that permit witness proofing – including the ICTY, ICTR, and SCSL – have not encountered significant negative effects associated with the practice. Yet another safeguard against improper witness tampering is the fact that witnesses who testify before the ICC are subject to cross-examination and may be questioned by the presiding judges. Finally, if the Trial Chamber does not believe that these safeguards are adequate to guard against the possibility of improper influence during proofing sessions, we recommend that the Chamber adopt a Code of Practice that makes clear what is and is not permitted.

As for the contribution to the expeditious conduct of proceedings, witness proofing is likely to help ensure that only those charges that will stand up at trial are ever brought before the Court. Furthermore, once a case is brought, witness proofing enables the full facts to be identified in light of the actual charges being tried against a particular accused. Lastly, because witness proofing assists in the process of human recollection, it is likely to enable not only the more accurate presentation of evidence, but also the more orderly and efficient presentation of that evidence.

2. *At a Minimum, the Court Should Allow Witness Proofing for Vulnerable Witnesses*

If the case for witness proofing in respect of “average” witnesses who come before the ICC is compelling, in respect of children and other vulnerable witnesses the case is overwhelming. As demonstrated by the first witness in the *Lubanga* trial, children and other vulnerable witnesses are likely to be more intimidated and to find the experience of testifying more difficult than other witnesses. To the extent witness proofing helps familiarize witnesses not only with the process of direct and cross-examination, but also with the lawyer who will be leading them through their initial testimony and the testimony they are likely to cover, there will be even greater contribution to the fairness and expeditiousness of proceedings. Thus, witness proofing for vulnerable witnesses should be authorized under Article 64(3)(a). Alternatively, the practice should be permitted pursuant to Rule 88 of the ICC Rules of Procedure and Evidence, which permits a Chamber to adopt special measures to facilitate the testimony of vulnerable witnesses.

3. *In the Event the Trial Chamber Continues to Find Witness Proofing Lacks a Legal Basis, the Judges of the ICC Should Consider Amending the Regulations of the Court to Authorize the Practice*

As explained in this report, the practice of witness proofing is likely to substantially contribute to both the fairness and expeditiousness of trial proceedings before the ICC. Thus, in the event that the Trial Chamber adheres to its decision that witness proofing lacks a legal basis, we recommend that the judges of the ICC amend the Regulations of the

Court to provide authority for the practice of witness proofing. The Rome Statute provides that the judges shall adopt Regulations, in accordance with the Statute and the Rules of Procedure and Evidence, necessary for its routine functioning. As outlined below, there is nothing about the practice of witness proofing that is inconsistent with the provisions of the Rome Statute or the Rules of Procedure and Evidence. To the contrary, witness proofing will assist the Court in its statutory duty to find the truth while ensuring fair and expeditious proceedings, as well as in its responsibilities to ensure the well-being of witnesses testifying before the Court.

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## I. THE ISSUE OF WITNESS PROOFING AS ADDRESSED BY THE ICC TO DATE

The issue of witness proofing has been addressed by both Pre-Trial Chamber I and Trial Chamber I, each time in the context of the first case to proceed to trial at the International Criminal Court (ICC): the case against Thomas Lubanga Dyilo. While both Chambers held that the practice of witness proofing, as proposed by the Prosecution, was not permitted in the ICC, the rulings of the two Chambers were based not on the merits of proofing, but rather on a finding that there was no express source of law applicable to the ICC authorizing the practice of witness proofing.

### A. WITNESS PROOFING BEFORE THE *LUBANGA* PRE-TRIAL CHAMBER

The issue of witness proofing first arose early in the proceedings against Mr. Lubanga, when the parties were preparing for the hearing on the confirmation of charges.<sup>1</sup> Specifically, the issue came to the attention of Pre-Trial Chamber I when the Prosecution informed the Chamber that the sole witness being called by the Prosecution at the confirmation hearing had been invited for “what is commonly referred to as ‘proofing.’”<sup>2</sup> A few days later, the Chamber issued a decision

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<sup>1</sup> The confirmation of charges is a process unique to the International Criminal Court under which the Pre-Trial Chamber holds a hearing, within a reasonable time after an accused is transferred to or surrenders to the Court, to confirm that there is sufficient evidence to establish substantial grounds to believe that the accused committed the crimes charged by the Prosecutor. *See* Rome Statute of the International Criminal Court, adopted on 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *entered into force* 1 July 2002, Art. 61, U.N. Doc. A/CONF.183/9 (1998). The Chamber may then confirm the charges and commit the accused to trial; decline to confirm the charges; or adjourn the hearing and request the Prosecutor to consider providing further evidence or amending a charge. *Id.*

<sup>2</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Practices of Witness Familiarisation and Witness Proofing, ICC-01/04-01/06-679, ¶ 1 (Pre-Trial Chamber I, 8 November 2006).

requesting that the Prosecution elaborate on what was meant by “witness proofing” and refrain from carrying out any proofing until the Court had a chance to rule on the matter.<sup>3</sup>

In response, the Prosecution first laid out its understanding of the term “proofing of a witness.”<sup>4</sup> The practice, as understood by the Prosecution, would be conducted for the purpose of “assisting the witness testifying with the full comprehension of the Court proceedings, its participants and their respective roles, freely and without fear,”<sup>5</sup> and would consist of the following measures:

1. providing the witness with an opportunity to acquaint him/herself with the lawyer who will examine the witness on the stand;
2. familiarizing the witness with the courtroom, the court’s participants, and its proceedings;
3. reassuring the witness about his/her role in the proceedings;
4. discussing matters that are related to the security and safety of the witness for the purpose of determining the necessity of protective measures;
5. reinforcing to the witness that he/she is under a strict legal obligation to tell the truth when testifying;
6. explaining the process of examination-in-chief, cross-examination, and re-examination;

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<sup>3</sup> *Id.* ¶ 2 (describing the Pre-Trial Chamber’s decision of 30 October 2006, which is confidential).

<sup>4</sup> *Id.* ¶ 4 (describing the “Prosecution’s Information on the Proofing of a Witness,” which is confidential).

<sup>5</sup> *Id.* ¶ 14.

7. allowing a witness to read his/her statement and refresh his/her memory in respect of the evidence he/she will give;
8. putting questions to the witness that the examining lawyer intends to ask the witness, and in the order anticipated; and
9. inquiring about possible additional information of both a potentially incriminatory and potentially exculpatory nature.<sup>6</sup>

The Prosecution also explained that the practice of witness proofing “is beneficial to the testimony of a witness and thus to the Court’s statutory duty to establish the truth.”<sup>7</sup> Finally, the Prosecution informed the Chamber that it undertook to comply with the principles set forth in Article 705 of the Code of Conduct of the Bar Council of England and Wales,<sup>8</sup> presumably because the ICC does not have its own code of conduct directly addressing witness proofing.

Shortly after receiving the Prosecution’s submission, the Pre-Trial Chamber issued a decision largely rejecting the Prosecution’s request.<sup>9</sup> The Chamber’s decision began by dissecting the components of witness proofing as identified by the Prosecution.<sup>10</sup> With regard to the first six measures, the Chamber held that such actions – more appropriately termed “witness familiarization” as opposed to “witness proofing”<sup>11</sup> – were not only permissible under the provisions governing the ICC, but were in fact mandatory, given the Court’s duty

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<sup>6</sup> *Id.* ¶¶ 14, 17.

<sup>7</sup> *Id.* ¶ 4.

<sup>8</sup> *Id.* ¶ 4.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* ¶¶ 11-17.

<sup>11</sup> *Id.* ¶ 23.

to provide for the “safety, physical and psychological well-being, dignity, and privacy of victims and witnesses.”<sup>12</sup> However, the Chamber found that these witness familiarization measures should be carried out by the Victims and Witnesses Unit (VWU) of the Court, *not* by the party intending to call the witness.<sup>13</sup> Moreover, the Chamber held that the last three measures outlined by the Prosecution – *i.e.*, those measures properly constituting “witness proofing,” in the opinion of the Chamber – were prohibited on the grounds that there was no legal basis for the practice of witness proofing under Article 21(1) of the Rome Statute.<sup>14</sup> That article, which sets forth the sources of law for the Court, provides that “[t]he Court shall apply:”<sup>15</sup>

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, 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

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<sup>12</sup> *Id.* ¶ 21 (citing Article 68(1) of the Rome Statute). The Chamber also cited to Article 57(3)(c), which authorizes the Pre-Trial Chamber to provide for the protection and privacy of victims and witnesses, and Rules 87 and 88 of the ICC Rules of Evidence and Procedure, which provide for a series of measures for the “safety, physical and psychological well-being, dignity, and privacy of victims and witnesses,” including “measures to facilitate their testimony.” *Id.*

<sup>13</sup> *Id.* ¶¶ 23-27.

<sup>14</sup> *Id.* ¶¶ 28-42.

<sup>15</sup> Rome Statute, *supra* n. 1, Art. 21(1).

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norms and standards.<sup>16</sup>

In its submission in support of the practice of witness proofing, the Prosecution apparently argued that witness proofing was admissible under Article 21(1)(b).<sup>17</sup> Specifically, the Prosecution argued that the practice of witness proofing “is a widely accepted practice in international criminal law,” citing two decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY); one Trial Chamber decision of the Special Court for Sierra Leone (SCSL); and a statement made by Justice Hassan B. Jallow, the Chief Prosecutor of the International Criminal Tribunal for Rwanda (ICTR) to the United Nations Security Council in 2004.<sup>18</sup> The Pre-Trial Chamber dismissed the last two sources as irrelevant because the SCSL decision, according to the Chamber, “does not deal with the practice of witness proofing” *per se*<sup>19</sup> – although the decision does deal with whether or not the Prosecution has to disclose notes taken during a witness proofing session and, as such, implicitly supports the fact that the SCSL permits witness proofing – and the statement by Justice Jallow is not “jurisprudence.”<sup>20</sup> The Pre-Trial Chamber also dismissed one of the two ICTY decisions cited by the Prosecution as insufficiently on point.<sup>21</sup> While the Chamber did acknowledge that the second ICTY case – namely a 2004 decision in the *Limaj* case – expressly authorizes the practice of witness proofing in cases before the ICTY, the Chamber nevertheless accorded the decision little weight because it

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<sup>16</sup> *Id.*

<sup>17</sup> *Lubanga*, Decision on the Practices of Witness Familiarisation and Witness Proofing, *supra* n. 2, ¶ 29. Again, the Prosecution’s submission on witness proofing is confidential, thus the only publicly available description of the filing comes from the Pre-Trial Chamber’s decision rejecting the Prosecution’s request.

<sup>18</sup> *Id.* ¶¶ 29-30.

<sup>19</sup> *Id.* ¶ 31.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

“does not regulate in detail the content of such practice.”<sup>22</sup> Hence, the Pre-Trial Chamber found the Prosecution’s claim that witness proofing is permitted under Article 21(1)(b) of the Rome Statute to be unpersuasive.<sup>23</sup>

The Pre-Trial Chamber also considered whether the practice of witness proofing would be permissible under either of the other two prongs of Article 21(1). First, it held that none of the measures considered by the Pre-Trial Chamber to constitute “witness proofing,” as opposed to “witness familiarization,” is “covered by any provision of the Statute, the Rules or the Regulations” governing the ICC.<sup>24</sup> As respects Article 21(1)(c), *i.e.*, whether witness proofing could be considered a general principle of law derived from the national laws of legal systems of the world, the Pre-trial Chamber found that the practice in different national jurisdictions varies widely, and in many countries the practice would in fact be “unethical or unlawful,” citing Brazil, Spain, France, Belgium, Germany, Scotland, Ghana, and Australia.<sup>25</sup> Notably, the Trial Chamber later recognized that Australia does in fact allow a form of pre-trial witness interviews that involve the same measures identified by the Pre-Trial Chamber as “witness proofing,”<sup>26</sup> and Scotland also permits pre-trial witness interviews.<sup>27</sup> Furthermore, Brazil, Spain, France, Belgium, and Germany are jurisdictions that fall more within the Romano-Germanic tradition than the common law tradition. As explained in detail below, although the ICC borrows characteristics from both the Romano-Germanic and common law

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<sup>22</sup> *Id.* ¶ 32.

<sup>23</sup> *Id.* ¶ 33.

<sup>24</sup> *Id.* ¶ 28.

<sup>25</sup> *Id.* ¶¶ 36-37.

<sup>26</sup> See *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ICC-01/04-01/06-1049, ¶ 40 (Trial Chamber, 30 November 2007).

<sup>27</sup> See The Rt. Hon. The Lord Goldsmith QC, *Pre-trial Witness Interviews by Prosecutors Report*, Her Majesty’s Attorney General, at 9, 20 December 2004.

traditions, the manner in which evidence is primarily presented at trial through the direct and cross-examination of witnesses by the parties – as opposed to through a “dossier” assembled by judges – means that, for purposes of witness proofing, the practice of Romano-Germanic jurisdictions is largely irrelevant.<sup>28</sup> Nevertheless, the Pre-Trial Chamber concluded that a general principle of law supporting witness proofing could not be derived from national laws, and that if any general principle of law could be discerned it would be that the Prosecution should refrain from such practices.<sup>29</sup>

#### B. WITNESS PROOFING BEFORE THE *LUBANGA* TRIAL CHAMBER

Following the confirmation of the charges against Mr. Lubanga, the case moved from Pre-Trial Chamber I to Trial Chamber I and the parties began to prepare for trial.<sup>30</sup> Given that the Trial Chamber is composed of a different set of three judges than make up the Pre-Trial Chamber, the Prosecution decided to seek a second opinion on the practice of witness proofing.<sup>31</sup> Specifically, the Prosecution submitted that, although it agreed with the Pre-Trial Chamber’s distinction between measures that consist of “witness familiarization,” and those more properly termed “witness proofing,” as well as with its finding that the VWU is the appropriate body to conduct familiarization, it disagreed with the Pre-Trial Chamber’s findings that proofing measures are not allowed under Article 21(1) of the Rome Statute.

First, the Prosecution argued that, although the Rome Statute and other

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<sup>28</sup> See *infra* n. 93 *et seq.* and accompanying text.

<sup>29</sup> *Lubanga*, Decision on the Practices of Witness Familiarisation and Witness Proofing, *supra* n. 2, ¶ 42.

<sup>30</sup> See *The Prosecutor v. Thomas Lubanga Dyilo*, Decision Constituting Trial Chamber I and Referring to It the Case of *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01-04-01-06-842 (Presidency, 6 March 2007).

<sup>31</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Prosecution’s submissions regarding the subjects that require early determination: procedures to be adopted for instructing expert witnesses, witness familiarization and witness proofing, ICC-01/04-01/06 (Office of the Prosecutor, 12 September 2007).

documents governing the ICC are silent on the precise issue of witness proofing, there is in fact a legal basis for the practice under Article 21(1)(a).<sup>32</sup> The Prosecution cited to several provisions in support of this claim, including Article 70 which prohibits, *inter alia*, corruptly influencing a witness and obstructing or interfering with the testimony of a witness.<sup>33</sup> If witness proofing as proposed by the Prosecution were prohibited, surely it would say so expressly in Article 70.<sup>34</sup> Similarly, the Prosecution noted that witness proofing is not prohibited by the ICC's Code of Professional Conduct for counsel appearing before the Court.<sup>35</sup> In terms of express law, the Prosecution pointed to Article 54(3)(b) of the Statute, which gives the Prosecutor the power to request the presence of and question persons being investigated, victims and witnesses, arguing that, when read in conjunction with Article 70, pre-trial contact with witnesses is in fact contemplated by the Statute.<sup>36</sup> Lastly, the Prosecution submitted that it was uniquely situated to conduct witness proofing on account of its obligations to conduct effective investigations and prosecutions pursuant to Article 54(1) of the Statute and disclose potentially exculpatory material to the defense pursuant to Article 67(2) of the Statute and Rule 77.<sup>37</sup>

Second, the Prosecution re-submitted its argument, first made before the Pre-Trial Chamber, that witness proofing is contemplated under Article 21(1)(b) because it is widely practiced in international criminal law.<sup>38</sup> In support of its position, the Prosecution cited, *inter alia*,

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<sup>32</sup> *Id.* ¶¶ 27-30.

<sup>33</sup> *Id.* ¶ 28.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* ¶ 29.

<sup>36</sup> *Id.* ¶ 30. In footnote 37 to that paragraph the Prosecution also cites Rule 76(1) of the Rules of Procedure and Evidence (Pre-Trial disclosure of names and witness statements of prosecution witnesses) as implying that contact with witnesses on multiple occasions before trial is contemplated by the Statute.

<sup>37</sup> *Id.* ¶ 31.

<sup>38</sup> *Id.* ¶ 18.

decisions of the ICTY and the ICTR upholding the practice of witness proofing following challenges brought by accused in the wake of the ICC Pre-Trial Chamber's decision against the practice.<sup>39</sup>

Finally, the Prosecution argued that under Article 21(1)(c) a general principle of law exists favoring the practice of witness proofing in those jurisdictions that are principally adversarial in nature, *i.e.*, those countries where the parties, as opposed to the judge, are "principally responsible for the questioning of witnesses,"<sup>40</sup> citing Australia, Canada, England and Wales, and the United States.<sup>41</sup>

Despite these arguments, the Trial Chamber largely concurred with the decision of the Pre-Trial Chamber on the subject of witness proofing.<sup>42</sup> First, the Trial Chamber rejected the Prosecution's arguments under Article 21(1)(a), stating only that it disagreed with the Prosecution's reading of Article 54(3)(b) and that just because witness proofing is not prohibited by Article 70 does not mean that it is permitted.<sup>43</sup> Second, while the Trial Chamber, unlike the Pre-Trial Chamber, did recognize that witness proofing is "commonly utilized" by the ICTY, ICTR, and SCSL,<sup>44</sup> it did not consider such procedural rules and jurisprudence to be automatically applicable to the ICC.<sup>45</sup> In that respect, the Chamber noted the fact that the ICC has developed a different procedural framework from those of the *ad hoc* tribunals, a

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<sup>39</sup> *Id.* ¶¶ 18-23 (citing *Prosecutor v. Milutinovic et al.*, Decision on Ojdanic Motion to Prohibit Witness Proofing, Case No. IT-05-97-T (Trial Chamber, 12 December 2006); *Prosecutor v. Karemera, et al.*, Decision on Defence Motions to Prohibit Witness Proofing, ICTR-98-44-T (Trial Chamber, 15 December 2006).

<sup>40</sup> *Id.* ¶ 24.

<sup>41</sup> *Id.*

<sup>42</sup> *Lubanga*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, *supra* n. 26.

<sup>43</sup> *Id.* ¶ 36

<sup>44</sup> *Id.* ¶ 43.

<sup>45</sup> *Id.* ¶ 44

framework to which the procedures of the *ad hoc* tribunals were not easily transferable.<sup>46</sup> Specifically, the Chamber laid out three ways in which the ICC differs from these other international criminal bodies: (i) at the ICC alone, the Prosecution has a duty to investigate exculpatory as well as incriminatory evidence; (ii) the Rome Statute allows for “greater intervention by the Bench” than permitted in the other bodies; and (iii) the ICC allows for victim participation.<sup>47</sup> The Trial Chamber did not, however, explain why any of these factors made witness proofing as practiced at the ICTY, ICTR, and SCSL inappropriate in the context of proceedings before the ICC. Lastly, the Trial Chamber held that the variety of terms and definitions used in various jurisdictions, as well as the lack of any coherent jurisprudence, makes it difficult to determine the extent to which witness proofing is in fact an established general principle of law.<sup>48</sup>

Based on these findings, the Trial Chamber held that the VWU would continue to carry out the process of witness familiarization, but added that such familiarization should be carried out “in consultation with the party introducing the witness.”<sup>49</sup> In addition, unlike the Pre-Trial Chamber, the Trial Chamber ordered that copies of their statements be made available to witnesses prior to their testimony.<sup>50</sup> However, it maintained the Pre-Trial Chamber’s bar against witness proofing in the sense put forward by the Prosecution, *i.e.*, putting questions to the witness that the examining lawyer intends to ask the witness, and in the order anticipated; and inquiring about possible additional information of both potentially incriminatory and potentially exculpatory nature.<sup>51</sup>

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<sup>46</sup> *Id.* ¶ 45

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* ¶ 39.

<sup>49</sup> *Id.* ¶ 53.

<sup>50</sup> *Id.* ¶ 55.

<sup>51</sup> *Id.* ¶ 57. The Trial Chamber produced a further decision on 23 May 2008 concerning the protocol on the practices to be used by the VWU to prepare witnesses

The Trial Chamber provided further clarification regarding the extent of allowable pre-trial contact with witnesses during a status conference on 16 January 2009.<sup>52</sup> First, the Chamber held, in a reversal of an earlier decision,<sup>53</sup> that absent exceptional circumstances, neither party nor the representatives of victims participating in the trial could be present during the VWU's witness familiarization session.<sup>54</sup> The Trial Chamber also clarified that witnesses should have made available to them not only their signed witness statements, but also taped interviews, be they video or audio.<sup>55</sup> Lastly, without any reference to its prior decisions on witness proofing, the Trial Chamber held that the parties could conduct the measures considered to be "witness proofing" with *expert* witnesses.<sup>56</sup> Notably, the Chamber did not point to any legal basis for witness proofing of expert witnesses under Article 21(1).<sup>57</sup> Instead, the Court looked directly to the perceived

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for trial. *The Prosecutor v. Thomas Lubanga Dyilo*, Decision regarding the Protocol on the practices to be used to prepare witnesses for trial, ICC-01/04-01/06 (Trial Chamber, 23 May 2008). Those directions provided, *inter alia*, that the VWU is not required to monitor or record anything that is said by a witness in the course of the familiarization process; that representatives of the parties or participants may be present during the process but may not speak; that the VWU is not under an obligation (absent exceptional circumstances) to report back to parties or representatives on the statement-reading process; and that it is not appropriate for the VWU to inform witnesses that they should not give hearsay evidence. *Id.* ¶¶ 38-41.

<sup>52</sup> See *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Status Conference, ICC-01/04-01/06-ENG ET WT, at 16:23 – 29:11 (16 January 2009).

<sup>53</sup> See *supra* n. 49.

<sup>54</sup> *Lubanga*, 16 January 2009 Status Conference, *supra* n. 52, at 27. Note that, as part of the process of "familiarization" conducted by the VWU, the witness will have a "contact meeting" with the party calling the witness and the other parties/participants involved in the trial. See Int'l Bar Ass'n, *First Challenges: An examination of recent landmark developments at the International Criminal Court*, June 2009, at 25, [http://www.ibanet.org/Human\\_Rights\\_Institute/ICC\\_Outreach\\_Monitoring/ICC\\_IBA\\_Publications.aspx](http://www.ibanet.org/Human_Rights_Institute/ICC_Outreach_Monitoring/ICC_IBA_Publications.aspx).

<sup>55</sup> *Lubanga*, 16 January 2009 Status Conference, *supra* n. 52, at 24.

<sup>56</sup> *Id.* at 29

<sup>57</sup> *Id.*

merits of proofing expert witnesses and reasoned that the Court is likely to be helped by such witnesses having the best possible understanding of the issues involved and thereby delivering focused and accurate evidence.<sup>58</sup>

### C. SUBSEQUENT EVENTS IN THE *LUBANGA* CASE

The first witness to take the stand in the *Lubanga* trial was a former child soldier, who was called to testify by the Prosecution.<sup>59</sup> The witness, who was given the pseudonym “Dieumerci,” initially took the stand on 28 January 2009.<sup>60</sup> He began by explaining that when in fifth grade he, along with other school children, was kidnapped by soldiers and taken away to a military camp.<sup>61</sup> As the session progressed, however, he seemingly took fright and eventually, recanted his testimony entirely, stating that an unnamed non-governmental organization had instructed him to testify falsely about being kidnapped and taken to a military camp.<sup>62</sup> The witness was then dismissed at the request of the Prosecution.<sup>63</sup>

Two weeks later, on 10 February 2009, Dieumerci took the stand again.<sup>64</sup> On this occasion, Dieumerci was shielded by a curtain from the direct view of Mr. Lubanga, who was able to watch the testimony being delivered on a computer screen.<sup>65</sup> Furthermore, the Trial

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<sup>58</sup> *Id.*

<sup>59</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Proceedings, ICC-01/04-01/06-T-110-ENG WT 28-01-2009 1-51 NB T, at 5:20 (28 January 2009).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 28:7 – 28:25.

<sup>62</sup> *Id.* at 35:19 – 41:22.

<sup>63</sup> *Id.* at 42:3 – 42:4.

<sup>64</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, Transcript of Proceedings, ICC-01/04-01/06-T-123-ENG WT 10-02-2009 1/75 (10 February 2009).

<sup>65</sup> *Id.* at 3:12 – 3:15.

Chamber allowed the witness to begin by telling his story in his own words rather than in response to questions.<sup>66</sup> Upon retaking the stand, Dieumerci repeated his initial testimony regarding being kidnapped and taken to a military camp,<sup>67</sup> and explained that, the first time he took the stand, a “lot of things went through [his] mind... [he] was angry and... wasn’t able to testify.”<sup>68</sup>

Although it is difficult to say whether the contradictory testimony Dieumerci gave on the witness stand was a result of the Prosecution’s inability to speak with and prepare him before he took the stand, the incident raises the question of what impact the bar on witness proofing will have on witnesses before the court, particularly on children and other vulnerable witnesses.

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<sup>66</sup> *Id.* at 3:16 – 3:20.

<sup>67</sup> *Id.* at 4:1 – 22:6.

<sup>68</sup> *Id.* at 30:24 – 30:25.

## II. RECOMMENDATIONS AND ANALYSIS

In light of the many potential benefits of witness proofing, discussed in detail below, and the possible negative impact on witnesses, particularly vulnerable witnesses, from the bar on witness proofing, we recommend that the Court re-examine whether there is a legal basis for witness proofing under the Rome Statute.

As an initial matter, it should be stressed that no governing provision of the ICC prohibits the practice of witness proofing. Moreover, the practice may be permitted under Article 64(3)(a) of the Statute, which expressly authorizes the Trial Chamber to “[c]onfer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings.”<sup>69</sup> At a minimum, the Court should allow witness proofing for vulnerable witnesses, which may be authorized under Article 64(3)(a) or a provision of the Rules of Procedure and Evidence allowing the Chamber to adopt special measures to facilitate the testimony of such witnesses. Finally, in the event that the Trial Chamber continues to find that witness proofing lacks a legal basis, we recommend that the judges of the ICC amend the Regulations of the Court to provide authority for the practice of witness proofing as defined before Pre-Trial Chamber I in the *Lubanga* case.<sup>70</sup>

### A. THE TRIAL CHAMBER WOULD BENEFIT FROM A RE-EXAMINATION OF WITNESS PROOFING UNDER THE CHAMBER’S AUTHORITY TO ADOPT PROCEDURES NECESSARY TO FACILITATE THE FAIR AND EXPEDITIOUS CONDUCT OF THE PROCEEDINGS

#### 1. Article 64(3)(a)

Surprisingly, despite the detailed submission of the Prosecution in

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<sup>69</sup> Rome Statute, *supra* n. 1, Art. 64(3)(a).

<sup>70</sup> See *supra* n. 6 and accompanying text.

*Lubanga* and the Trial Chamber's thorough examination of the grounds proposed by the Prosecution in favor of witness proofing, neither the Prosecution nor the Chamber seems to have considered that witness proofing may be adopted by the Trial Chamber under Article 64(3)(a) of the Rome Statute. As stated above, that provision authorizes the Trial Chamber to "[c]onfer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings."<sup>71</sup>

While there is little publicly available drafting history regarding this provision of the Rome Statute, one commentator has observed that it was "inspired by the experience of the *ad hoc* Tribunals,"<sup>72</sup> referring to the ICTY and ICTR, each of which permits the judges to amend the tribunal's procedural rules as necessary, something that has occurred more than forty times in the ICTY<sup>73</sup> and seventeen times at the ICTR.<sup>74</sup> Because the ICC requires a two-thirds majority of the members of the Assembly of States Parties to amend the Rules of Procedure and Evidence, the need for Article 64(3)(a) is self-evident, as limiting the Trial Chamber to those measures that are expressly mentioned in the positive law would be unworkable. As argued in a recent article:

No procedural code could hope to regulate every aspect of a tribunal's operation, and to presume that a practice that is not expressly provided for is thereby prohibited would cripple practitioners and judges alike.<sup>75</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> Frank Terrier, *Powers of the Trial Chamber*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 1259 (Cassese *et al.* eds., 2002), 1268.

<sup>73</sup> See International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, *entered into force* 14 March 1994, *amendments adopted* 4 November 2008.

<sup>74</sup> International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, *entered into force* 29 June 1995, *amendments adopted* 14 March 2008.

<sup>75</sup> Ruben Karemaker, B. Don Taylor III, and Thomas Wayde Pittman, *Witness*

Indeed, the judges of the ICTY observed, in a submission to the Preparatory Commission charged with drafting the ICC's Rules of Procedure and Evidence, that the "flexibility" afforded to the ICC's Trial Chamber by virtue of Article 64(3)(a) "should not be constrained by inflexible Rules that are contrary to the intent and purposes of [Article 64], and indeed, the Statute."<sup>76</sup> This recommendation is not surprising, given that the judges of both the ICTY and the ICTR, even with those tribunals' relatively flexible approach to amending the rules of procedure, have found themselves having to operate outside of the express letter of the law in a number of instances when fairness and/or efficiency so demanded.<sup>77</sup> In fact, witness proofing, which is not

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*Proofing in International Criminal Tribunals: Response to Ambos*, 21 Leiden J. Int'l L. 917 (October 2008).

<sup>76</sup> International Criminal Tribunal for the former Yugoslavia, *Contributions of the Chambers of the International Criminal Tribunal for the former Yugoslavia*, submitted to the 26 July – 13 August 1999 Preparatory Commission on the Proposed Rules of Procedure and Evidence for the International Criminal Court, at 7.

<sup>77</sup> Presumably, because the statutes of the ICTY and ICTR do not contain a provision equivalent to the Rome Statute's Article 64(3)(a), the judges have invoked the "doctrine of inherent powers," which "provides that a court should be recognized as having been implicitly conferred the powers which prove necessary to the exercise of its mandate." *Prosecutor v. Rwamakuba*, Decision on Appropriate Remedy, ICTR-98-44C-T, ¶ 46 (Trial Chamber, 31 January 2007). Thus, for example, in *Rwamakuba*, the ICTR Trial Chamber determined that it had inherent authority to award monetary damages to an accused whose rights had been violated by the ICTR because "this power is essential for the carrying out of judicial functions, including the fair and proper administration of justice." *Id.* ¶ 47. See also *Prosecutor v. Popovic, et al.*, Decision on the Request for Reconsideration of the Decision on the Admissibility of the Expert Report and Proposed Expert Testimony of Professor Schabas, IT-05-88-T, at 1 (Trial Chamber, 30 July 2008) ("[A] Chamber has inherent discretionary power to reconsider a previous decision in exceptional cases if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice"); *Prosecutor v. Nyiramasuhuko*, Decision on Pauline Nyiramasuhuko's Motion for Recall or Reconsideration of Witness 44, or Certification to Appeal the Decision of 23 April 2007, ICTR-97-21-T, ¶ 13 (Trial Chamber, 11 May 2007) ("Although the Rules do not explicitly provide for it, the Chamber has an inherent power to reconsider its own decisions."); *Nahimana, et al. v. Prosecutor*, Decision on Appellant Jean-Bosco Barayagwiza's Motion Contesting the Decision of the President Refusing to Review and Reverse the Decision of the Registrar Relating to the Withdrawal Of Co-Counsel, ICTR-99-52-A, ¶ 9 (Appeals Chamber, 23 November 2006) ("The Appeals Chamber has inherent power to review decisions of the Tribunal's President concerning withdrawal of counsel where such decisions are closely related to issues involving the fairness of proceedings on appeal...");

expressly authorized by the statutes of either of the *ad hoc* tribunals, is itself an area where they may have used their inherent power to deal

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*Prosecutor v. Ntagerura, et al.*, Judgment, ICTR-99-46-A, ¶ 14 (Appeals Chamber, 7 July 2006) (“Finally, it should be recalled that the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing. The Appeals Chamber will dismiss arguments which are evidently unfounded without providing detailed reasoning.”); *Prosecutor v. Bagosora, et al.*, Decision on the Defence Motions for the Reinstatement of Jean Yaovi Degli as Lead Counsel for Gratien Kabiligi, ICTR-98-41-T, ¶ 24 (Trial Chamber, 19 January 2005) (“The Chamber observes that there is authority for Trial Chambers to review a decision by the Registrar pursuant to their inherent powers to ensure the fair and expeditious trial of accused persons.”); *Prosecutor v. Karemera, et al.*, Decision on Severance of Andre Rwamakuba and Amendments of the Indictment, Article 20(4) of the Statute, Rule 82 (B) of the Rules of Procedure and Evidence, ICTR-98-44-PT, ¶ 22 (Trial Chamber, 7 December 2004) (“The Chamber also considers that it has the power to make such a ruling independently of the Appeals Chamber ruling, where it concludes that it is required in the interests of justice. The Chamber is endowed with inherent powers to make judicial findings that are necessary to achieve the primary obligation to guarantee a fair trial to the accused.”); *Prosecutor v. Nyiramasuhuko*, Decision on Ntahobali’s Motion for Withdrawal of Counsel, ICTR-97-21-T, ¶ 20 (Trial Chamber, 22 June 2001) (following the withdrawal of accused’s counsel, the Trial Chamber, “by virtue of its inherent powers to control its own proceedings, ... decides *proprio motu* that it is in the interest of justice that a Duty Counsel be immediately appointed so as to ensure that the Accused is assisted in the conduct of his defence” pending his selection of new permanent counsel); *Prosecutor v. Seselj*, Decision on Amending the List of Exhibits Relative to the Report of Reynaud Theunens, IT-03-67-T, ¶ 7 (Trial Chamber, 12 February 2008) (“[T]he Chamber is free to authorise the amendment of the [Prosecution’s list of exhibits] in the exercise of its inherent discretion in managing the trial proceedings.”); *Prosecutor v. Blagojevic*, Public And Redacted Reasons for Decision on Appeal by Vidoje Blagojevic to Replace His Defence Team, IT-02-60-AR73.4, ¶ 7 (Appeals Chamber, 7 November 2003) (upholding the Trial Chamber’s decision to review a decision by the ICTY Registrar, rather than directing the appeal of the Registrar’s decision to the Presidency, because the Trial Chamber acted pursuant to “its inherent power to ensure the fair and expeditious trial of the accused.”); *Prosecutor v. Bobetko*, Decision on Challenge by Croatia to Decision and Orders of Confirming Judge, IT-02-62-AR54 bis & IT-02-62-AR108 bis, ¶ 15 (Appeals Chamber, 29 November 2002) (“The Tribunal has an inherent power to stay proceedings which are an abuse of process, such a power arising from the need for the Tribunal to be able to exercise effectively the jurisdiction which it has to dispose of the proceedings.”); *Prosecutor v. Tadic*, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, IT-94-1-A-R77, ¶ 13 (Appeals Chamber, 31 January 2000) (“There is no mention in the Tribunal’s Statute of its power to deal with contempt. The Tribunal does, however, possess an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction which is expressly given to it by that Statute is not frustrated and that its basic judicial functions are safeguarded.”).

with matters directly relevant to the administration of justice, in this case to uphold the legality of the practice.<sup>78</sup>

Notably, while there has been virtually no reference to Article 64(3)(a) in the jurisprudence of the ICC to date,<sup>79</sup> the *Lubanga* Trial Chamber may have relied upon the provision on at least one occasion, namely when it decided to permit witness proofing of *expert* witnesses. As explained above, the Trial Chamber made this decision without any consideration of a legal basis for the proofing of expert witnesses, saying only:

The Chamber is persuaded that different considerations apply as between “lay witnesses as to fact,” and experts and that the disadvantages of discussions prior to giving evidence do not apply to the latter category of witness. Instead, the court is likely to be helped by the lawyers calling the expert having the best possible understanding of the issues involved, thereby leading to a focused and accurate presentation of the evidence.

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<sup>78</sup> *Prosecutor v. Limaj et al.*, Decision on Defence Motion on Prosecution Practice of “Proofing” Witnesses, Case No. IT-03-66-T, at 2 (Trial Chamber, 10 November 2004) (expressly upholding the practice of witness proofing); *Karemera*, Decision on Defence Motions to Prohibit Witness Proofing, *supra* n. 39. Note that the ICTR Appeals Chamber has observed, in upholding a decision by the Trial Chamber that the practice of witness proofing is permissible at the ICTR, that the Trial Chamber may have been acting pursuant to its powers under a provision in the Tribunal’s Rules of Procedure and Evidence that grants the Trial Chamber discretion to apply “rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the principles of law.” *Prosecutor v. Karemera, et al.*, Decision on Interlocutory Appeal Regarding Witness Proofing, ICTR-98-44-AR73.8, ¶ 8 (Appeals Chamber, 11 May 2006). However, it is not altogether clear that the practice of witness proofing could be approved under this particular rule, suggesting that the Trial Chambers of both the ICTR and the ICTY were instead acting pursuant to their inherent powers to ensure the proper administration of justice when they approved witness proofing.

<sup>79</sup> The *Lubanga* Trial Chamber seems to have only referenced the provision once, when scheduling a status conference at which the parties would address the different languages to be used by witnesses testifying at Mr. Lubanga’s trial. See *The Prosecutor v. Thomas Lubanga Dyilo*, Agenda for Status Conference on 28 May 2008 and Scheduling Order, ICC-01/04-01/06-1343 21-05-2008 1/6 CB T, ¶ 2 (Trial Chamber, 21 May 2008).

Accordingly, discussions between the parties and their experts may take place at any stage prior to calling the witness.<sup>80</sup>

Although not entirely clear, the Trial Chamber's finding that the proofing of expert witnesses would benefit the Court supports the notion that the decision could have been taken under Article 64(3)(a), which as noted above, permits the Chamber to adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings. As described below, the same may be said of witness proofing for lay witnesses, an issue that was never considered by the Trial Chamber, as it found that the Prosecution had failed to provide a legal basis for the practice under Article 21 of the Rome Statute.

## 2. *Witness Proofing is a Procedure that Will Encourage the Fairness and Expeditiousness of Trial Proceedings*

That witness proofing is a procedure that encourages fairness and expeditiousness is supported by the fact that a significant number of national jurisdictions that conduct trials through the direct and cross-examination of witnesses make use of the practice. Note that while the *Lubanga* Trial Chamber found, in terms of national jurisdictions, that only the United States, Canada, and Australia practice some form of witness proofing, the Trial Chamber misstated the rule in England and Wales when it held that accepted practice in those jurisdictions does not permit substantive conversations between attorneys and witnesses prior to the witness giving evidence.<sup>81</sup> First, solicitors in England and Wales – *i.e.*, those lawyers who by and large do not directly participate in court proceedings, but rather engage in case preparation<sup>82</sup> – are “permitted, even when acting as an advocate, to interview and take

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<sup>80</sup> *Lubanga*, 16 January 2009 Status Conference, *supra* n. 52, at 29:3 – 29:11.

<sup>81</sup> *Lubanga*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, *supra* n. 26, ¶ 42.

<sup>82</sup> For an overview of the prosecutorial system in England and Wales, including the split within the legal profession, see Michael Zander QC, “The English Prosecution System” (September 2008), <http://www.radicali.it/download/pdf/zender.pdf>.

statements from any witness or prospective witness at any stage in the proceedings, whether or not that witness has been interviewed or called as a witness by another party.”<sup>83</sup> Second, barristers – *i.e.*, those lawyers who typically act as advocates in court proceedings – are permitted to meet with witnesses in the context of “Pre-Trial Witness Interviews” (PTWIs), whereby prosecutors can assess the reliability of a witness’s evidence, gain a better understanding of complex evidence, and explain court processes and procedures to the witness.<sup>84</sup> These PTWIs may involve any or all of the following measures: taking the witness through his/her statement, asking questions to clarify and expand evidence, asking questions relating to the character of the witness, asking questions about new evidence that has come to light since the making of the witness statement, and establishing the extent of discrepancies.<sup>85</sup> Furthermore, prior to adopting the practice of allowing barristers to conduct PTWIs in 2003, then-Attorney General Lord Peter Goldsmith concluded that the “Criminal Justice process in England and Wales [was] *unusual, if not unique*, among common law jurisdictions in the extent to which prosecutors keep themselves at arms length from prosecution witnesses.”<sup>86</sup> Similarly, the Hong Kong Director of Public Prosecutions concluded in 2008 that “major common law jurisdictions have adopted [pre-trial witness interviews],

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<sup>83</sup> Solicitors’ Code of Conduct 2007, available at <http://www.sra.org.uk/solicitors/code-of-conduct/198.article>.

<sup>84</sup> Attorney General’s Office News Release of 27 November 2007, at 1, available at <http://www.attorneygeneral.gov.uk/attachments/PWITnationalrollout28%2011%2007.pdf>.

<sup>85</sup> Lord Goldsmith Report, *supra* n. 27, at 21-23. *See also* Pre-trial Witness Interviews: Code of Practice, available at [www.cps.gov.uk/victims\\_witnesses/interviews.html](http://www.cps.gov.uk/victims_witnesses/interviews.html) (“Where a prosecutor conducts a pre-trial interview to assess the reliability of a witness’s evidence, the witness may be asked about the content of his/her statement or other issues that relate to reliability. This may include taking the witness through his/her statement, asking questions to clarify and expand evidence, asking questions relating to character, exploring new evidence or probing the witness’s account.”).

<sup>86</sup> Lord Goldsmith Report, *supra* n. 27, at 5-6 (emphasis added).

and its use is regarded as basic good practice.”<sup>87</sup>

Moreover, as noted above, the ICTY,<sup>88</sup> the ICTR,<sup>89</sup> and Special Court for Sierra Leone<sup>90</sup> have each upheld the practice of witness proofing. Indeed, both the ICTY and the ICTR have expressly recognized that “discussions 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’ evidence.”<sup>91</sup> While the *Lubanga* Trial Chamber was correct that the practices of the ICTY, ICTR, and SCSL, as a whole, are “not easily transferable into the system of law created by the ICC Statute and Rules,”<sup>92</sup> the process of examining witnesses is virtually the same in the ICC as it is in these other bodies. In other words, while the ICC has adopted certain aspects of both common law and Romano-Germanic legal traditions, the delivery of testimony by witnesses *via*

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<sup>87</sup> LegCo Panel on Administration of Justice and Legal Services, Meeting on 23 June 2008, Opening Statement by the Director for Public Prosecutions in respect of Pre-trial Interviewing of Witnesses by Prosecutors, ¶ 4, available at <http://74.125.47.132/search?q=cache:j7gtf4RvRIgJ:www.doj.gov.hk/eng/public/pdf/2008/dpp20080623e.pdf+hong+kong+pre-trial+witness&hl=en&ct=clnk&cd=3&gl=us&client=firefox-a>. Scotland and Northern Ireland also make use of pre-trial witness interviews similar to those now used in England and Wales. Lord Goldsmith Report, *supra* n. 27, at Annex A.

<sup>88</sup> *Limaj*, Decision on Defence Motion on Prosecution Practice of “Proofing” Witnesses, *supra* n. 78; *Milutinovic*, Decision on Ojdanic Motion to Prohibit Witness Proofing, *supra* n. 39.

<sup>89</sup> *Karemera*, Decision on Defence Motions to Prohibit Witness Proofing, *supra* n. 39.

<sup>90</sup> *Prosecutor v. Sesay et al.*, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, Case No. SCSL-04-15-T (Trial Chamber, 26 October 2005).

<sup>91</sup> *Milutinovic*, Decision on Ojdanic Motion to Prohibit Witness Proofing, *supra* n. 39, ¶ 16; *Karemera*, Decision on Defence Motions to Prohibit Witness Proofing, *supra* n. 39, ¶ 14 (favorably quoting the *Milutinovic* decision before affirming that the practice of witness proofing is sanctioned at the ICTR).

<sup>92</sup> *Lubanga*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, *supra* n. 26, ¶ 45.

direct and cross-examination is, as in the ICTY, ICTR, and SCSL, conducted pursuant to the adversarial, common law tradition.<sup>93</sup> Furthermore, unlike in a traditional Romano-Germanic jurisdiction, the judges of the ICC are not provided with a dossier or other investigatory case file, meaning that trials will largely be decided based on what the judges “see and hear in the courtroom,”<sup>94</sup> which in turn “rests primarily upon the parties.”<sup>95</sup> Hence, the three primary differences cited by the Trial Chamber in its 30 November 2007 decision between the ICC, on the one hand, and the ICTY, ICTR, and SCSL, on the other – namely the prosecution’s role within the ICC of investigating exculpatory as well as incriminatory evidence, the scope for greater intervention by the bench, and the element of victim participation<sup>96</sup> – do not mean that procedures used by the ICTY, ICTR, and SCSL for preparing witnesses for examination and cross-examination during trial are not transferrable. Indeed, the Trial Chamber did not explain how those three elements make the transferability of the *ad hoc* Tribunals’ jurisprudence on witness proofing difficult, and it is certainly not obvious. As regards the Prosecution’s role of ensuring an impartial investigation, from the outset the Prosecution in *Lubanga* took the position that where the process of witness proofing results in new evidence, be it exculpatory or incriminatory, it would – in accordance with its disclosure obligations – disclose that information to the Defense.<sup>97</sup> In respect of

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<sup>93</sup> See, e.g., Terrier, *supra* n. 72, at 1268 (explaining that “[e]ach of the parties must let the other know what witnesses it intends to call... and each party has a right to cross-examine the witnesses called by the other party.”); Claude Jorda & Jérôme de Hemptinne, *The Status and Role of the Victim*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1387, 1388 (Cassese, *et al.* eds., 2002) (describing the system established by the Rome Statute as one that is “essentially accusatorial” in nature, in which “the trial is conceived as a duel between two adversaries – the prosecution and the defense...”).

<sup>94</sup> Ruben Karemaker, B. Don Taylor III, and Thomas Wayde Pittman, *Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence*, 21 *Leiden J. Int’l L.* 683, § 2 (July 2008).

<sup>95</sup> *Id.*

<sup>96</sup> *Lubanga*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, *supra* n. 26, ¶ 45.

the scope for greater intervention by the bench, it is clear from the transcript of the first session of evidence of Dieumerici, that when a witness falls apart on the stand, the bench is just as much at a loss as the attorneys.<sup>98</sup> It is not clear therefore how intervention from the bench obviates the need for witness proofing. Similarly, it is unclear how the element of victim participation relates to the issue of whether witness proofing is appropriate.

Perhaps even more importantly, despite the differences between the ICC and these other international criminal bodies, there are also significant *similarities* that are relevant in this context. In particular, each of these other bodies has jurisdiction over the same types of crimes as the ICC and, like the ICC, often has to rely on testimony from victims of these heinous crimes who have had to travel far from their current homes to testify under a legal system that is foreign to them. At the same time, international criminal bodies are likely to have a high proportion of vulnerable witnesses, such as children and survivors of sexual violence.

a) Fairness

(i) *Proofing is Likely to Increase Fairness for Both Parties and Witnesses*

Witness proofing – *i.e.*, the process of allowing a witness to read his/her statement and refresh his/her memory in respect of the evidence he/she will give; putting questions to the witness that the examining lawyer intends to ask the witness, and in the order anticipated; and inquiring about possible additional information of both a potentially incriminatory and potentially exculpatory nature – demonstrably contributes to the fairness of proceedings in several ways. First, as both the ICTY and the ICTR have recognized, witness proofing enables differences in recollections to be identified and shared with the Defense before the evidence is given at trial, “thereby

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<sup>97</sup> *Id.* ¶¶ 16-18.

<sup>98</sup> See the transcript of Dieumerici’s evidence on 28 January 28 2009, *supra* n. 62.

reducing the prospect of the Defense being taken entirely by surprise.”<sup>99</sup> Interestingly, the *Lubanga* Trial Chamber took the view in its decision against allowing witness proofing that “spontaneity during the giving of evidence by a witness” is “helpful.”<sup>100</sup> Yet, as one commentary points out, “[i]f the parties are to have any meaningful role in presenting the evidence, such surprises should be avoided to the maximum extent possible.”<sup>101</sup> The process of proofing in the ICTY, ICTR, and SCSL has also contributed to the fairness of proceedings by generating new probative evidence previously unknown to either party.<sup>102</sup> This aspect of witness proofing would be particularly useful in the context of the ICC, given that the Prosecution is required by the Rome Statute not only to disclose potentially exculpatory evidence that comes into its possession, but to *actively search* for exculpatory evidence.<sup>103</sup> Finally, from the perspective of the parties and the Chamber, the ICTY has found that witness proofing is “likely to enable” a more “accurate” and “complete” presentation of the evidence at trial,<sup>104</sup> something that enhances the overall fairness for both the Prosecution and the Defense.

Proofing witnesses also increases the fairness of proceedings for the witnesses, many of whom will have been victims of the relevant

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<sup>99</sup> *Limaj*, Decision on Defence Motion on Prosecution Practice of “Proofing” Witnesses, *supra* n. 78, at 2. See also *Milutinovic*, Decision on Ojdanic Motion to Prohibit Witness Proofing, *supra* n. 39, ¶ 20; *Karempera*, Decision on Defence Motions to Prohibit Witness Proofing, *supra* n. 39, ¶¶ 9, 17.

<sup>100</sup> *Lubanga*, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, *supra* n. 26, ¶ 52.

<sup>101</sup> Karemaker, Taylor, and Pittman, *Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence*, *supra* n. 94, § 5.2.2.

<sup>102</sup> *Id.*

<sup>103</sup> Rome Statute, *supra* n. 1, Art. 54(1)(a).

<sup>104</sup> *Limaj*, Decision on Defence Motion on Prosecution Practice of “Proofing” Witnesses, *supra* n. 78, at 2; *Milutinovic*, Decision on Ojdanic Motion to Prohibit Witness Proofing, *supra* n. 39, ¶ 20.

crimes. For instance, the ICTY has noted that witness proofing is valuable to the tribunal given “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.”<sup>105</sup> Likewise, the SCSL has observed 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.<sup>106</sup>

The ICTY’s recently released “Manual on Developed Practices” confirms that “[s]ensitive and appropriate preparation during the proofing phase can only contribute to enhance a witness’ sense of control and confidence.”<sup>107</sup> By contrast, “[h]aving witnesses take the stand ‘cold’ threatens to: render them unprepared to testify effectively before the Court, set them up for re-traumatization during any cross-examination, and risk their being discredited where their testimony is stilted, confused or diverges from statements that may have been taken years prior.”<sup>108</sup> Notably, the ICTY has expressly held that the process of “preparing a witness to cope adequately with the stress of [the]

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<sup>105</sup> *Limaj*, Decision on Defence Motion on Prosecution Practice of “Proofing” Witnesses, *supra* n. 78, at 3.

<sup>106</sup> *Sesay*, Decision on the Gbao and Sesay Joint Application for the Exclusion of the Testimony of Witness TF1-141, *supra* n. 90, ¶ 33.

<sup>107</sup> ICTY and UNICRI, *ICTY Manual on Developed Practices*, 2009, at 84, available at [http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY\\_Manual\\_on\\_Developed\\_Practices.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTY_Manual_on_Developed_Practices.pdf).

<sup>108</sup> Beth van Schaak, *Witness Proofing & International Criminal Law*, 26 November 2008, available at <http://intlwgrrls.blogspot.com/2008/11/witness-proofing-international-criminal.html>.

proceedings,” is “properly the realm of proofing, and [is] not to be left to the different form of support provided by the Victims and Witnesses Section.”<sup>109</sup> Indeed, the ICTY’s Manual on Developed Practices observes that “a proper conclusion of the witness’ relationship with the legal team can contribute to a sense of completion for the witness.”<sup>110</sup>

*(ii) Any Risk that Proofing Could Decrease Fairness  
Through Improper Influencing of Witnesses May Be  
Overcome Through Various Safeguards*

Opponents of witness proofing argue that the practice *reduces* the fairness of proceedings, to the extent that measures authorized as “proofing” develop into “coaching.” Indeed, as Pre-Trial Chamber I observed in its decision on witness proofing, a number of Romano-Germanic jurisdictions regard proofing as “unethical or unlawful,”<sup>111</sup> and even some “mixed” systems of law – *i.e.*, those that incorporate aspects of both adversarial and inquisitorial legal traditions – ban the practice, presumably due to concerns regarding the potential that the lawyer conducting proofing will improperly influence the witness.<sup>112</sup> However, upon close examination, this concern does not outweigh the potential contributions of witness proofing. As an initial matter, nothing inherent in witness proofing as proposed by this report – *i.e.*, the process of allowing a witness to read his/her statement and refresh his/her memory in respect of the evidence he/she will give; putting questions to the witness that the examining lawyer intends to ask the witness, and in the order anticipated; and inquiring about possible additional information of both a potentially incriminatory and potentially exculpatory nature – permits influencing a witness. Furthermore, those jurisdictions that permit witness proofing have not

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<sup>109</sup> *Id.*

<sup>110</sup> *ICTY Manual on Developed Practices*, *supra* n. 107, at 84.

<sup>111</sup> *See supra* n. 25.

<sup>112</sup> Based on authors’ conversations with Chief Public Prosecutor and Director of the Norwegian National Authority for Prosecution of Organized and Other Serious Crime.

encountered significant negative effects associated with the practice.<sup>113</sup> In fact, former Attorney General of England and Wales, Lord Peter Goldsmith, conducted a detailed report on the practice of witness proofing across a number of domestic common law systems and concluded as follows:

None of the other jurisdictions studied rules out prosecution witness interviews on the grounds that there is a possibility that the process may contaminate a witness's evidence. While all recognise the risks, and provide training and guidance to prosecutors, none reports that it is in practice a significant issue.<sup>114</sup>

Neither has any accused been able to successfully challenge the practice of witness proofing at the ICTY or ICTR on the basis of prejudice.<sup>115</sup> On this subject, Lord Goldsmith further observed: "I note, in any event, that a witness's evidence is rarely preserved in aspic from the moment the events in question occurred. A process of explanation and reiteration to friends and family will often occur. Yet this risk of 'contamination' is accepted."<sup>116</sup>

Beyond this empirical evidence on the lack of serious ethical problems in jurisdictions that permit witness proofing, lawyers who are governed by the profession's rules and codes of ethics should not be presumed to unduly influence witnesses. Again quoting Lord Goldsmith:

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<sup>113</sup> Lord Goldsmith Report, *supra* n. 27, at 18.

<sup>114</sup> *Id.*

<sup>115</sup> See *Limaj*, Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses, *supra* n. 78, at 3 (dismissing the accused's claims that the practice of witness proofing by the Prosecution resulted in undue prejudice); *Milutinovic*, Decision on Ojdanic Motion to Prohibit Witness Proofing, *supra* n. 39, ¶¶ 20-21 (same); *Karemera*, Decision on Defence Motions to Prohibit Witness Proofing, *supra* n. 39, ¶¶ 21-24 (same).

<sup>116</sup> Lord Goldsmith Report, *supra* n. 27, at 18.

The argument [against witness proofing] seems to be based on the premise that a prosecutor is more likely to coach or contaminate a witness's evidence than a police officer. I do not accept this argument. If anything, there is a powerful argument that a prosecutor, who is well versed in the rules of evidence and subject to a professional code of conduct, is less likely to coach a witness or ask questions that may contaminate the witness's evidence.<sup>117</sup>

Similarly, former Justice Thurgood Marshall of the United States Supreme Court once noted:

If our adversary system is to function according to design, we must assume that an attorney will observe his responsibilities to the legal system, as well as to his client. I find it difficult to conceive of any circumstances that would justify a court's limiting the attorney's opportunity to serve his client because of fear that he may disserve the system by violating accepted ethical standards. If any order barring communication between a defendant and his attorney is to survive constitutional inquiry, it must be for some reason other than unethical conduct.<sup>118</sup>

Furthermore, for those lawyers who do not live up to the high standards of the profession, there is the threat of punishment under Article 70 of the Rome Statute for corruptly influencing a witness.<sup>119</sup>

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<sup>117</sup> *Id.*

<sup>118</sup> *Geders v. United States*, 425 U.S. 80, 93 (1976). See also *Limaj*, Decision on Defence Motion on Prosecution Practice of "Proofing" Witnesses, *supra* n. 78, at 3 ("The... concerns raised by the Defence [regarding the dangers of improper proofing] are really inherent in the established and accepted proofing procedure. There are clear standards of professional conduct which apply to Prosecuting counsel when proofing witnesses. What has been submitted does not persuade the Chamber that there is reason to consider these are not being observed, or that there is such a risk that they may not be, as to warrant some intervention by the Chamber.").

<sup>119</sup> Rome Statute, *supra* n. 1, Art. 70.

Such an offense carries a sentence of up to five years imprisonment, so is a significant deterrent. In addition, the ICC has, by virtue of Article 71, power to impose sanctions, other than imprisonment, for misconduct before the Court, *i.e.*, it has at its disposal a contempt power.<sup>120</sup>

Yet another safeguard against improper witness tampering is the fact that witnesses who testify before the ICC are subject to cross-examination. As the ICTR Appeals Chamber has observed, “through careful cross-examination, a party can explore the impact of preparation on the witness’s testimony and use this to call into question the witness’s credibility.”<sup>121</sup> Indeed, in the words of one commentary, “[i]t would be a poor advocate... 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.”<sup>122</sup> Moreover, even if the opposing attorney does not pick up on, or is not able to expose, the fact that a witness has been coached, there is still another layer of oversight, namely from the judge. From the transcript of the first day of testimony of witness Dieumerici in the *Lubanga* trial, it is apparent that Judge Fulford was very astute in respect of the witness, and was alive to the possibility that fears and pressures, extraneous to the simple requirement to tell the truth, were operating upon him. A similar level of vigilance should be expected in respect of the possibility of witness coaching.

Finally, if the Trial Chamber does not believe that these safeguards are adequate to guard against the possibility of improper influence during proofing sessions, we recommend that the Chamber adopt a Code of Practice that makes clear what is and is not permitted.

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<sup>120</sup> *Id.* Art. 71.

<sup>121</sup> *Karemera, Decision on Interlocutory Appeal Regarding Witness Proofing, supra* n. 78, ¶ 13.

<sup>122</sup> Karemaker, Taylor, and Pittman, *Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence, supra* n. 94, § 5.3.1.

Thus, on the whole, given the potential benefits of witness proofing to the parties, the Chambers, and the witnesses, and the various factors safeguarding against improper tampering of witnesses, the practice of witness proofing will contribute to the fairness of proceedings.

b) Expeditiousness

In addition to contributing to the fairness of proceedings, witness proofing has the potential to substantially expedite proceedings, particularly in the context of the types of cases that are within the jurisdiction of the ICC. As an initial matter, proofing encourages efficiency by ensuring that only those charges that will stand up at trial are ever brought before the Court.<sup>123</sup> Once a case has been brought, as both the ICTY and the ICTR have recognized, witness proofing enables the full facts to be identified in light of the actual charges being tried against a particular accused.<sup>124</sup> As the ICTY explained: “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.”<sup>125</sup>

Furthermore, both the ICTY and the ICTR have noted that witness

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<sup>123</sup> See, e.g., Statement by Justice Hassan B. Jallow, Prosecutor of the ICTR to U.N. Security Council, 29 June 2004, available at <http://69.94.11.53/ENGLISH/speeches/jallow290604.htm> (“Indictments will be drafted and filed only after proofing and selection of witnesses with the pre-trial brief prepared. This will put the OTP in a position to proceed with the trial immediately when the indictment is confirmed by a judge and will avoid the need for amendments to indictments, as this can delay the proceedings.”); Lord Goldsmith Report, *supra* n. 27, at 8 (in recommending that England and Wales change their rules to allow for pre-trial witness interviews, the Attorney General notes that “[i]n 22% of the [criminal] cases where the reason for the adverse case outcome was evidential, the principal cause was a witness failing to come up to proof.”).

<sup>124</sup> *Limaj*, Decision on Defence Motion on Prosecution Practice of “Proofing” Witnesses, *supra* n. 78, at 2; *Milutinovic*, Decision on Ojdanic Motion to Prohibit Witness Proofing, *supra* n. 39, ¶ 20; *Kamera*, Decision on Defence Motions to Prohibit Witness Proofing, *supra* n. 39, ¶ 17.

<sup>125</sup> *Limaj*, Decision on Defence Motion on Prosecution Practice of “Proofing” Witnesses, *supra* n. 78, at 2.

proofing is helpful because the crimes charged in the indictment occurred many years ago, and often the witness interviews took place a long time ago.<sup>126</sup> Indeed, because witness proofing assists the process of human recollection, it is “likely to enable” not only the more accurate presentation of evidence, but also the more “orderly and efficient” presentation of that evidence.<sup>127</sup> As recognized in regards to witness proofing in the United States, the process of meeting with a witness before his testimony means that “the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer... and is to be commended because it promotes a more efficient administration of justice and saves court time.”<sup>128</sup>

Finally, witness proofing contributes to efficiency to the extent that issues such as the reluctance of a witness to testify, changes in a witness’ recollection, and the discovery of additional evidence may be dealt with before the witness is scheduled to take the stand at trial. As the ICTY has observed, “[n]eedless delays due to witnesses being unavailable or their intended areas of testimony altering can be avoided by conducting proofing sessions sufficiently in advance of the witness’ appearance in court.”<sup>129</sup>

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In sum, given the similarities between the core of the ICC’s work and that of the ICTY, ICTR, and SCSL, as well as the use of similar procedures for adducing evidence from witnesses at trial, the findings of the ICTY, ICTR, and SCSL, as well as certain national jurisdictions

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<sup>126</sup> *Id.*; *Karemera*, Decision on Defence Motions to Prohibit Witness Proofing, *supra* n. 39, ¶ 17.

<sup>127</sup> *Limaj*, Decision on Defence Motion on Prosecution Practice of “Proofing” Witnesses, *supra* n. 78, at 2. *See also Milutinovic*, Decision on Ojdic Motion to Prohibit Witness Proofing, *supra* n. 39, ¶ 20.

<sup>128</sup> *State v. McCormick*, 298 N.C. 788, 882 (1979).

<sup>129</sup> *ICTY Manual on Developed Practices*, *supra* n. 107, at 83.

that practice witness proofing, offer compelling evidence that proofing is a procedure that would increase both the fairness and the expeditiousness of trial proceedings at the ICC. Therefore, the practice can and should be sanctioned by the Trial Chambers of the International Criminal Court pursuant to Article 64(3)(a) of the Rome Statute.

B. AT A MINIMUM, THE COURT SHOULD ALLOW WITNESS  
PROOFING FOR VULNERABLE WITNESSES

If the case for witness proofing in respect of “average” witnesses who come before the ICC is compelling, in respect of children and other vulnerable witnesses the case is overwhelming. Notably, a former trial attorney at the ICTY who has also worked at the ICC and the SCSL predicted difficulties in the presentation of evidence by unprepared child witnesses in the *Lubanga* case well before that trial began, saying:

In the *Lubanga* case, before the ICC, witness presentation is going to be extremely problematic. The vast majority of the crime base witnesses are children who have made multiple statements which can often lead to inconsistencies. Here proofing, if done fairly, could be essential. You are looking at young people who have never even been in a courtroom let alone given evidence. Constraints on proofing in this instance will present prosecutors with great challenges in the courtroom.<sup>130</sup>

Of course, the defense is subject to the same challenges to the extent it calls vulnerable witnesses. Another commentator has observed that “[v]ictims of sexual violence, in particular, may find it difficult to testify about what happened to them without the benefit of some prior preparation.”<sup>131</sup> Finally, in announcing the adoption of new rules

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<sup>130</sup> *Workshop, The International Criminal Court Five Years on: Progress or Stagnation?*, 6 J. Int'l Crim. Just. 763, 779 (September 2008) (quoting Andrew Cayley).

<sup>131</sup> Van Schaak, *supra* n. 108.

allowing for pre-trial meetings between solicitors and witnesses in England and Wales, Attorney General, Baroness Scotland announced that she was “particularly confident that this change in policy will be extremely valuable in cases where there are vulnerable witnesses.”<sup>132</sup>

Authority for allowing witness proofing for vulnerable witnesses may be found either under Article 64(3)(a), for the reasons discussed above, or under Rule 88 of the Rules of Procedure and Evidence, which provides that “a Chamber may, taking into account the views of the victim or witness, order special measures such as, but not limited to, measures to facilitate the testimony of a traumatized victim or witness, a child, an elderly person or a victim of sexual violence.”<sup>133</sup> While it is possible that children and other vulnerable witnesses may be more susceptible to coaching, the advantages of witness proofing and the safeguards against its potential abuse discussed above indicate that the benefits of proofing vulnerable witnesses far outweigh the potential disadvantages.

C. IN THE EVENT THE TRIAL CHAMBER CONTINUES TO FIND WITNESS PROOFING LACKS A LEGAL BASIS, THE JUDGES OF THE ICC SHOULD CONSIDER AMENDING THE REGULATIONS OF THE COURT TO AUTHORIZE THE PRACTICE

As explained above, we believe the practice of witness proofing will substantially contribute to both the fairness and expeditiousness of trial proceedings before the ICC. Thus, in the event that the Trial Chamber continues to find that witness proofing lacks a legal basis, we recommend that the judges of the ICC amend the Regulations of the Court to provide authority for the practice of witness proofing. The Rome Statute provides that the “judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an

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<sup>132</sup> Attorney General’s Office News Release of 27 November 2007, at 1, available at <http://www.attorneygeneral.gov.uk/attachments/PWITnationalrollout28%2011%2007.pdf>.

<sup>133</sup> International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3, *entered into force* 9 September 2002, R. 88.

absolute majority, the Regulations of the Court necessary for its routine functioning.”<sup>134</sup> As outlined by the Prosecution in its submissions to the Trial Chamber on the subject of witness proofing,<sup>135</sup> there is nothing about the practice of witness proofing that is inconsistent with the provisions of the Rome Statute or the Rules of Procedure and Evidence. To the contrary, witness proofing will assist the Court in its statutory duty to find the truth while ensuring fair and expeditious proceedings,<sup>136</sup> as well as in its duties to ensure the well-being of witnesses testifying before the Court.<sup>137</sup>

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<sup>134</sup> Rome Statute, *supra* n. 1, Art. 52(1).

<sup>135</sup> See *supra* n. 33 *et seq.* and accompanying text.

<sup>136</sup> See Rome Statute, *supra* n. 1, Art. 54(1)(a); *id.* Art. 64(2); *id.* Art. 69(1).

<sup>137</sup> *Id.* Art. 68(1).

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To date, two chambers of the International Criminal Court (ICC) - Pre-Trial Chamber I and Trial Chamber I - have ruled against requests by the Prosecution that parties be permitted to engage in “witness proofing.” Proofing, as proposed by the Prosecution, is a process that would involve lawyers meeting with witnesses before their testimony to allow the witnesses to read their prior statements and refresh their memories in respect of the evidence they would give, as well as review the questions that the examining lawyer intends to ask at trial and explore any additional information that the witness may be able to offer, whether incriminating or exculpatory. A substantial number of national jurisdictions characterized as predominantly “adversarial” in nature - meaning that, like the ICC, evidence is primarily adduced by the parties through the examination and cross-examination of witnesses - allow some form of witness proofing. Moreover, witness proofing has consistently been conducted by both the Prosecution and the Defense at other international criminal bodies, including the International Criminal Tribunal for Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone. Each of these other bodies has jurisdiction over the same types of crimes as the ICC and, like the ICC, often has to rely on testimony from victims of heinous crimes who have had to travel far from their current homes to testify under a legal system that is foreign to them about stressful events that occurred many years prior to their testimony.

Importantly, the decisions of the two ICC chambers that rejected witness proofing were based not on the merits of proofing, but rather on a technical finding that there was no express source of law authorizing the practice. At the same time, however, Trial Chamber I did approve a request that the parties be permitted to proof *expert* witnesses, as opposed to lay witnesses, even though the ICC’s governing provisions contain no express source of law authorizing that particular practice.

This report takes the position that the practice of witness proofing can and should be extended to include meetings between the parties and lay witnesses prior to trial, particularly in the case of vulnerable witnesses. While there is no express provision authorizing witness proofing in the context of the ICC, neither is there any provision prohibiting the practice. Moreover, Article 64(3)(a) of the Rome Statute establishing the ICC authorizes the Trial Chamber to “adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings,” which, as this report details, may be interpreted to include witness proofing. Finally, although there may be some concern that witness “proofing” will develop into witness “coaching,” the report explains that a number of safeguards will work to prevent any improper influencing of witnesses and that, on balance, the potential benefits of witness proofing to the parties, the Chambers, and the witnesses far outweigh the potential drawbacks.



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