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TELLING THEIR STORIES IN THEIR OWN WORDS: WITNESS FAMILIARISATION AT THE INTERNATIONAL CRIMINAL COURT

Christine SCHÖN*

I. Introduction

When the evidence of the first witnesses before the International Criminal Court (“Court” or “ICC”) was about to be heard, the question about the adequate preparation of witnesses for their testimony needed to be addressed. Before other international criminal courts and tribunals the parties calling the witnesses conducted “witness proofing” to prepare witnesses in a substantive way for their testimony. However, the Judges of the International Criminal Court (“Court” or “ICC”) decided to diverge from this practice which had previously been followed¹ and prohibited the practice of witness proofing by the party. Instead, the Chamber ordered the Court’s Victims and Witnesses Unit (“Unit” or “VWU”) to undertake the process of witness familiarisation to ensure that witness fully understand the courtroom procedure. This has widely been recognized as a new concept to the practices applied in international criminal law² and has not taken place without criticism or academic debate.³ With the second trial before the ICC well on its

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¹ ICC, *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, Trial Chamber I, 30 November 2007 (hereinafter *Lubanga familiarisation trial decision*) para. 45: “The ICC Statute has, through important advances, created a procedural framework which differs markedly from the ad hoc tribunals [...]. Therefore, the Statute moves away from the procedural regime of the ad hoc tribunals, introducing additional and novel elements to aid the process of establishing the truth. [...]”.

² “The decision [to prohibit witness proofing] has marked a notable divergence from the practice of the international tribunals.”, International Bar Association Human Rights Institute Report, *First Challenges: An examination of recent landmark developments at the International Criminal Court*, June 2009, p.25 (hereinafter IBA Report).

³ See, for example, Ruben Karemarker, B. Don Taylor III, Thomas Wayde Pittman, *Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence*, *Leiden Journal of International Law*, 21 (2008), p. 683: “The decisions, in the case of *Prosecutor v. Thomas Lubanga Dyilo (Lubanga)*, set the ICC

way⁴, witness familiarisation seems to have become an increasingly established practice before the Court.⁵

No express provisions can be found that deal with the preparation of witnesses in order to prepare them best for their testimony at trial, and the expression “proofing of a witness” cannot be found in the Rome Statute, the Rules of Procedure and Evidence or the Regulations of the Court. Article 68(1) of the Rome Statute demonstrates, however, that the Court⁶ as a whole shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses; the different organs and units of the Court are tasked with specific responsibilities in this respect. In fact, each party and participant in the process has specific responsibility to ensure that victims and witnesses are secure and safe, in addition to their general duty to provide for the well-being of victims and witnesses.⁷ Finally, Regulation 79 of the Regulations of the Registry makes it clear that preparation of witnesses for the experience of testifying is an important consideration: “Pursuant to article 43, paragraph 6, and rules 16, 17 and 18, the Registrar shall develop and, to the extent possible, implement policies and procedures to enable witnesses to testify in safety, so that

completely at odds with the well-established international criminal tribunals which have ruled on the matter. See also Sergey Vasiliev, *Proofing the Ban on Witness Proofing: Did the ICC get it right?*, Criminal Law Forum, 20 (2009), pp. 193-261; Kai Ambos, ‘Witness Proofing’ before the International Criminal Court: A Reply to Karemaker, Taylor, and Pittman, Leiden Journal of International Law, 21 (2008), pp. 911-916; Ruben Karemaker, B. Don Taylor III, Thomas Wayde Pittman, *Witness Proofing in International Criminal Tribunals: Response to Ambos*, Leiden Journal of International Law, 21 (2008), pp. 917-923; see also *Witness Proofing at the International Criminal Court*, produced by War Crimes Research Office, International Criminal Court Legal Analysis and Education Project, July 2009. See also Minna Schrag, *Lessons Learned from ICTY Experience*, Journal of International Criminal Justice, 2 (2004), pp. 427 – 434.

⁴ The trial commenced on 24 November 2009.

⁵ In this respect, Trial Chamber II held: “The Chamber takes note of the decisions of Trial Chamber I on the issue of witness familiarisation and the “Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial”[...]. A priori, the Chamber has no comments on the matter, [...]” See ICC, *Decision on a number of procedural issues raised by the Registry*, ICC-01/04-01/07-1134, Trial Chamber II, 14 May 2009, para. 18.

⁶ Article 34 of the Rome Statute reads: “The Court shall be composed of the following organs: (a) The Presidency (b) An Appeals Division, a Trial Division and a Pre-Trial Division (c) The Office of the Prosecutor (d) The Registry.

⁷ See Article 54 (1)(b) and (3)(f) of the Rome Statute, Rules 87 and 88 of the Rules of Procedure and Evidence. In relation to the responsibilities of the VWU see in particular Article 43(6) of the Rome Statute, Rules 17 to 19 of the Rules of Procedure and Evidence and Regulations 79 to 91 of the Regulations of the Registry.

the experience of testifying does not result in further harm, suffering or trauma for the witnesses.”

This article describes the principal decisions defining witness familiarisation and prohibiting witness proofing (II.). It further provides an overview of the practices currently applied to prepare witnesses for and familiarise them with giving testimony before the different Chambers (III.). Finally, it describes some of the first experiences with the practical implementation of the preparation and familiarisation process and addresses some of the challenges in implementing the decisions in the different cases and situations (IV.).

II. Principal decisions relating to the preparation of witnesses to give testimony

1) Pre-Trial Chamber I: *Prosecutor v. Thomas Lubanga Dyilo*

The first witness being called to give testimony before the Court was the only witness to be called for the confirmation hearing in the case *The Prosecutor v Thomas Lubanga Dyilo* and subsequently raised the question of which practices would be allowed to prepare witnesses adequately for testimony. The Prosecution had informed the Chamber that it intended to prepare the witness for trial in a manner it referred to as ‘proofing’ the witness.⁸ The single judge of Pre-Trial Chamber I requested the Prosecution to elaborate on the content of what the Prosecution referred to as witness proofing and the specific conditions under which the Prosecution wished to carry out this practice.⁹ The Prosecution consequently described the measures it envisaged to encompass:

- i. "To provide the witness with an opportunity to acquaint him/herself with the Prosecution's Trial Lawyer and other whom may examine the witness in Court;
- ii. To familiarise the witness with the Courtroom, the Participants to the Court proceedings and the Court proceedings;
- iii. To reassure the witness about his/her role in the Court proceedings;
- iv. To discuss matters that are related to the security and safety of the witness, in order to determine the necessity of applications for protective measures before the Court;
- v. To reinforce to the witness that he/she is under a strict legal obligation to tell the truth when testifying;

⁸ ICC, *The Prosecutor v Thomas Lubanga Dyilo*, Decision on witness proofing and witness familiarisation, ICC-01/04-01/06-679, Pre-Trial Chamber I, 8 November 2006, (hereinafter *Lubanga familiarisation pre-trial decision*), para. 1.

⁹ *Ibid.*, para. 2.

- vi. To explain the process of examination-in-chief, cross-examination and reexamination,"¹⁰
- vii. To allow a witness to read his/her statement and refresh his/her memory in respect of the evidence he/she will give;
- viii. Relying on the witness' statement, the Prosecution's Trial Lawyer puts to the witness the questions he/she intends to ask the witness during the witness' testimony, and in the order as anticipated;
- ix. To inquire about possible additional information of both, potentially incriminatory and potentially exculpatory nature."¹¹

The Prosecution also advanced that this practice of witness proofing would be useful as it would assist the witness in the process of human recollection.¹² It further substantiated that by comparing the statements made by a witness during the proofing with the content of an earlier statement of the witness, deficiencies and differences in recollection of the witness could be detected and that, as a consequence, in addressing such deficiencies and differences prior to witness' testimony, "proofing" was likely to allow the witness to present the evidence in a more accurate, complete, structured and efficient manner.¹³ Finally, the Prosecutor argued that proofing allowed "the Prosecution to disclose to the Defence both additional information and/or evidence of incriminatory or exculpatory nature in sufficient time prior to the witness' testimony, thereby reducing the prospect of the Defence being taken by surprise during the witness testimony."¹⁴

Following the submissions by the parties¹⁵, the Pre-Trial Chamber I issued its "Decision on witness proofing and witness familiarisation".¹⁶ In the analysis of the Chamber, the goals and measures encompassed by the Prosecution definition of witness proofing are to be divided into two groups.¹⁷ The first group encompasses a number of measures which can be described as assisting the witness to fully comprehend the Court proceedings, its participants and their respective roles,

¹⁰ *Ibid.*, para. 14.

¹¹ *Ibid.*, para. 17.

¹² *Ibid.*, para. 16.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ The Defence in its "Response to Prosecution Information on Witness Proofing" requested the Chamber to reject the Prosecution's request or, in the alternative, to require the Prosecution to disclose any records of any proofing session under Rule 76 of the Rules of Procedure and evidence, see, *ibid.*, para. 6.

¹⁶ *Lubanga* familiarisation pre-trial decision.

¹⁷ *Ibid.*, paras. 18 *et seq.* and paras. 28 *et seq.*

freely and without fear (“witness familiarisation”).¹⁸ The second group relates to the actual content of the witness’s evidence by allowing the witness to read his or her statement, putting questions to the witness that the Prosecution’s Trial Lawyer intended to ask the witness during the witness’s testimony and to inquire about any additional information of both, potentially incriminatory and potentially exculpatory nature (“witness proofing”).¹⁹ The Chamber further noted that the expression “proofing of a witness” could not be found in the Rome Statute, the Rules of Procedure and Evidence or the Regulations of the Court. The Chamber did, however, looking at Articles 57(3)(c) and 68(1) of the Statute and Rules 87 and 88 of the Rules of Procedure and Evidence in particular, consider that the submissions making up the first group, i.e. witness familiarisation, were mandatory.²⁰ The discrepancy, then, lay in the opinion as to which was the most appropriate body to carry out these functions. The Office of Prosecutor had clearly advanced that it should conduct all the measures, including those the Chamber considered to fall under witness familiarisation. However, the Chamber, looking at the scope of the Victims and Witnesses Unit’s mandate under Article 43(6) and Rule 16 and 17 of the Rules of Procedure and Evidence, attributed the measures relating to ‘witness familiarisation’ to the Victims and Witnesses Unit.²¹ The Pre-Trial Chamber stated that tasking the VWU with witness familiarisation was not only in accordance with the literal interpretation of the said provisions, but also consistent with the principle that witnesses to a crime are the property neither of the Prosecution nor of the Defence and instead should be considered as witnesses of the Court.²² In addition, the Court held that this approach would contribute to the full achievement of the object and purpose of Article 43(6) of the Rome Statute and Rules 16 and 17 of the Rules of Procedure and Evidence, “[...] which is to ensure that the practice of “witness familiarisation” provides a thorough and objective preparation of witnesses for giving oral evidence before the Court.”²³ The Chamber concluded further that “[...] this would avoid from the outset any risk that witnesses may be confronted with one-sided interpretations of the Statute and the Rules and would make moot any allegation that the practice of “witness familiarisation” might be used to influence the testimony of the witnesses in some way.”²⁴

The Chamber took a different stance with regards to the second group of measures relating to witness proofing. It noted that the goals and measures

¹⁸ *Ibid.*, paras. 18 *et seq.*

¹⁹ *Ibid.*, paras. 28 *et seq.*

²⁰ *Ibid.*, paras. 21 to 23.

²¹ *Ibid.*, para. 26.

²² *Ibid.*, paras 24 *et seq.*

²³ *Ibid.*, para. 27.

²⁴ *Ibid.*

encompassed by this second group are not covered by the statutory framework.²⁵ Furthermore, it comparatively discussed the current practices in domestic jurisdictions, and the fact that the functions covered by the second group are currently unethical or even unlawful in numerous national jurisdictions.²⁶ The measures were not embraced by any general principle of law derived from the national laws of the legal systems of the world. In fact, the Chamber held that “[...] if any general principle of law were to be derived from the national laws of the legal systems of the world on this particular matter, it would be the duty of the Prosecution to refrain from undertaking the practice of witness proofing as defined in [the second group]”.²⁷

Consequently, the Pre-Trial Chamber decided against the Prosecution's application to conduct witness proofing, referring to the lack of statutory guidance and established practices in different jurisdictions.²⁸ This did not mean that the Chamber dismissed all of the practices referred to by the Prosecution; in fact, it found that many of these practices were not only desirable but mandatory.²⁹ They were not to be carried out as ‘proofing’ in the way that the Prosecution submitted. Instead, the Pre-Trial Chamber ordered the Victims and Witnesses Unit to proceed with witness familiarisation and to adopt a number of further specified measures.³⁰ The Prosecution was furthermore ordered to refrain from all contact with the witness outside the courtroom from the moment the witness takes the stand and makes the solemn undertaking provided for in Rule 66 of the Rules of Procedure and Evidence.³¹

2) Trial Chamber I: Prosecutor v. Thomas Lubanga Dyilo

After the charges against Thomas Lubanga Dyilo were confirmed and the case was transferred to the trial stage, the Prosecution raised the question of preparation of its witnesses again. The parties and participants were ordered to file their written observations on the subject and made further oral submissions. Trial Chamber I consequently rendered its “Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial”³² whereby it confirmed the distinction already drawn by the Pre-Trial Chamber between what it considered the admissible practice of witness familiarisation and the inadmissible practice of witness proofing.³³ In general, Trial Chamber I

²⁵ *Ibid.*, para. 28.

²⁶ *Ibid.*, para. 41.

²⁷ *Ibid.*, para. 42.

²⁸ *Ibid.*

²⁹ *Ibid.*, para. 23.

³⁰ *Ibid.*, page 21.

³¹ *Ibid.*, page 22.

³² *Lubanga* familiarisation trial decision.

³³ *Ibid.*, para. 28.

followed the legal argumentation and consequent distribution and prohibition of some tasks.³⁴ The Trial Chamber also confirmed that the Victims and Witnesses Unit, within the Court's Registry, was the entity responsible for conducting witness familiarisation³⁵ and agreed with the tasks the Pre-Trial Chamber had already defined as falling under the familiarisation process, further adding to the list the task of assisting witnesses to understand fully the court proceedings.³⁶ The Trial Chamber also drew specific attention to the potential vulnerability of some witnesses.³⁷ While the Trial Chamber explicitly agreed with the conclusion "that witnesses are not attributable to parties, but rather are witnesses of the Court",³⁸ it also recognized that the party calling the witness was more likely "to have greater insight into the background and particular facets of the witness".³⁹ Based on this reasoning, the Trial Chamber allowed the VWU to work in consultation with the party calling the witness in order to undertake the familiarisation of witnesses in the most appropriate way.⁴⁰

Regarding any substantive preparation of the witness's testimony, *i.e.* witness proofing, the Trial Chamber concurred with the Pre-Trial Chamber in that it saw no express provision of this possibility in the legal framework of the Court.⁴¹ While the Chamber recognized that some national jurisdictions permitted contact between counsel and witnesses before trial, as advanced by the Prosecution, it also found that the extent to which this was permitted varied greatly.⁴² The Chamber noted that the Prosecution had not advanced any examples of Romano-Germanic law traditions and concluded that a general principle of law allowing for the substantive preparation of witnesses prior to testimony could not be derived from national legal systems worldwide pursuant to Article 21(1)(c) of the Rome Statute, stating that the Court shall apply such a general principle of law in the absence of guiding provisions in the Court's legal framework and international law principles.⁴³ Contrary to the Pre-Trial Chamber's decision⁴⁴, the Trial Chamber did recognize that witness proofing was commonly utilized at the *ad hoc* tribunals, an argument advanced by the Prosecution in support of its submissions.⁴⁵ Both

³⁴ *Ibid.*, para. 53 where the distribution of familiarisation tasks are laid out.

³⁵ *Ibid.*, para. 33.

³⁶ *Ibid.*, para. 30.

³⁷ *Ibid.*, para. 32.

³⁸ *Ibid.*, para. 34.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, para. 36.

⁴² *Ibid.*, paras. 39 to 41.

⁴³ *Ibid.*, para. 44.

⁴⁴ *Lubanga* pre-trial familiarisation decision, para. 33.

⁴⁵ *Lubanga* pre-trial familiarisation decision, para. 28 *et seq.* and *Lubanga* trial familiarisation decision., para. 43.

Chambers recognised that Article 21(1)(b) of the Statute states that the Court shall apply, where appropriate, international law principles and rules.⁴⁶ The Pre-Trial Chamber, after considering each specific assertion that the Prosecution made to support its claim that witness proofing was widely accepted in international law, decided that the claim was unfounded.⁴⁷ The Trial Chamber, on the contrary, did agree with the Prosecution that witness proofing was accepted practice in some other international forums. However, in application of Article 21, it pointed out the use of the phrase 'where appropriate'.⁴⁸ In this case, it held, it was not appropriate to consider that procedural rules in the *ad hoc* tribunals should automatically constitute a binding precedent on the ICC, particularly by virtue of the fact that, in the Chamber's opinion, the ICC statute has created a "procedural framework which differs markedly from the *ad hoc* tribunals"⁴⁹ allowing, *inter alia*, for greater intervention by the Bench. The Chamber considered that "the pro-active role of judges under the Statute and the Rules will help to ensure that witnesses are not 'revitalized' by their testimony, whilst also preventing any improper influence being applied to the witness."⁵⁰ At the same time, the Chamber recognized that some aspects of a proofing session could potentially help the Court arrive at the truth in an efficient manner although others may well prove detrimental. Thus, the Trial Chamber considered that "allowing a witness to read his past statements will aid the efficient presentation of the evidence and will help the Trial Chamber to establish the truth."⁵¹ However, according to the Trial Chamber the same reasoning did not apply in relation to any discussion on the actual topics to be dealt with in court and that, on the contrary, this could lead to a distortion of the truth and come close to rehearsing in-court testimony. In particular, the Chamber stated that "[a] rehearsed witness may not provide the entirety or the true extent of his memory or knowledge of a subject"⁵² and that substantive preparation of a witness "may diminish what would otherwise be helpful spontaneity during the giving of evidence by a witness. The spontaneous nature of testimony can be of paramount importance to the Court's obligation to find the truth."⁵³

⁴⁶ *Lubanga* trial familiarisation decision paras. 44 *et seq.*

⁴⁷ *Lubanga* pre-trial familiarisation decision., para. 33.

⁴⁸ *Lubanga* trial familiarisation decision, paras. 44.

⁴⁹ *Ibid.*, para. 45.

⁵⁰ *Ibid.*, para. 52.

⁵¹ *Ibid.*, para. 50.

⁵² *Ibid.*, para. 51.

⁵³ *Ibid.*, para. 52.

The Trial Chamber further prohibited any meeting between a party and its witness outside the Court, once the process of familiarisation has commenced.⁵⁴ This restricts the Prosecution more than the Pre-Trial Chamber, which had ordered:

"[...] the Prosecution to refrain from all contact with the witness outside the courtroom from the moment the witness takes the stand and makes the solemn undertaking provided for in Rule 66 of the Rules [of Procedure and Evidence]."⁵⁵ As the process of familiarising witnesses will have already been completed by the time the solemn declaration is made in Court, the prohibition of contact in the jurisprudence of Trial Chamber I encompasses a considerably longer period of time.

The Trial Chamber consequently ordered the VWU to undertake the process of witness familiarisation in consultation with the party introducing the witness and further specified that this process should include:

- a. Assisting the witness to understand fully the Court's proceedings, its participants and their respective roles;
- b. Reassuring witnesses about their role in proceedings before the Court;
- c. Ensuring that witnesses clearly understand that they are under a strict legal obligation to tell the truth when testifying;
- d. Explaining to the witnesses the process of examination;
- e. Discussing matters relating to the security and safety of witnesses in order to determine the necessity of applications for protective measures;
- f. Providing witnesses with an opportunity to acquaint themselves with the people who may examine them in court;
- g. "Walking witnesses through" the courtroom and its procedure prior to the day of their testimony in order to acquaint them with the layout of the court, and particularly where the various participants will be seated and the technology that will be used in order to minimise any confusion or intimidation.⁵⁶

The party calling the witness was ordered to make any previous witness statement available to the VWU who in turn was ordered to make the statements

⁵⁴ *Ibid.*, para. 56. A distinction is made in this regard between expert witnesses and lay witnesses. Limitation of contact does not apply to expert witnesses, so discussion between the parties and their experts may take place at any stage prior to calling the witness, see ICC, Transcript, *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01-04-01-06-T-104-ENG, Trial Chamber I, 16 January 2009, page 29, line 3 to 9 (hereinafter Transcript of 16 January 2009).

⁵⁵ *Lubanga* familiarisation pre-trial decision, page 22.

⁵⁶ *Ibid.*, para. 53.

available to the witness in order to refresh their memory.⁵⁷ The Chamber prohibited any further meeting between a party and its witness outside of Court and in more general terms prohibited the practice of witness proofing.⁵⁸

III. Implementing witness familiarisation

After the VWU had been ordered to prepare and submit a protocol on witness familiarisation in the Lubanga proceedings⁵⁹, additional decisions were rendered which defined witness familiarisation in more detail and interpreted the exact mandate and scope of such practice. Other Chambers, while adopting the general approach of witness familiarisation, further shaped and varied the practices to be applied.

1) Trial Chamber I: *Prosecutor v. Thomas Lubanga Dyilo*

Questions and concerns raised by the parties, participants and the Registry led Trial Chamber I to render its “Decision regarding the Protocol on the practices to be used to prepare witnesses for trial” of 23 May 2008.⁶⁰ The decision dealt with a number of issues regarding the practical implications of facilitating witnesses’ testimony, such as under which conditions witnesses could travel and be accommodated jointly.⁶¹ It also stipulated that once the witness’s evidence in court was completed, the party calling the witness was no longer banned from discussions with the witness, unless the Chamber ordered otherwise.⁶² The Chamber specifically addressed the witness familiarisation process itself, with regard to the process of witnesses reading their previously given statements. Here, the Chamber reiterated that allowing the witness to re-read their statements was to help to “refresh” potentially fallible memories.⁶³ The Chamber stated that “[t]his is not an “evidence-checking” procedure, namely establishing whether or not the witness maintains the original account or whether he or she consider that changes to the written account need to be made. Any discrepancies of that kind should be ventilated in court rather than being discussed and recorded shortly before the witness gives evidence. The Chamber is more likely to identify the truth

⁵⁷ *Ibid.*, para. 55.

⁵⁸ *Ibid.*, para. 57.

⁵⁹ ICC, *The Prosecutor v Thomas Lubanga Dyilo*, Decision on various issues related to witnesses’ testimony during trial, ICC-01/04-01/06-1140, Trial Chamber I, 29 January 2008, para. 44 (i).

⁶⁰ ICC, *The Prosecutor v Thomas Lubanga Dyilo*, Decision regarding the Protocol on the practices to be used to prepare witnesses for trial, ICC-01/04-01/06-1351, Trial Chamber I, 23 May 2008, (*‘Lubanga protocol trial decision’*).

⁶¹ *Ibid.*, paras. 31 *et seq.* Other issues dealt with were, for example, providing witnesses with copies of statements (paras. 34 *et seq.*), providing a copy of each statement in the first language of the witness (paras. 36 *et seq.*).

⁶² *Ibid.*, para. 42.

⁶³ *Ibid.*, para. 38 *et seq.*

if the witness explains any reservations about the written account during their testimony, rather than by having his or her concerns interpreted and recorded by a representative of the VWU.”⁶⁴ The Chamber also specified that the VWU was neither under an obligation to provide a report on the statement-reading process nor would any notes made by the witness during this process be provided to the parties or the Court.⁶⁵ While in this decision the Chamber ruled that representatives of the parties and participants may be present during the familiarisation process, including when the witness reads the previously given statement, it also clarified that the parties and participants were not allowed to speak with the witness about the evidence and could only watch the procedure.⁶⁶

Subsequent to this decision, the VWU submitted its observations on the protocol on 31 December 2008.⁶⁷ In particular, the presence of representatives of the Prosecution, Defence and Legal Representatives of Victims, *i.e.* a setting whereby a potentially high number of representatives could be present, throughout the re-reading process raised concerns.⁶⁸ The VWU submitted that “while the reading of the statement may in itself be an overwhelming emotional experience, the VWU has concerns that this setting could significantly increase the witness’s level of pressure”.⁶⁹ The VWU was further concerned that this might also negatively impact on witnesses asking for support services during the statement reading process.⁷⁰ Consequently, the VWU recommended restricting the number of persons present during the re-reading process to a maximum of three, namely one representative of the prosecution, one of the defence and one of the legal representatives.⁷¹ In these observations the VWU also gave further explanation about the available support services during the statement-reading process, again highlighting the fact that such a process could potentially be distressing for witnesses and increase their emotional stress.⁷²

Just before the Lubanga trial was due to commence, in an oral decision of 16 January 2009, the Trial Chamber further clarified procedures relating to the familiarisation and preparation of witnesses.⁷³ Taking into account the fact that

⁶⁴ *Ibid.*, para. 38.

⁶⁵ *Ibid.*, para. 40.

⁶⁶ *Ibid.*, para. 39.

⁶⁷ ICC, *The Prosecutor v Thomas Lubanga Dyilo*, Victims and Witnesses Unit report on practices used to prepare and familiarise witnesses for giving testimony at trial, ICC-01/04-01/06-1578, 31 December 2008.

⁶⁸ *Ibid.*, para. 10.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*, para. 11.

⁷² *Ibid.*, paras. 12-14.

⁷³ Transcript of 16 January 2009.

vulnerable witnesses “may feel intimidated if they are being watched and scrutinised whilst looking at the record of their evidence by a number of persons”⁷⁴, it reversed its previous order. The Chamber held that prosecution, defence and legal representatives should be excluded from attending the statement reading unless the Chamber is persuaded that exceptional circumstances request a decision to the contrary.⁷⁵ In making this decision, the Chamber considered that “[t]he VWU will be able to provide proper support for witnesses in an appropriate environment, and the presence of any of the representatives may well be a distraction or an impediment.”⁷⁶ With regards to the presence of VWU support staff during the re-reading process, the Chamber ordered that support assistants should be present at the very least during a significant portion of this process and, if not in the room, the VWU support staff should be present nearby and readily available to assist the witness. However, when dealing with potentially vulnerable witnesses, such as minors, former child soldiers or others who may become upset during the process, the Chamber held that there should be a support assistant present throughout.⁷⁷ In this oral decision the Chamber also clarified that any signed witness statement or an electronic recording of an interview would be considered to fall under the definition of statement to be provided to and read by the witnesses during the familiarisation process.⁷⁸ “Critically, the witness should refresh his or her memory from documents that they have expressly agreed as reflecting their recollection of the relevant events.”⁷⁹ While this definition includes “any document referred to in the statement or electronic recording which are to be shown to the witness by the party calling him or her”⁸⁰, the Chamber excluded screening, investigator’s or similar notes.⁸¹

2) Pre-Trial Chamber I: The Prosecutor v. Bahar Idriss Abu Garda

The issue of familiarisation was next addressed when the Prosecution decided to call witnesses for the purposes of the confirmation hearing in the proceedings against Abu Garda.⁸² The Chamber reiterated that witness proofing continued to

⁷⁴ *Ibid.*, page 27, line 5 to 7. In reaching this conclusion, the Chamber also took note of the defence’s submission that it might not be possible for a defence representative to attend these sessions of statement reading.

⁷⁵ *Ibid.*, page 27, line 3 to 8.

⁷⁶ *Ibid.*, page 27, line 12 to 14.

⁷⁷ *Ibid.*, page 28, line 9 to 16.

⁷⁸ *Ibid.*, page 24, line 14 to 18.

⁷⁹ *Ibid.*, page 24, line 25 to page 25, line 2.

⁸⁰ *Ibid.*, page 25, line 10 to 12.

⁸¹ *Ibid.*, page 24, line 19 to 21.

⁸² See in particular ICC, Transcript, *The Prosecutor v Abu Garda*, ICC-02/05-02/09-T-11-ENG, Pre-Trial Chamber I, 23 September 2009.

be prohibited and confirmed that all necessary steps to allow for witness familiarisation were to be undertaken.⁸³ During the process of the hearing the Chamber made further steps in deciding specificities of the familiarisation process. Notably, the Chamber authorised courtesy meetings only by the party calling the witness, not by the other parties or participants who may examine the witness in Court.⁸⁴ Upon request by the representative of the Registrar, the Presiding Judge clarified that statements were defined as documents generated by the witness themselves.⁸⁵ The Chamber further held that “[t]he Chamber allows the Prosecution to deliver to the witnesses copies of their statements and the documents related to their statements that were attached to their statements without any specific instruction to the main points of the statements [...] about which the witness will be interrogated.”⁸⁶ In response to submissions by the parties regarding materials that did not fall within the restrictive scope provided for by the Chamber’s definition, the Presiding Judge commented “[b]ut in relation to other related materials, they will appear on the screen. And if need be, the witness will have time to read, to observe, to confirm its knowledge about the documents. There is no need for the witness to receive these documents in advance. I think this more restrictive approach is the one that the Chamber is taking.”⁸⁷

3) Trial Chamber II: The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui

The issue of adequate preparation of witnesses became once again of relevance in the preparation of the trial proceedings against Germain Katanga and Mathieu Ngudjolo Chui. The Chamber had asked all parties and participants, as well as the Registry, to “set out the issues and observations which they deem relevant on which they would like the Chamber to rule.”⁸⁸ None of the parties and participants used this opportunity to either challenge the practice of witness familiarisation or

⁸³ *Ibid.*, page 15, line 21 to page 16, line 1: “I am sure that both parties are aware of the precedents of this Chamber in relation to proofing of witnesses. That is not allowed at all. But on the other hand we have this familiarisation of the witnesses, so have the Prosecution made any arrangements for bringing the witnesses on time for them to have the opportunity to familiarise?”

⁸⁴ *Ibid.*, page 22, line 3 to 4. The authorized practice by Trial Chamber I had been to facilitate courtesy meetings between all parties or participants who may examine the witness in Court.

⁸⁵ *Ibid.*, page 18, line 17 to 21 and page 20, line 8 to 9.

⁸⁶ *Ibid.*, page 18, line 17 to 21.

⁸⁷ *Ibid.*, page 21, line 15 to 19.

⁸⁸ ICC, *The Prosecutor v Germain Kathanga and Mathieu Ngudjolo Chui*, Decision on a number of procedural issues raised by the Registry, ICC-01/04-01/07-1134, Trial Chamber II, 14 May 2009, para. 1.

request any changes or amendments to it. The Chamber consequently took note of the previous decisions by Trial Chamber I in the Lubanga case and the Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial.⁸⁹ Just before the commencement of the trial on 24 November 2009, Trial Chamber II issued “Directions for the conduct of the proceedings and testimony in accordance with rule 140”.⁹⁰ These directions detail the orders and modalities of questioning witnesses. Interestingly, the directions consistently refer to the terms examination-in-chief and cross-examination, a concept which had previously been considered as not known within the legal framework of the Court.⁹¹

IV. First experiences and future challenges

When the first witness testified in the Lubanga trial, the familiarisation process was inevitably put in the spotlight. It had been ruled that the first witness would testify under a pseudonym and with face and voice distortion; however, it was possible for this witness to see the accused. On 28 January 2009, the witness, who at this stage was referred to throughout as ‘Mr Witness’, was giving his evidence, and had been asked a specific question by the Prosecution when he responded: “As I gave an oath in court that I would say the truth, the whole truth and nothing but the truth, I find myself in a delicate position to answer what you

⁸⁹ *Ibid.*, para. 18.

⁹⁰ ICC, *The Prosecutor v Germain Kathanga and Mathieu Ngudjolo Chui*, Directions for the conduct of the proceedings and testimony in accordance with rule 140, ICC-01/04-01/07-1665, Trial Chamber II, 20 November 2009.

⁹¹ *Lubanga* familiarisation pre-trial decision, footnote 30: “For instance, the Chamber finds that rule 140 of the Rules does not use the expressions “examination-in-chief”, “cross-examination” and “re-examination”, which have a very technical and specific meaning in a number of jurisdictions, and instead uses expressions such as “question the witness” or “examine the witness”. [...]”. Contrary hereto, Rule 85(B) of the ICTY Rules of Procedure and Evidence reads: “Examination-in-chief, cross-examination and re-examination shall be allowed in each case. [...]”. It is therefore not entirely clear whether the terms referred to by Trial Chamber II in the above quoted directions refer to the technical and specific terms of examination-in-chief and cross-examination or merely make reference to the examination of the witness by the party introducing the witness and by the examination of the other parties and participants. See also ICC, Decision on the Manner of Questioning Witnesses by the Legal Representatives, ICC-01/04-01/06-2127, 16 September 2009”, para. 22: “The terms “examination-in-chief”, “cross-examination” and “re-examination”, which are used in common law and Romano Germanic legal systems, do not appear in the Statute. However, [...] these expressions have been used as terms of convenience by the parties and the participants when addressing the issue of how witnesses are to be questioned during their evidence before the Trial Chamber.”

have just said.”⁹² As the Presiding Judge consequently concluded that this statement could potentially relate to self-incrimination, the witness was provided with an opportunity to obtain legal advice pursuant to Rule 74(10) of the Rules of Procedure and Evidence.⁹³ However, upon resuming the testimony, the witness continued to maintain that the previously told story had not been true.⁹⁴ Subsequently, the evidence was put on hold in order to discuss the issue. The witness was then called again on 10 February 2009.⁹⁵ The Presiding Judge explained that the witness was now not going to be referred to any longer as Mr Witness, but instead would be referred to as “Dieumerci”, a pseudonym not revealing the true identity of the witness.⁹⁶ In addition to the procedural protective measures already granted, the Judges now separated the witness from the accused with a curtain. This meant that the accused, who was in the courtroom, was able to see the witness on a screen in front of him, but the installed curtain prevented the witness from looking at the accused during the evidence.⁹⁷ Presiding Judge Fulford introduced the witness’s testimony with the following words: “Would you like at the beginning of today to have the opportunity simply to tell the story in your own words? Would you prefer to do it that way to begin with?”⁹⁸ The witness then gave a full account of his story, repeating his initial testimony, without any interruptions and only after his extensive and uninterrupted statement did the parties question him. With reference to his previous appearance in court he stated that a “lot of things went through [his] mind [...] [he] was angry and [...] wasn’t able to testify.”⁹⁹

With the first practical experiences the decisions on non-proofing and familiarisation were put to the test. It has been suggested that the inability of the Prosecution to prepare the witness before giving testimony, *i.e.* the prohibition of witness proofing, had impacted negatively on Dieumerci’s testimony.¹⁰⁰ Indeed, it seems possible that the witness might have already raised the “withdrawal of his original statement”, if he had been proofed and had discussed the content of his

⁹² ICC, Transcript, *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-110-ENG, Trial Chamber I, 28 January 2009, page 35, line 21 to 23.

⁹³ *Ibid.*, page 36, line 15 to 21.

⁹⁴ *Ibid.*, page 41, line 17 to 22.

⁹⁵ ICC, Transcript, *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-123-ENG, Trial Chamber I, 10 February 2009. The witness was not asked to repeat the solemn declaration.

⁹⁶ *Ibid.*, page 3, line 6 to 11.

⁹⁷ *Ibid.*, page 3, line 12 to 15.

⁹⁸ *Ibid.*, page 3, line 16 to 20.

⁹⁹ *Ibid.*, page 30, line 24 to 25.

¹⁰⁰ *Witness Proofing at the International Criminal Court*, produced by War Crimes Research Office, International Criminal Court Legal Analysis and Education Project, July 2009, page 19.

statement with the prosecution lawyers beforehand. Notably, the possibility of a witness changing his or her statement during the proofing session is specifically referred to in the section of witness proofing in the ICTY's Manual on Developed Practices.¹⁰¹ This is to some extent also acknowledged by Trial Chamber I when finding "[...] whilst some aspects of a proofing session could potentially help the Court arrive at the truth in an efficient manner, many others may well prove detrimental."¹⁰² In the case at hand, witness proofing may have very well led to less interruptions of the trial. However, the first part of the Dieumerci's testimony would have been "removed" from the courtroom and consequently outside the direct control of the Bench and potentially the knowledge of the other parties, participants and the public. It is questionable whether this would have been in the interest of the trial proceedings, as Trial Chamber I stated "[t]he spontaneous nature of testimony can be of paramount importance to the Court's ability to find the truth, and the Trial Chamber is not willing to lose such an important element in the proceedings."¹⁰³

The practical experiences of the Court in preparing and familiarising witnesses for their testimony is still relatively limited, in particular as at the point of writing no witnesses have been introduced by the defence teams. At the same time, those experiences including the incident concerning 'Dieumerci' already highlighted the fact that witnesses and their requirements are unique and will require individual assessments and tailor-made measures. No matter how extensive the preparation for trial can be, unpredictable elements can still occur and all entities involved will have to show sufficient flexibility to deal with unforeseen developments. Careful evaluation and preparation of the witnesses will also have to take into consideration the individual circumstances of the witnesses. Rule 88 of the Rules of Procedure and Evidence provides for this flexibility in that it allows a Chamber to "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, pursuant to article 68, paragraphs 1 and 2." The familiarisation process can provide the necessary framework to address those needs and to explore all appropriate measures which could facilitate witness's testimony in the best possibly way. For this purpose, the protocol on the familiarisation and preparation of witnesses needs to be extensive and comprehensive, incorporating clear definitions of the different roles and

¹⁰¹ ICTY Manual on Developed Practices, ICTY-UNICRI, Turin 2009, page 83, para. 22: "When a witness modifies a statement during witness proofing, and then is withdrawn as a witness by the party who intended originally to call him, issues may arise concerning the obligation to disclose the modification under the Prosecution's obligation to disclose exculpatory information under Rule 68."

¹⁰² *Lubanga* familiarisation trial decision, para. 47.

¹⁰³ *Lubanga* familiarisation trial decision, para. 52.

responsibilities of all entities involved. It will be important, though, to maintain the right balance between the protocol being a firm and unambiguous document, yet flexible enough to account for unforeseeable factors and developments.

Such a protocol, with the primary responsibility of implementing witness familiarisation placed on a neutral part of the Court, *i.e.* the Registry's VWU, further ensures equal treatment of all witnesses, irrespective of which party or participant¹⁰⁴ is introducing them. In particular in relation to vulnerable witnesses requiring special and individualised attention, this is an important aspect contributing to the principle of equality of arms. It is unlikely that defence teams, or indeed the legal representatives of victims, will be able to hire specialised staff to deal with the specific needs of vulnerable witnesses. The VWU, however, includes staff with such expertise, as listed in Rule 17(2) of the Rules of Procedure and Evidence, to cater to such witnesses appropriately. Furthermore, it is obliged to act impartially when cooperating with all parties, as provided for by Rule 18(b) of the Rules of Procedure and Evidence.

Although the contact between the parties and participants and the witness is restricted during the period of witness familiarisation, this does not exclude the party introducing the witness from contributing to the familiarisation process. Quite to the contrary, as also recognized by the Trial Chamber, the parties calling the witness play an important role in facilitating the familiarisation process in the best possible manner: "[T]he party which is intending to call a particular witness will be likely to have greater insight into the background and particular facets of the witness, which may assist the Victims and Witnesses Unit in discharging their

¹⁰⁴ Witnesses could also be introduced by the legal representatives of participating victims, see ICC, Decision on victims' participation, ICC-01/04-01/06-1119, Trial Chamber 1, 18 January 2008, para. 108: "The Trial Chamber considers that the right to introduce evidence during trials before the Court is not limited to the parties, not least because the Court has a general right (that is not dependent on the cooperation or the consent of the parties) to request the presentation of all evidence necessary for the determination of the truth, pursuant to Article 69 (3) of the Statute. Rule 91(3) of the Rules enables participating victims to question witnesses with the leave of the Chamber (including experts and the defendant). The Rule does not limit this opportunity to the witnesses called by the parties. It follows that victims participating in the proceedings may be permitted to tender and examine evidence if in the view of the Chamber it will assist it in the determination of the truth, and if in this sense the Court has 'requested' the evidence. Furthermore, for the reasons set out above, the Chamber will not restrict questioning by the victims to reparations issues, but instead will allow appropriate questions to be put by victims whenever their personal interests are engaged by the evidence under consideration." See also ICC, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation, ICC-01/04-01/06—1432, Appeals Chamber, 11 July 2008, para. 104.

role during the witness familiarisation process.”¹⁰⁵ Indeed, to a large extent, the parties play an important role in providing the VWU with all relevant information to ensure that the services are adjusted to the witness’s individual needs to the extent possible. In addition, the parties also play an integral role of creating an atmosphere within the court room conducive to the witnesses’ wellbeing and ultimately their testimony. The Human Rights Watch Report summarised this aspect as “[t]he success of the VWU’s plans will depend in part on cooperation among all the parties, participants, and the bench, including in the manner in which witnesses are examined on the stand.”¹⁰⁶ While all entities involved need to cooperate accordingly, the Judges will ultimately have to ensure that witness’s testimony is facilitated in the best possible manner. “The pro-active role of judges under the Statute and Rules will help to ensure that witnesses are not ‘revitalized’ by their testimony, whilst also preventing any improper influence being applied to the witness.”¹⁰⁷

Further challenges to the practical implementation of the familiarisation process can be created by varying practices for witnesses testifying before the different Chambers. A court-wide coherent approach, however, could be envisaged at least regarding specific aspects of the familiarisation process, such as the definition of the statements or the point in time from which onwards any meeting between the party and the witness is prohibited. In this context, it is notable that neither of the parties or participants have sought leave to appeal any of the decisions in relation to witness familiarisation and the prohibition of witness proofing so far.¹⁰⁸ It remains to be seen whether the matter will at some point be resolved on the appellate level.

Ultimately, the Court could not function without witnesses who take what often may be a difficult decision to cooperate with the Court.¹⁰⁹ Witnesses’ testimonies

¹⁰⁵ *Lubanga* familiarisation trial decision, para. 34; see also para. 53 which reads: “The Trial Chamber orders the Victims and Witnesses Unit to undertake the process of witness familiarisation in consultation with the party introducing the witness before the Court previous to their testimony being given. [...]” (emphasis added).

¹⁰⁶ Human Rights Watch: *Courting History, The Landmark International Criminal Court’s First Years*, July 2008, page 158.

¹⁰⁷ *Lubanga* familiarisation trial decision, para. 52.

¹⁰⁸ See also comment in the IBA Report, pages 26-27: “The decision of the Chambers in the *Lubanga* case cannot yet be considered a final determinant of the practice of witness proofing. The parties in the *Katanga and Ngudjolo* case may yet raise the issue before TC II, which could diverge from the *Lubanga* practice and instead choose the approach of the ad hoc tribunals.”

¹⁰⁹ As appreciated by the Trial Chamber I: “We are deeply appreciative of the fact that you have travelled a very long way in order to assist this court. We well understand that this will have been a difficult process for you. You have been brought many miles overseas, and you have had to spend a number of days in this courtroom being asked some, on

are an integral part of the trial proceedings and are of paramount importance for the successful discharge of the Court's mandate. Meaningful preparation of witnesses is consequently in the interests not only of the witnesses themselves, but of the parties to the proceedings, the accused and ultimately contributes to the overall goal of a fair and expeditious trial. The familiarisation process aims to ensure that witnesses are willing to testify without fear, discomfort or insecurity¹¹⁰ and to create an atmosphere where witnesses are empowered to contribute to the trial without retraumatisation or revictimisation. Giving witnesses the chance to speak without worrying about what the parties or participants might want to hear or what the "right answer" may be, seems to be not only an integral part of such a preparation process, but "[t]he spontaneous nature of testimony can [also] be of paramount importance to the Court's ability to find the truth."¹¹¹ It will not be possible to predict all possible scenarios and to prevent situations which potentially cause disturbances or interruptions to trial proceedings.

The familiarisation process recognises witnesses as subjects of the proceedings and implements that witnesses do not fall "into the possession" of either party, but serve the Court as a whole. Ultimately, the familiarisation process puts the witnesses and "their stories" into the centre of the trial by enabling the witnesses to "tell their stories in their own words."

SUMMARY

The Judges of the International Criminal Court decided to prohibit the practice of witness proofing and instead ordered the Court's Victims and Witnesses Unit to conduct "witness familiarisation" to prepare witnesses for their testimony at trial. This article examines the principle decisions rendered by the Court on the issue and describes the practices of familiarising and preparing witnesses for their testimony before the different Chambers. While it addresses some of the challenges in implementing the familiarisation procedure, it does not enter into the dogmatic debate on whether witness proofing could have been permitted under the legal framework of the Court.

SOMMAIRE

Les juges de la Cour pénale internationale ont décidé d'interdire la pratique de la validation des témoignages et, à la place, ont ordonné à la section des victimes et à l'unité des témoins de procéder à une "familiarisation du témoignage" afin de préparer les témoins pour leur témoignage durant le procès. Cet article examine les décisions de principe rendues par la Cour sur la question et décrit les pratiques de « familiarisation » et de

occasions, very difficult questions. This court could not function without the cooperation of people such as yourself.", see ICC, Transcript, *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-142-ENG, Trial Chamber I, 4 March 2009, page 20, line 4 to 12.

¹¹⁰ *Ibid.*, page 25.

¹¹¹ *Lubanga* familiarisation trial decision, para. 52.

préparation des témoins à leurs témoignages devant les différentes chambres. Bien qu'il réponde à certaines des difficultés dans l'application de la procédure de familiarisation, il n'entre pas dans le débat dogmatique sur le fait de savoir si la validation des témoignages aurait pu être autorisée en vertu du cadre juridique de la Cour.

RESUMEN

Los jueces de la Corte Penal Internacional decidieron prohibir la práctica de la verificación de testigos y en su lugar ordenaron a la Unidad de Víctimas y Testigos de la Corte que llevara a cabo una "familiarización de los testigos", en orden a su preparación para su testimonio en el juicio. El presente trabajo examina las decisiones principales dictadas por el Tribunal sobre la cuestión y describe las prácticas de familiarización y preparación de los testigos para su testimonio ante las diferentes Cámaras. Apunta algunos de los retos en la aplicación del procedimiento de familiarización, pero no entra en el debate dogmático acerca de si la verificación de testigos podría estar permitida por el marco jurídico de la Corte.