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International Criminal Court

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No.: **ICC-01/09-01/11**
Date: **2 January 2013**

TRIAL CHAMBER V

Before: **Judge Kuniko Ozaki, Presiding**
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG

Public

with public Annex

Decision on witness preparation

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Ms Fatou Bensouda

Counsel for William Samoei Ruto
Mr Kioko Kilukumi Musau
Mr David Hooper

Counsel for Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Mr Joel Kimutai Bosek

Legal Representatives of Victims
Mr Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit
Ms Maria Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber V ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* ("*Ruto and Sang* case"), having considered Articles 21, 43(6), 54, 64(2) and (3)(a), 68(1) and (4) and 70(1) of the Rome Statute ("Statute"), Rules 16, 17, 18, 88 and 134 of the Rules of Procedure and Evidence ("Rules"), and Regulation 83 of the Regulations of the Registry, renders the following Decision on witness preparation.

I. Procedural Background

1. On 14 May 2012, the Chamber issued its "Order scheduling a status conference,"[1] whereby it requested the Office of the Prosecutor ("prosecution") and the defence teams (together "parties") to make written submissions by 28 May 2012 on a number of issues and directed that, if there were additional issues to be resolved before the commencement of the trial, these should be promptly brought to the attention of the Chamber.[2]

2. In its submissions on the agenda for the status conference, filed on 28 May 2012,[3] the prosecution stated that it intended to seek a ruling from the Chamber regarding the permissible scope of witness preparation and indicated that a motion would be filed to this effect.[4]

3. On 13 August 2012, the prosecution filed its submissions on the permissible scope of witness preparation.[5] The defence teams for both accused filed a joint response

[1] Order scheduling a status conference, 14 May 2012, ICC-01/09-01/11-413.
[2] ICC-01/09-01/11-413, para. 4.
[3] Prosecution's Submissions on the Agenda for Status Conference, 28 May 2012, ICC-01/09-01/11-417.
[4] ICC-01/09-01/11-417, para. 40.
[5] Prosecution Motion Regarding the Scope of Witness Preparation, 13 August 2012, ICC-01/09-01/11-446 and Prosecution's Compendium of authorities in support of Prosecution Motion Regarding the Scope of Witness Preparation, 13 August 2012, ICC-01/09-01/11-447.

on 4 September 2012.[6] The Registry provided its observations pursuant to Regulation 24 *bis* on 12 September 2012.[7]

II. Definitional issues

4. The terms "witness preparation", "witness proofing" and "witness familiarisation" are all used, sometimes interchangeably, throughout the submissions of the parties and the Victims and Witnesses Unit ("VWU"). In this Decision, the Chamber will use the term "witness preparation" to refer to a meeting between a witness and the party calling that witness, taking place shortly before the witness's testimony, for the purpose of discussing matters relating to the witness's testimony. The term "witness familiarisation" will be used to describe the support provided by the VWU to witnesses as set out in the Registry's "Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony" ("Familiarisation Protocol").[8]

III. Submissions

Prosecution Submissions

5. The prosecution seeks a modification of the Familiarisation Protocol that has been applied by Trial Chambers I, II and III in order to enable the party calling a witness to meet with the witness in The Hague before he or she is to give evidence.[9] The purpose of the proposed meeting would be to:

i. Re-iterate the witness's obligation to tell the truth;

[6] Joint Defence Response to Prosecution Motion Regarding the Scope of Witness Preparation, ICC-01/09-01/11-452.
[7] Registrar's Observations pursuant to regulation 24*bis* of the Regulations of the Court on the "Prosecution Motion Regarding the Scope of Witness Preparation" (ICC-01/09-01/11-446), ICC-01/09-01/11-455.
[8] ICC-01/09-01/11-259-Anx.
[9] ICC-01/09-01/11-446, para. 5.

ii. Review the topics to be covered in examination and the likely topics of cross-examination;

iii. Review, with the witness, his/her prior statements;

iv. Confirm whether the statements are accurate, clarify additional points and document additions or retractions the witness may deem appropriate;

v. Show potential exhibits to the witness for his/her comments; and

vi. Answer questions the witness may have, including about what to expect in court.[10]

6. Under the prosecution's proposal (referred to herein as "Proposed Protocol"), common rules would be adopted to govern the witness preparation process and these rules would apply to all parties and participants.[11]

7. In support of its position, the prosecution relies on Articles 64(2), 64(3)(a), 64(6)(f) and 64(8)(b) of the Statute, Rule 140 of the Rules and Regulation 43 of the Regulations of the Court ("Regulations"), which give the Chamber broad discretion to adopt procedures to "facilitate the fair and expeditious conduct of the proceedings" and Article 68(1), which requires the Chamber to take appropriate measures to protect the well-being of witnesses. When these provisions are read together, the prosecution argues, they provide ample legal basis for the Chamber to take a different approach to witness preparation than that followed by other Trial Chambers of this Court.[12]

8. The prosecution also cites the approach of the *ad hoc* tribunals, where witness preparation is permitted, and submits that although this jurisprudence is in no way

[10] ICC-01/09-01/11-446, para. 5.
[11] ICC-01/09-01/11-446, paras 6, 31; ICC-01/09-01/11-446-AnxA.
[12] ICC-01/09-01/11-446, para. 10.

binding on the Court, "it is instructive to consider the experience and practice of other courts that try similar cases".[13]

9. The prosecution submits that witness preparation in this case should account for the specific facts of the Kenya cases.[14] It suggests that due to the high level of witness interference in these cases, it is important for counsel to be able to meet with witnesses before their testimony to allay any fears they may have and also to inquire as to whether they have been interfered with since their last contact with the calling party.[15]

10. Additionally, the prosecution asserts that in previous cases it had more opportunity to meet with witnesses outside The Hague whereas, in the present case, it is likely that the witness will meet the lawyer who will question him or her in court for the first time upon the witness's arrival in The Hague to testify.[16] It submits that the VWU familiarisation process is insufficient to adequately prepare witnesses as VWU staff cannot answer questions such as "what to expect questions on and whether certain issues are relevant to the case".[17] The prosecution argues that under the current system, witnesses may refuse to reveal, during their testimony, information which may, in their view, expose them to increased risk.[18] The prosecution contends that witness preparation assists in the process of recollection and enables witnesses to tell their story accurately on the stand.[19]

11. Aside from the suggested benefits to witnesses, the prosecution also submits that the Proposed Protocol will increase the efficient conduct of the trial by "enabling parties to streamline their witness examinations and tailor them to the salient

[13] ICC-01/09-01/11-446, para. 11.
[14] ICC-01/09-01/11-446, para. 16.
[15] ICC-01/09-01/11-446, para. 17.
[16] ICC-01/09-01/11-446, paras 18-19.
[17] ICC-01/09-01/11-446, para. 19.
[18] ICC-01/09-01/11-446, paras 20–21.
[19] ICC-01/09-01/11-446, para. 28.

issues" while simultaneously reducing the potential for unexpected issues to arise for the first time during testimony.[20] It submits that allowing counsel to prepare the witness and to show him or her potential exhibits saves court time, including by enabling counsel to determine which exhibits the witness can speak to and which he or she cannot.[21] The prosecution refers to the dissenting opinion of Judge Ozaki in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* ("*Bemba* case") in this regard.[22]

12. The prosecution submits that although witness preparation may result in the disclosure of additional information shortly before a witness testifies, this is preferable to requiring the opposing party to react to new evidence during the testimony of a witness.[23] It further notes that the Chamber will be able to regulate the in-court use of any new information to ensure the fairness of the proceedings.[24]

13. As a related matter, the prosecution submits that requiring counsel to explore new information with a witness for the first time on the stand is inefficient and can prevent the Chamber from hearing relevant and probative testimony.[25]

14. Finally, the prosecution suggests that certain safeguards could be employed to mitigate the perceived risks of the modification it seeks. These include guidelines providing a definition of acceptable and prohibited conduct (as set out in Annex A to the prosecution's filing) and the use of cross-examination by the opposing party to explore the impact of witness preparation of the witness' testimony.[26]

Defence Submissions

[20] ICC-01/09-01/11-446, paras 22–26.
[21] ICC-01/09-01/11-446, para. 25.
[22] ICC-01/09-01/11-446, para. 25 (citing Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 24 November 2010, ICC-01/05-01/08-1039 ("*Bemba* Dissenting Opinion")).
[23] ICC-01/09-01/11-446, para. 26
[24] ICC-01/09-01/11-446, para. 26 (citing *Bemba* Dissenting Opinion).
[25] ICC-01/09-01/11-446, para. 27.
[26] ICC-01/09-01/11-446, paras 31–32.

15. The defence requests that the Chamber deny the prosecution's motion to alter the Familiarisation Protocol in order to permit substantive witness preparation at the place of testimony and submits that there is no legal basis for this practice in the ICC Statute or Rules of Procedure, nor is it "supported by general principles of law".[27] Moreover, the defence argues that there is no compelling justification to depart from the practice of other Chambers of this Court.[28]

16. The defence also submits that the prosecution's proposed modifications are contrary to the rights of the accused persons to have adequate time to prepare their case and "are not the most effective way of ascertaining the truth".[29]

17. The defence suggests that most or all of the components of substantive witness preparation proposed by the prosecution – including reviewing with the witness the topics to be covered in direct and cross-examination, showing the witness exhibits, and answering questions the witness may have about what to expect in court – could and should be done prior to the witness's arrival at the place of testimony.[30]

18. Although the defence submits that "proofing forms an integral part of a genuine investigative attempt to understand the full ambit of a witness's knowledge and which aspects of the case he is able to speak to", it suggests that this exercise must be carried out far enough in advance of testimony so that "any inadvertent coaching will have worn off or been forgotten by the time of testimony".[31] The defence submits that the prosecution has had adequate time to carry out all of the activities listed in the Proposed Protocol prior to the witness's arrival at the place of

[27] ICC-01/09-01/11-452, paras 3–9.
[28] ICC-01/09-01/11-452, para. 8.
[29] ICC-01/09-01/11-452, paras 9 and 15 – 20.
[30] ICC-01/09-01/11-452, paras 7, 10 and 20 – 22.
[31] ICC-01/09-01/11-452, para. 21.

testimony.[32] The defence also submits that the prosecution should not be permitted to use witness preparation as a vehicle to re-interview witnesses.[33]

19. The defence submits that given many of the prosecution's witnesses have already been relocated outside of Kenya, there is no justification for permitting "delayed investigations" with regard to these witnesses. With regard to those prosecution witnesses still in Kenya, the defence contends that meetings could be arranged in a manner which does not jeopardize witness security.[34]

20. The defence also argues that witnesses will be more suggestible immediately prior to their testimony at trial and that the risk of contamination of testimony (either by being made aware of which aspects of their testimony are more likely to help or hurt the case or being informed of new details from the testimony of the preceding witnesses) is greatest at this time.[35]

21. The defence submits that witness preparation immediately prior to trial should only be allowed in exceptional circumstances and upon application to the Chamber, and further should be accompanied by safeguards including the presence of a member of the Registry or the defence or audio/video recording of the session.[36]

22. The defence requests that the timing of witness preparation in respect of its own witnesses should not be regulated the same way as it is for prosecution witnesses, due to disparities between the institutional resources available to the prosecution and the defence, and submits that the Chamber should revisit this issue after the close of the prosecution's case.[37]

Registry Submissions

[32] ICC-01/09-01/11-452, paras 24–25.
[33] ICC-01/09-01/11-452, para. 31.
[34] ICC-01/09-01/11-452, para. 23.
[35] ICC-01/09-01/11-452, paras 26–29.
[36] ICC-01/09-01/11-452, para. 32.
[37] ICC-01/09-01/11-452, paras 33–34.

23. The Registry provides information concerning the way in which the witness familiarisation process is currently carried out by the VWU. This includes informing witnesses of the way in which questioning by the opposing party will take place (without going into the content of their evidence),[38] giving witnesses the chance to participate in "neutral role plays" in order to prepare for court, and allowing witnesses to read their previous statements in order to refresh their memories.[39] The VWU submits that witnesses have generally given positive feedback as regards the current witness familiarisation process and felt that they were well-prepared and knew what to expect in the courtroom.[40]

24. The Registry suggests that if the Chamber grants the prosecution's motion, any concerns related to witness protection or care that arise during the witness preparation phase should be immediately reported to the VWU.[41] It submits that "any assessment or intervention relating to the witness' well-being should entirely remain the responsibility of the VWU and a strict separation between proofing and addressing well-being is of utmost importance in order to avoid any confusion for the witness and to allow the VWU to perform its duties independently".[42] It submits that, if the prosecution's motion is granted, it would be preferable to conduct witness preparation in parallel with witness familiarisation carried out by the VWU.[43]

25. Finally, the Registry submits that if witness preparation is carried out in The Hague, sufficient time should be allowed between the preparation session and the start of the witness's testimony.[44]

[38] ICC-01/09-01/11-455, paras 19–20.
[39] ICC-01/09-01/11-455, para. 19.
[40] ICC-01/09-01/11-455, para. 21.
[41] ICC-01/09-01/11-455, para. 17.
[42] ICC-01/09-01/11-455, para. 28.
[43] ICC-01/09-01/11-455, paras 29–31.
[44] ICC-01/09-01/11-455, para. 32.

IV. Analysis

Legal basis for witness preparation

26. The first question concerns the legal basis for witness preparation. As previous Chambers of this Court have concluded,[45] the Statute is silent on this issue.[46] Accordingly, the Chamber finds it appropriate to consider in this regard Article 64 of the Statute, the provision relating to trial management. Article 64 provides, in relevant part:

> 2. The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
>
> 3. Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall:
>
> > (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings.

27. Article 64 of the Statute grants the Chamber flexibility in managing the trial. Its formulation makes clear that the Statute is neither an exhaustive nor a rigid instrument, especially on purely procedural matters such as witness preparation, and that silence on a particular procedural issue does not necessarily imply that it is forbidden.[47] Article 64 is formulated so as to give judges a significant degree of discretion concerning the procedures they adopt in this respect, as long as the rights of the accused are respected and due regard is given to the protection of witnesses and victims.

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[45] Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679, paras 11 and 28 and Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/04-01/06-1049, para. 36.

[46] Trial Chamber I, relying heavily on Article 21, based its conclusion that witness preparation was prohibited on the fact that it was not specifically provided for in the Statute. ICC-01/04-01/06-1049. Trial Chamber III approved this reasoning, Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, ICC-01/05-01/08-1016, and Trial Chamber II did so implicitly when it adopted the same Witness Familiarisation Protocol, Decision on a number of procedural issues raised by the Registry, ICC-01/04-01/07-1134, para. 18.

[47] *Bemba* Dissenting Opinion, para. 10.

28. It is instructive in this regard to compare the practice followed by the *ad hoc* tribunals,[48] whose statutes and rules of procedure, like the ICC Statute, are also silent on this issue. The ICTR Appeals Chamber has held:

> The Tribunal's Statute and Rules do not directly address the issue of witness proofing. In the absence of express provisions, Rule 89(B) of the Rules generally confers discretion on the Trial Chamber 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 general principles of law". [49]

29. While bearing in mind the different statutory provisions that apply to those tribunals and the non-binding nature of their jurisprudence upon this Court,[50] the fact that the *ad hoc* tribunals interpreted silence in their statutory provisions to confer flexibility regarding witness preparation is meaningful when evaluating the silence in this Court's analogous statutory provisions. Notwithstanding the provisions of the ICTR Rules, the Chamber finds that Articles 64(2) and (3)(a) provide ample authority for the Chamber to adopt a case-specific approach to the issue of witness preparation.

30. Having established the legal basis for the Chamber to rule on witness preparation, the next question is whether the practice should be adopted in this case. In the following section, the Chamber considers the potential merits and risks of witness preparation.

Merits of witness preparation

1. Facilitation of a fair and expeditious trial

31. It goes without saying that relevant, accurate and complete witness testimony facilitates a fair, effective and expeditious trial. The need for clear and focused

[48] *See e.g.* ICTY, *The Prosecutor v. Milutinović*, Case No. IT-05-87-T, Decision on Ojdanić Motion to Prohibit Witness Proofing, 12 December 2006.
[49] ICTR, *Prosecutor v. Karemara et al.*, Case No. ICTR-98-44-AR73.8, Appeals Chamber, Decision on Interlocutory Appeal Regarding Witness Proofing, 11 May 2007, para. 8.
[50] *See* Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Pre-Trial Chamber II of 23 January 2012 entitled "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", 24 May 2012, ICC-01/09-01/11-414 (OA 3, OA 4), para. 31.

testimony is especially significant at this Court, where Article 69(2) establishes the principle of the primacy of oral evidence. The live testimony of witnesses, elicited through questioning by the parties, participants and the Chamber[51] is likely to constitute the most significant body of evidence in the case. As a result, the manner in which witness testimony is presented to the Chamber is of particular significance. A witness who testifies in an incomplete, confused and ill-structured way because of lack of preparation is of limited assistance to the Chamber's truth-finding function.

32. In this regard, and as the defence also notes,[52] the ICTY Trial Chamber in the *Limaj* case found that substantive witness preparation "is likely to enable the more accurate, complete, orderly and efficient presentation of the evidence of a witness in the trial."[53] The Chamber agrees that permitting witnesses to re-engage with the facts underlying their testimony aids the process of human recollection, better enables witnesses to tell their stories accurately on the stand and can assist in ensuring that the testimony of a witness is structured and clear.

33. Similarly, a witness shown a document for the first time on the stand may be caught off guard, without adequate time to consider whether he knows of the document and what relevant information, if any, he can provide about it. Given the complexity of this case and the large number of potential exhibits, the Chamber finds that showing witnesses potential exhibits ahead of time will assist in the efficient conduct of proceedings and will help to ensure that witnesses are in a position to give the Chamber the most complete version of their evidence.

[51] *See* Rule 140(2) of the Rules.
[52] *See* ICC-01/09-01/11-452, para. 21.
[53] *Prosecutor v. Limaj, et al.*, Case No. IT-03-66-T, Decision on Defence Motion on Prosecution Practice on "Proofing" Witnesses, 10 December 2004, page 2.

34. In order to elicit focused and structured testimony and to ensure that all probative evidence is presented, it is also important that counsel, particularly counsel of the calling party, are well prepared and fully acquainted with each witness's evidence. A pre-testimony meeting is a last opportunity for the calling party to determine the most effective way to question its witnesses and which topics will elicit the most relevant and probative evidence during in-court examination.

35. It is for these reasons that witness preparation is either allowed or encouraged at the *ad hoc* tribunals and in various national jurisdictions where the principle of the primacy of orality is followed and where trials heavily rely on the examination of live witnesses through questioning by the parties.[54] The chamber is of the view that, properly conducted, witness preparation is also likely to enhance the efficiency, fairness and expeditiousness of the present trial.

36. Moreover, the crimes under the jurisdiction of this Court are complex, both as regards the factual circumstances and legal issues involved. Consequently, witnesses may have to give complicated and delicate evidence in the courtroom. At the same time, many of the witnesses before this Court have no experience in a courtroom, come from places far from the seat of the Court and come from a variety of different cultural and linguistic backgrounds. They are often unfamiliar with the Court's system of questioning and cross-examination. In addition, witnesses testifying before this Court are often asked to recount events that occurred many years ago. As a result, there is an increased likelihood that witnesses will give testimony that is incomplete, confused or ill-structured.

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[54] *See* Australia, New South Wales Barrister's Rules, June 2008, Rules 43 and 44; Canada (Ontario), Crown Policy Manual - Witness, 21 March 2005; Canada, Law Society of Upper Canada, Rules of Professional Conduct, 1 November 2000, Rule 4.03; England and Wales, Code of conduct of the Bar of England and Wales, para. 705 and the Written Standards for the Conduct of Professional Work, Section 6, 31 October 2004, The Crown Prosecution Service - Pre-Trial Witness interviews, Code of Practice, February 2008; United States, Restatement of the Law (3d) of The Law Governing Lawyers, § 116 (adopted in 2000); New Zealand: Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008: Rules of conduct and client care for lawyers, point 13.10.2008; Japan, Rules of Criminal Procedure (Rules of the Supreme Court No. 32 of 1948 Article 191-3) and Fukuoka High Court Judgement, 22 March 1965 (Kouken-Sokuho No.944-9) Judge Eboe-Osuji does not concur as to all the footnote references.

2. Protection of the well-being of witnesses

37. The Chamber is of the view that proper witness preparation also enhances the protection and well-being of witnesses, including by helping to reduce their stress and anxiety about testifying. Limiting pre-testimony contact between counsel and witnesses to the ten minute "courtesy meeting" provided for in the Familiarisation Protocol does not best serve the Chamber's Article 68(1) duty to take appropriate measures to protect the well-being and dignity of witnesses. In most of the cases before this Court, witnesses' concerns extend beyond the individual protective measures accorded to them or the logistics of trial proceedings such as the layout of the courtroom and the role of the parties and participants. Their concerns may also result from anxiety about giving evidence in what may feel like a foreign and even hostile environment, a lack of confidence in their ability to communicate and articulate their experiences, and/or apprehension over the unfamiliar experience of being challenged during cross-examination. Witness preparation can help to ensure that witnesses fully understand what to expect during their time in court and that they are able to communicate any concerns to the calling party, including case-specific questions which the VWU would be unable to address. Particularly with regard to vulnerable witnesses, such prior preparation may help to reduce the psychological burdens of testimony, since those witnesses may face unique difficulties when being questioned repeatedly about traumatic events. Enabling interaction with counsel on the substantive aspects of their evidence may help to increase witnesses' confidence and may reduce their reluctance to reveal sensitive information on the stand. The role of the VWU, while of vital importance to the work of the Court, is not a substitute for the relationship between questioning counsel and the witness in this respect. The majority of the Chamber finds that in the present case, witness preparation is even more crucial as a means to protect the well-being of the witnesses, considering the specific situation in Kenya. (Judge

Eboe-Osuji does not concur as to the reference to the "specific situation in Kenya", as, in his view, the Chamber has not yet made a specific inquiry in that regard for purposes of that determination). Those witnesses from Kenya who have expressed strong concerns in connection with their testimony are likely to benefit from such pre-testimony meeting with the calling party.

Potential risks of witness preparation

38. The main arguments of the defence against witness preparation are (i) permitting witness preparation immediately prior to in-court testimony is not the most effective way of ascertaining the truth; (ii) there is a risk that it will be used to re-interview witnesses with the aim of improving the calling party's case; and (iii) it will result in late disclosure.[55]

39. The defence submits that witness preparation at the seat of the Court, up to 24 hours prior to a witness's testimony, heightens the risk of an inadvertent modification of the witness's testimony in response to the preparation. The Chamber is not convinced that this risk is any higher immediately prior to testimony than during the investigation phase. Nor is the Chamber convinced that witness preparation, properly conducted, is likely to result in substantive alterations to a witness's testimony at trial. While informing witnesses of the likely topics of direct and cross-examination will presumably help them to focus on the relevant issues, it does not follow that possessing such information will induce witnesses to modify their testimony. On this point, the Chamber also notes that the prosecution's proposed guidelines would prohibit giving a witness any information during preparation concerning testimony provided by other witnesses at trial. This

[55] ICC-01-09-01/11-452.

safeguard will help to ensure that witnesses do not attempt to tailor their evidence in light of the testimony of other witnesses.

40. According to the defence, "proofing forms an integral part of a genuine investigative attempt" to arrive at a more complete understanding of a witness's potential evidence.[56] However, the defence contends that the activities which constitute witness preparation should be carried out during the investigative stage.[57]

41. The Chamber finds that the purpose and nature of the witness preparation conducted by counsel shortly before the testimony of a witness differs in important respects from those activities that are properly undertaken during an investigation. Whereas the aim of an investigation is to obtain evidence, the purpose of witness preparation is to enhance the efficacy of the proceedings. Further, the prosecution's investigation should be concluded, in principle, before the final disclosure deadline in order to allow sufficient time for the defence to prepare for trial, or more preferably, before the start of the confirmation hearing [58] On the other hand, witness preparation, by its nature, is appropriately conducted shortly before a witness is due to testify.

42. The defence further argues that allowing substantive witness preparation conflicts with the prosecution's duty to complete disclosure by the beginning of 2013.[59] The Chamber emphasises that witness preparation is to be used to review and clarify the witness's evidence. It is not meant to function as a substitute for thorough investigations, nor as a way to justify late disclosure. As has been raised by both

[56] ICC-01-09-01/11-452, para. 21.
[57] ICC-01-09-01/11-452, paras 7, 13.
[58] Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568 (OA 3), para 54.
[59] ICC-01-09-01/11-452, paras. 15–20.

parties,[60] witness preparation may result in new information being revealed which was not included in a witness's statement. However, an advantage of witness preparation in this regard is that the new information may then be disclosed to the defence, pursuant to the Statute and the Rules, in advance of the witness's testimony. The Chamber is of the view that such pre-testimony disclosure is preferable to requiring the opposing party to react to new evidence only when the witness is on the stand. It will also help to ensure that the Chamber is not foreclosed from the possibility of hearing the entirety of a witness's evidence. At the same time, the use at trial of such additional evidence will be controlled by the Chamber in order to ensure that the defence is not prejudiced.

Safeguards

43. The defence submits that if witness preparation is allowed, it should only be permitted in exceptional circumstances and upon application to the Chamber, and only then with certain safeguards.[61]

44. The Chamber is mindful of the concern that witness preparation could become an improper rehearsal of in-court testimony which may negatively affect the reliability of the evidence adduced at trial. However, the Chamber is not convinced that this possibility necessitates a ban on pre-testimony meetings between parties and the witnesses they are calling, nor is it persuaded that an individual application should be required each time a party wishes to conduct a pre-testimony meeting with a witness. The Chamber considers that the risk can be adequately addressed by appropriate safeguards.

45. One such safeguard is the use of cross-examination. The Chamber is of the view that cross-examination, and questioning by the Chamber, concerning the extent of a witness's preparation can provide an important check against improper conduct.

[60] ICC-01/09-01/11-446, paras 7, 26 and ICC-01/09-01/11-452, para. 18.
[61] ICC-01-09-01/11-452, para. 32.

46. The risk that witness preparation could be used to coach witnesses can also be mitigated by clear guidelines establishing permissible and prohibited conduct. The Chamber has included such guidelines in the witness preparation protocol appended as an Annex to this Decision. In addition, the Chamber notes that professional standards require counsel to act in good faith at all times and prohibit intentional interference with a witness's evidence.

47. As an additional safeguard, the Chamber also considers it worthwhile to require that preparation sessions be video recorded. Without prejudice to the relevant Articles and Rules applicable to disclosure, in the event of allegations of coaching of a witness or of any other improper interference with the evidence to be presented by a witness, the non-calling party may request the Chamber to order the disclosure of the video. The party making such a request shall satisfy the Chamber that there is a concrete and credible basis for the request. On being so satisfied as to the basis of the request, the Chamber, in its discretion, may consider whether to review the video recording prior to making any disclosure order, mindful of the need, among other things, to protect such privileged information as may be revealed in the video recording.

48. However, the Chamber considers video recording to be a sufficient safeguard and finds that requiring the presence of a representative from the non-calling party or the VWU at the meeting is unwarranted at this stage. The Chamber has no basis for assuming that either party will fail to adhere to the limitations established in the attached protocol for conducting witness preparation or will otherwise violate professional standards when preparing witnesses, and therefore concludes that it is unnecessary to require a third party to attend the meetings.

49. Finally, the defence has requested that the question of timing of witness preparation be revisited after the close of the prosecution's case. However, as the protocol adopted by the Chamber will apply to both parties, this is unnecessary.

V. Conclusion

50. After thorough consideration of the various advantages and drawbacks of the practice, the Chamber concludes that it is neither practical nor reasonable to prohibit pre-testimony meetings between parties and the witnesses they will call to testify at trial. Rather, judicious witness preparation aimed at clarifying a witness's evidence[62] and carried out with full respect for the rights of the accused is likely to enable a more accurate and complete presentation of the evidence, and so to assist in the Chamber's truth finding function.

51. Accordingly, the Chamber determines that witness preparation shall be permitted in this case and shall take place in accordance with the protocol in Annex to this Decision ("Witness Preparation Protocol"). The protocol, which is based upon the prosecution's proposal, sets out a complete list of permitted and prohibited conduct, along with rules governing logistical matters and disclosure.

52. The Familiarisation Protocol[63] is to be followed in this case, except to the extent that it regulates contact between the calling party and its witnesses, in which case it is superseded by the Witness Preparation Protocol. Additionally, Section 2.6. ("Reading and provision of statement") of the Familiarisation Protocol shall no longer apply, as this step is to be carried out by the party calling a witness. These changes shall be reflected in an updated version of the Familiarisation Protocol.

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[62] *Bemba* Dissenting Opinion, ICC-01/05-01/08-1039, para. 22. *See also Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Ojdanić Motion to prohibit witness proofing, 12 December 2006, para. 16.
[63] ICC-01/09-01/11-259-Anx.

53. Witness familiarisation by the VWU is to be carried out in parallel with the witness preparation carried out by the calling party, in case the latter is conducted at the seat of the Court.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ADOPTS the Witness Preparation Protocol contained in Annex; and

ORDERS the Registry to file an updated version of the Familiarisation Protocol in accordance with paragraph 52 above.

Judge Eboe-Osuji appends a partly dissenting opinion.

Done in both English and French, the English version being authoritative.

Judge Kuniko Ozaki, Presiding Judge

Judge Christine Van den Wyngaert **Judge Chile Eboe-Osuji**

Dated 2 January 2013

At The Hague, The Netherlands

PARTLY DISSENTING OPINION OF JUDGE EBOE-OSUJI

1. I fully concur in the outcome of the Chamber's decision permitting counsel in this case to engage in ethical preparation of witnesses for purposes of their testimonies in court. I also concur with much of the reasoning of the Chamber in that regard. I do, however, disagree with my highly esteemed colleagues in the Majority as regards their general prohibition of 'practising' of testimonies, as indicated in the annex to the decision. I offer the following opinion to develop both my concurrence and my partial dissent as indicated.

The March of Reform in Law and Administration of Justice

2. To insist that lay witnesses be led into the witness stand without thorough preparation—not only to testify to their evidence-in-chief but also to withstand what may come in cross-examination—evokes in my mind the fate of the unfortunate *noxii* in the ancient Roman amphitheatre. Untrained, unskilled and inexperienced in the duels to which they were condemned, they were left largely at the mercy of the trained, highly skilled and experienced and sometimes highly remunerated and elite gladiators arraigned against them, who teased, taunted and struck them at will with the aim of destroying them. Moving the comparative imagery to the modern courtroom, trial judges can only do their best to limit the pain and trauma. Such an imagery of that aspect of the administration of justice might have been considered by some as desirable at some time in the past—and possibly still so in some jurisdictions; but, the ethos of law reform ought not continue to countenance it in the modern era nor in the international arena.

3. Regarding the ethos of law reform, it bears keeping in mind that the administration of justice in criminal cases has never been an eternal slave to old ideas and practices. From time to time, shibboleths of the past have been reconsidered, reformed or rejected, as the case may be, in favour of new ones. Consider, for instance, that there were times in the adversarial system of the past when defence counsel could not represent clients in making submissions on questions of fact in a case (they were limited to making submissions on points of law only, even then upon cause shown); accused persons were not entitled to a copy of the indictment against them; accused persons were incompetent to testify as witnesses in their own cases; a spouse was incompetent to testify in favour or against the spouse, on the theory that the celebration of marriage gave a husband and wife a union of identity in the eyes of the law; corroboration was needed for the evidence of a woman or girl who was a victim of rape—and in the absence of such corroboration, the judge was required to warn the jury or remind himself (if he was sitting alone) that it was 'really dangerous

to convict on the evidence of the woman or girl alone'[1]; the chastity of a woman victim of rape could be attacked to destroy her credibility by showing that she had voluntary sexual relations at other times, with her alleged rapist or with other men; the law did not recognise the rape of a man upon his wife. There are many more examples of such ideas of the past, generally accepted in their time as correct, that have since been rejected.

4. Some of those ideas—now apparently strange to modern sensibilities—were not mere punctilios. Some of them were totally ecliptic in their operation. Take, for instance, the Assize of Clarendon of 1166 that in section 2 provided as follows: 'And he who shall be found through the oath of the aforesaid persons [the grand jury] to have been charged or published as being a robber, or murderer, or thief, or a receiver of them, since the lord king has been king, shall be taken and *shall go to the ordeal of water*, and shall swear that he was not a robber or murderer or thief or receiver of them since the lord king has been king, to the extent of five shillings as far as he knows.'[2] [Emphasis added.] It has been suggested[3] that the trial by ordeal that the Assize of Clarendon illustrated derived inspiration from passages in the Bible such as the one in the Book of Numbers, which prescribed a trial by ordeal for a wife whose husband suspected of adultery without evidence in support. The temple priest was to serve her a concoction of holy water mixed with dirt from the floor of the tabernacle. She was to stand in front of the altar and drink it, as the priest administered the following imprecation: 'If no other man has had intercourse with you, and you have not gone astray by defiling yourself while under the authority of your husband, be immune to this water of bitterness that brings a curse. But if you have gone astray while under the authority of your husband, and if you have defiled yourself and a man other than your husband has had intercourse with you may the LORD make you a curse and malediction among your people by causing your uterus to fall and your belly to swell! May this water, then, that brings a curse, enter your bowels to make your belly swell and your uterus fall!' And the woman was to say, 'Amen, amen!'[4] [It was of no moment, of course, that philandering husbands did not suffer an equivalent process.]

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[1] *R v Henry* (1969) 53 Cr App R 150 at p 153 [Court of Appeal of England and Wales, per Salmon LJ, as he then was.]

[2] Translation from original Latin: at <www.avalon.law.yale.edu/medieval/assizecl.asp>. Bishop Stubbs described the Assize of Clarendon as 'a document of the greatest importance to [English] legal history, and must be regarded as introducing changes into the administration of justice which were to lead the way to self-government at no distant time': William Stubbs, *Selected Charters and Other Illustrations of English Constitutional History* [Oxford: Clarendon Press, 1870] p 141.

[3] See L Kip Wheeler 'Trial by Ordeal' <http://web.cn.edu/kwheeler/trial_ordeal.html>

[4] Numbers 5:11-30.

5. Some commentators have articulated the merits of these ancient trials by ordeal.[5] Regardless of those merits, however, those ideas of law and justice have been cast aside for the modern times. Such is the way of the continuing march of law reform.

The Values of Witness Preparation

6. Although law reform as concerns administration of justice has largely done away with trials by ordeal in the real sense of the word, some might argue that witness testimony has remained, in a manner of speaking, something of an 'ordeal' for the lay witness in the adversarial system of justice.[6] Justice Thomas Cromwell of the Supreme Court of Canada and his co-authors Bryan Finlay QC and Nikiforos Iatrou, in their book on witness preparation, partly capture the point in the following way: 'A tribunal is a foreign and hostile environment for the inexperienced witness. The formality of the setting and the unaccustomed procedures will cause anxiety and induce an inability to communicate effectively.'[7]

7. To that I must add that public speaking is a dreaded experience for many. It is the more so for witness testimonies, as what is involved is not merely public speaking followed by expectation of polite ovation, but public speaking in circumstances in which highly trained and experienced legal professionals are expected to dissect and attack everything that is said, and quite often the person of the witness herself, in a quest to demonstrate flaws that may or may not exist.

8. The foregoing observations about stress and the relative palliative effects of witness preparation are standard observations usually made in the context of litigation in the average western society, pertaining to witnesses native to that culture. The value of these observations has, then, even greater force in relation to the average witness that comes to testify before this Court. The environment and circumstances of our courtrooms and those of the seat of the Court itself are likely to be wholly foreign to such a witness. She may come from the most rural areas of the economically developing world. The travel through the capital city of her country to take the flight that brings her here is in itself an experience that may induce the stress of unfamiliar life in a different world. But that may be compounded by the stress of international air

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[5] See Peter Leeson, 'Justice, medieval style' in *The Boston Globe* 31 January 2010 <http://www.boston.com/bostonglobe/ideas/articles/2010/01/31/justice_medieval_style>

[6] See also Louise Ellison, 'The protection of vulnerable witnesses in court: an Anglo-Dutch comparison' (1999) 3 *International Journal of Evidence and Proof* 29 at 29 and 32. See also Baroness Vivien Stern, *The Stern Review: Independent Review into How Rape Complaints are Handled by Public Authorities in England and Wales* [Government Equalities Office and Home Office, 2010] p 79.

[7] Bryan Finlay, T A Cromwell and Nikiforos Iatrou, *Witness Preparation—A Practical Guide* [Aurora, Ontario: Canada Law Book, 2010] p 7.

travel, perhaps a first, crossing time zones and generating jet-lag, to a very foreign country and city. Add to that, the fact that venturing out to run life's ordinary errands in the foreign city—simple things like taking the tram or the bus or shopping for grocery and feeling all along like fish out of water—may induce a more acute otherworldly feeling of disorientation. And, to all that must further be added the experience of transportation into the ICC courtroom, full of strangers from distant cultures and places, asking earnestly penetrating—often uncomfortable—questions that she must answer. It is accepted that she must answer them alone. But, it is contended that she must answer them without prior preparation. I reject the contention.

9. Any effort that makes the experience of testifying a little more tolerable for witnesses appearing before this Court must be encouraged. The Chamber's decision has indicated some—and by no means all—of the benefits of preparing witnesses appropriately for their testimony before they testify. Chief among them is reduction in levels of stress and anxiety. As one commentator observed: 'Adequate preparation of the witness is a most important factor. Fear of the unknown causes nervousness. Knowledge of what is to come induces confidence and composure. A thorough interview before the witness is called to testify is one effective method of reducing the chances that the witness will become nervous and confused as he testifies.'[8] The mere fact of going through the witness preparation process alone does much to achieve this. And this is all the more so when appropriate, professional rapport is established, by virtue of that process, between the witness and the counsel who will examine the witness in the courtroom. It is that familiar, human phenomenon of being in a strange and uncomfortable place with a familiar and reassuring face. It reduces anxiety.

10. In this connection, particular regard must be had to the provisions of article 68(1) of the Statute, which requires the Court, as a matter of obligation, to 'take appropriate measures to protect the safety, physical and *psychological well-being, dignity* and privacy of victims and witnesses.' [Emphasis added.] It is reasonable to consider that granting counsel permission to conduct thorough and ethical witness preparation of witnesses for their testimony is part of the 'appropriate measures' that the Court is required to take to protect the psychological well-being and dignity of witnesses.

[8] Professor Robert Keeton, *Trial Tactics and Methods* [Toronto: Little, Brown, 1973] p 28, quoted in Earl Levy, *Examination of Witnesses in Criminal Cases*, 5th edn [Scarborough, Ontario: Thomson-Carswell, 2004], p 22.

11. Beyond minimising the 'ordeal' factor of testimony, witness preparation also assists in an orderly search for the truth. Cromwell, Finlay and Iatrou succinctly captured such value of witness preparation in the following way:

> Witness preparation involves two main sorts of work. First, it is part and parcel of counsel's relentless search for facts, both favourable and unfavourable. The interviewing of potential witnesses is an important aspect of this search. Second, once it is decided who will be called to testify, counsel must prepare the witnesses to give evidence, and in doing so, the duty of counsel is to make the testimony as effective as possible. In order to achieve this, counsel must assist the witnesses to deal satisfactorily with what probably will be an unusual and, in some cases, a traumatic experience. Moreover, tribunals depend on witnesses being adequately prepared so that evidence is adduced in an orderly and efficient manner.[9]

12. In explaining the efficacious value of witness preparation, they observed as follows: 'The testimony of a witness must be focused. The trier of fact has a difficult enough job without having to pore over reams of badly organised, marginally relevant material. The goal of "winning the case" argues in favour of witnesses being properly prepared and centred on relevant materials before the commencement of the hearing.'[10]

Spontaneity

13. It is right to insist that the overall benefits of witness preparation are not to be accorded subordinate value in comparison to the idea of 'spontaneity' in witness testimony that is held up as militating against witness preparation. It might also be pointed out that all the questions that counsel ask witnesses in examinations-in-chief or cross-examinations are seldom spontaneous, if counsel had truly prepared their cases thoroughly. Counsel's questions come mostly from extensive advance preparation to ask precise questions in a precise way. Nor are counsel's dictions, syntaxes, cadences, facial expressions, postures, etc, always spontaneous. If it is fair for counsel to engage in preparations for purposes of asking questions in, say, cross-examination, so, too, must it be fair for witnesses to be prepared to answer questions in cross-examination.

14. Similarly, the extensive preparation of counsel ahead of cross-examination does not wholly eliminate spontaneity in the process. Prepared witnesses often give unexpected answers to questions; presenting competent and alert counsel with spontaneous opportunities to be explored or exploited. Hence, preparing witnesses for their testimony will not eliminate spontaneous occurrences in the course of the examination.

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[9] Finlay, Cromwell and Iatrou, *supra*, p 6.
[10] *Ibid*, p 7.

15. Indeed, invoking spontaneity as an argument against witness preparation is strikingly reminiscent of the argument employed to deny accused persons legal representation in common law jurisdictions up until the 18th century. Notably, William Hawkins, Serjeant-at-Law, considered it a 'settled Rule at Common Law, that no Counsel shall be allowed a Prisoner, whether he be a Peer or Commoner, upon the General Issue, on an Indictment of Treason or Felony, unless some Point of Law arise, proper to be debated.' [11] The irony is palpable in Hawkins's following explanation for the prohibition:

> This indeed many have complained of as very unreasonable, yet if it be considered, that generally every one of Common Understanding may as properly speak to a Matter of Fact, as if he were the best Lawyer; and that it requires no manner of Skill to make a plain and honest Defence, which in Cases of this Kind is always the best, the Simplicity and Innocence, artless and ingenuous Behaviour of one whose Conscience acquits him, having something in it more moving and convincing than the highest Eloquence of Persons speaking in a Cause not their own. And if it be farther considered that it is the Duty of the Court to be indifferent between the King and Prisoner, and to see that the Indictment be good in Law, and the Proceedings regular, and the Evidence legal, and such as fully proves the Point in Issue, there seems no great Reason to fear but that, generally speaking, the Innocent, for whose Safety alone the Law is concerned, have rather an Advantage than Prejudice in having the Court their only Counsel. Whereas on the other Side, the very Speech, Gesture and Countenance, and Manner of Defence of those who are guilty, when they speak for themselves, may often help to disclose the Truth, which probably would not so well be discovered from the artificial Defence of others speaking for them.[12]

16. Clearly, the underlying pursuit of spontaneity was ultimately considered not good enough to sustain the continued denial of full representation of counsel for defendants, in spite of the salutary value it was considered to have in the search for the truth in such an 'accused speaks' trial regime. In the modern era, its value for the denial of thorough preparation of witnesses remains just as dubious.

17. It is truly not necessary to overrate any value that spontaneity may have. Such a value is neutral, at best. I am mindful that our colleagues in the *Lubanga* case spoke of it in terms of 'helpful spontaneity'. [13] But that desirable value is necessarily neutralised in the context of a process that does not guarantee spontaneity as always 'helpful'. In particular, spontaneity might lead the witness away from the following platitudes of testimony, among others, that aid an orderly judicial search for the truth:

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[11] William Hawkins, *A Treatise of the Pleas of the Crown*, 3rd edn (1739), bk II, ch 39, § 2.
[12] *Ibid* § 3.
[13] See *Prosecutor v Lubanga (Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial)* Case No ICC-01/04-01/06 dated 30 November 2007 [ICC, Trial Chamber I] para 52.

- Listen carefully to the question asked and answer only that question, using your own words. Do not let the questioner put words into your mouth.
- Take your time to think about the question and the answer you will give, but do not take forever.
- Do not guess or speculate.
- Speak clearly for the record. Avoid gestures, as they cannot be recorded on the transcript. In particular, movements of the head, hands or fingers, do not assist the record.
- Be concise with your answers.
- Do not accept open-ended baits, like 'is that all', to keep talking, if you have nothing more to add. Nor should you assume the obligation to fill silences with words. Silences do not appear on the transcripts. It is counsel's duty to ask the next question, to fill any silence.
- Do not be shy to seek clarification. If you do not understand the question or any part of it, say so.
- Do not be afraid to correct an answer you have given—either immediately or later on in the course of your testimony.
- Do not worry about the direction of the question. Just answer the question accurately and truthfully. But feel free to indicate any significant context for the answer.
- Do not worry about the propriety of the question. It is the calling counsel's and the court's responsibility to worry about that. In the absence of an objection or a ruling from the court against the question, just answer it.

18. Alongside responsible focusing of the substance of the witness's testimony in the relevant manner, pieces of advice such as appear above are classic features of a proper witness preparation session.

19. It must also be observed that trials of international crimes have typically involved accused persons who held the power of life and death over their victims at times material to the judicial inquiry. The phenomenon is amply borne out in the records of the Nuremberg tribunals, the Far East tribunals, the *Eichmann* trial, the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, the Special Court for Sierra Leone, the Extraordinary Chamber in the Courts of Cambodia, etc. Allowance must then be made for the incidence of at least some witnesses remaining in thrall to the overpowering awe of the accused who will be in the courtroom during the testimony. Spontaneity is not a reliable ally of justice in those circumstances. Spontaneity may indeed work a mischief in the opposite direction. It should be an objective of witness preparation to detect the possible existence of such an overpowering awe in a witness and to prepare

her in a manner that repowers her to tell the whole truth and nothing but the truth, regardless of the presence of the accused in the courtroom, and without prejudice to the presumption of innocence that every accused must enjoy during his or her trial. An arrangement that permits this Court's Victims and Witnesses Unit to introduce the witness to the Prosecution for only 30 minutes—and only for an arms-length meeting—is woefully inadequate for that purpose.

Witness Preparation in Other Jurisdictions

20. It is to be stressed that permitting witness preparation will not be a radical development in the administration of justice. It is consistent with the practice at other international criminal tribunals.[14] So, too, is it consistent with the practice in some of the major adversarial jurisdictions of the world, such as the United States and Canada.

21. In the US, for instance, the question of witness preparation was at issue in *Hamdi & Ibrahim Mango Co v Fire Association of Philadelphia*, where the US District Court for the Southern District of New York held that 'it is usual and legitimate practice for ethical counsel' to confer with the witness whom he or she is about to call prior to the testimony of the witness, and to review with the witness the testimony to be adduced.[15] In that judgment, the Court noted that Wigmore had 'recognised "the absolute necessity of such a conference for legitimate purposes" as part of intelligent and thorough preparation for trial.'[16] According to the Court, in such a conference, 'counsel will usually, in a more or less general terms, ask the witness the same questions as he expects to put to him on the stand. He will also, particularly in a case involving complicated transactions and numerous documents, review with the witness the pertinent documents, both for the purpose of refreshing the witness' recollection and to familiarise him with those which are expected to be offered in evidence. This sort of preparation is essential to the proper presentation of a case and to avoid surprise.'[17] Similarly in *State v McCormick*, the Supreme Court of North Carolina observed as follows:

> It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his

[14] See *Prosecutor v Karemera & Ors (Decision on Interlocutory Appeal Regarding Witness Proofing)* 11 May 2007 [ICTR Appeals Chamber]; *Prosecutor v Gacumbitsi (Judgment)* 7 July 2006 [ICTR Appeals Chamber] para 74; *Prosecutor v Milutinović & Ors (Decision on Ojdanić Motion to Prohibit Witness Proofing)* 12 December 2006 [ICTY Trial Chamber III]; *Prosecutor v Limaj & Ors (Decision on Defence Motion on Prosecution Practice of 'Proofing' Witnesses)* 10 December 2004.
[15] *Hamdi & Ibrahim Mango Co v Fire Association of Philadelphia*, 20 FRD 181 (SDNY, 1957) at pp 182—183.
[16] See 3 *Wigmore on Evidence*, (3d Edition) § 788.
[17] *Hamdi & Ibrahim Mango Co v Fire Association of Philadelphia, supra*, p 183.

> 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 [citation omitted] and is to be commended because it promotes a more efficient administration of justice and saves time.
>
> Even though a witness has been prepared in this manner, his testimony at trial is still his voluntary testimony. Nothing improper has occurred so long as the attorney is preparing the witness to give the witness' testimony at trial and not the testimony that the attorney has placed in the witness' mouth and not false or perjured testimony.[18]

22. Beyond case law such as *Hamdi* and *McCormick*, the legitimacy of witness preparation in the United States is directly recognised in the American Law Institute's *Restatement (Third) of the Law Governing Lawyers*. In §116(1), it is recognised that 'a lawyer may interview a witness for the purpose of preparing the witness to testify.' The commentary to this rule specifically recognises witness preparation in the various following ways:

> In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client. Preparation consistent with the rule of this Section may include the following: discussing the role of the witness and effective courtroom demeanor; *discussing the witness's recollection and probable testimony*; *revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light*; discussing the applicability of law to the events in issue; *reviewing the factual context into which the witness's observations or opinions will fit*; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet. *Witness preparation may include rehearsal of testimony*. A lawyer may suggest choice of words that might be employed to make the witness's meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact. [Emphases added.]

23. Indeed, witness preparation is deemed such a crucial factor in competent legal representation in the US that failure to do it well would attract questions of professional negligence and ineffective representation of counsel.[19]

24. Similarly in Canada, witness preparation is considered an important aspect of effective trial preparation by counsel.[20] Indeed, witness preparation was taught as part of the bar admission course in Ontario—the largest province in Canada. Notice, for instance, the following instructions, among others, appearing in the 2005 Bar Admission Course materials for that province:

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[18] *State v McCormick*, 298 N C 788 at pp 791—792; 259 S E 2d 880 at 882 (1979).

[19] In this connection, one notes the following observation in American Law Institute, *Restatement (Third) of the Law Governing Lawyers*: 'Competent preparation for trial (see generally §52(1) (general negligence standard might also require pre-testimonial interviews with witnesses)': commentary (b) under §116. See also John S Applegate, 'Witness Preparation' (1989) 68 *Texas Law Review* 277 at pp 287—288.

[20] See, for instance, Levy, *supra*, pp 17—25.

If you have thoroughly reviewed the evidence with a witness, it will do much to put him or her at ease. *During your final preparation of a witness you will be calling, it is advisable to put your questions to him or her in the same manner as you expect to ask questions at trial.* This will enable the witness to become comfortable with the form and style of your questioning as he or she will hear it in court. Counsel must, however, be conscious of the fact there is a danger that a witness will memorize responses. Memorization makes the witness an easy target for an effective cross-examination. The purpose of preparing a witness is not to enable the witness to adduce his or her testimony by rote, but rather to enable the witness to express in his or her own words the facts to which he or she can testify.[21]

25. Such professional training for Ontario barristers continues to the present day.[22]

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[21] The Law Society of Upper Canada, 48th Bar Admission Course, Academic Phase 2005, Civil Litigation Reference Materials, ch 14, p 187 (emphasis added).

[22] For instance, in the Law Society of Upper Canada, Licensing Process, Barrister, Examination Study Materials (2012), pp 224—225, one finds the following relevant instruction to trainee barristers:

> '**2.8 Re-interview**
> At a reasonable time before trial, you should re-interview important witnesses to prepare them to give their evidence at trial. It is improper to suggest what a witness's testimony ought to be; but where a prospective witness makes statements in conflict with other witnesses, physical facts, or documentary evidence, it is perfectly proper to review any discrepancy with the witness and make an honest attempt to explain, reconcile, or eliminate these conflicts.
>
> **2.8.1 Weak evidence**
> Where there appears to be any inaccuracy or indefiniteness, a witness should be politely cross-examined, informed of the weaknesses in the witness's testimony, and given an opportunity to clarify the evidence and explain himself or herself. If the evidence is still unsatisfactory, consider whether the witness should be called or whether further testimony should be secured to clarify or amplify the witness's testimony.
>
> **2.8.2 Acknowledge discussion**
> Tell witnesses whom you intend to call at trial that they may be asked in cross-examination whether they have discussed their evidence with you before trial. Contrary to what many witnesses may think, there is nothing improper about such prior discussion. Tell the witness acknowledge, if asked, that the witness has discussed the evidence with a lawyer and was told to tell the truth.
>
> ...
>
> **2.9.3 No memorization**
> During your final preparation of a witness you will be calling, *put your questions to the witness in the same manner as you expect to ask the questions at trial.* This will enable the witness to become comfortable with the form and style of your questioning as the witness will hear it in court.
>
> Be conscious of whether the witness appears to have memorized responses. Memorization makes the witness an easy target for an effective cross-examination. You are preparing the witness to be able to express the facts to which the witness can testify in the witness's own words, not by rote.
>
> **2.9.4 Review exhibits and documents**
> You should review all of the documents and transcripts from all parties to the action with your client prior to trial. In the case of a non-party witness, go over any exhibits or documents that the witness will have to identify, interpret, or testify about during the course of the witness's examination. If the witness has to testify about a physical fact, such as the description of an accident location, the witness should go to the scene of the accident to refresh the witness's recollection about the physical details.
>
> You should visit the scene with the witness so that you will have the same picture in your mind of it as the witness does during the course of the examination. Since you will be looking

26. In addition to encouraging lawyers to take witnesses through the evidence to which they will testify—including by way of rehearsals—as is evident in the quote above,[23] lawyers are also encouraged to review with witnesses 'any exhibits or documents that they will have to identify, interpret or testify about during the course of their examination.'[24] In addition to preparation for examination-in-chief, witnesses are also to be prepared for cross-examination. 'The purpose of the preparation is not to alter the witness's evidence, but to ensure that on cross-examination the witness does not become excited, flustered or embarrassed and thus jeopardize credibility.'[25] As part of a rehearsal exercise, counsel are encouraged to 'assume the role of opposing counsel and to cross-examine, particularly if the witness will be subject to attack on credibility due to a pecuniary interest in the case, friendship with your client, bias, previous conviction or any other factor which may be the subject of cross-examination by opposing counsel.'[26]

27. In these jurisdictions that permit witness preparation, counsel are never encouraged, let alone permitted, to engage in the illicit practice of 'coaching' the witness.[27] Witness coaching may be defined as preparing the witness in a manner that involves improper influence upon the witness, intentionally exerted by counsel, with the view to rendering false evidence into testimony. As far as it goes, coaching is truly subornation of perjury, since the witness is being fraudulently manipulated to give testimony that is false.

28. It would be strange to claim expressly or by implication that the quality of justice is substandard or inferior in the other international criminal tribunals or in the United States and in Canada simply because lawyers are permitted to prepare

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> at the scene from a fresh viewpoint, you may pick up on important details that may not be immediately obvious to the witness.
>
> **2.9.5 Cross-examination**
> Prepare each witness to be called for both direct examination and cross-examination. If you assume the role of the opposing lawyer and cross-examine the witness in preparation for trial, you may guard against the witness becoming excited, flustered, or embarrassed on actual cross-examination at trial, a situation that could jeopardize the witness's credibility. Some witnesses may be especially vulnerable to an attack on their credibility during cross-examination by opposing counsel due to a pecuniary interest in the case, friendship with your client, bias, a previous conviction, etc.' [Emphasis added.]

[23] See also Levy, *supra*, p 23.
[24] See Law Society of Upper Canada, 48th Bar Admission Course, *loc cit.* See also Law Society of Upper Canada, Licensing Process, Barrister, *supra*, §2.9.4.
[25] Law Society of Upper Canada, 48th Bar Admission Course, *loc cit.*
[26] *Ibid*, pp 187—188. See also Law Society of Upper Canada, Licensing Process, Barrister, *supra*, §2.9.5.
[27] See Levy, *supra*, p 23; *Ibarra v Baker* 388 Fed Appx 457 (2009) [US Court of Appeals, 5th Circuit, Texas] p 465 and 467. See also Law Society of Upper Canada, Licensing Process, Barrister, *supra*, §2.8.

witnesses in the manner outlined above prior to testimony; in particular when care is taken in such witness preparations to avoid coaching.

29. In contrast to the practice in the US and Canada, the England and Wales Barrister's Code of Conduct forbids a barrister to 'rehearse, practice or coach a witness in relation to his evidence.'[28] This provision had led to the general view that witness preparation was not done in England and Wales, especially since barristers did not generally make pre-trial contact with witnesses other than their clients, expert witnesses and character witnesses.[29] But such a view would have created an incomplete impression of the practice of lawyers in that jurisdiction, considering that solicitors were allowed—if not required—to investigate cases, make contact with witnesses and interview them for their testimony. It was particularly the case, it appears, that solicitors were not forbidden to prepare witnesses for their testimony. Also, '[r]egarding clients who are to be witnesses in criminal cases,' Andrew Watson observes that 'it is true that solicitors may put to them difficult questions that might be asked in cross-examination. Also, in order to give appropriate advice about prospects of success and strength of evidence it appears to be counsels' practice in criminal matters to raise the likely subjects of cross-examination in conferences with lay clients.'[30] Solicitors instructing counsel were not forbidden to engage in role plays. According to Watson:

> It is conspicuous that no rule prevents solicitors, other than when acting as solicitor advocates, from rehearsing witness. From limited research conducted, it seems that a small number of solicitors do role play to introduce client and non-client witnesses to questions they are likely to meet in cross-examination. When asked about this, the Law Society explained that great caution had to be exercised to avoid encouraging witnesses to alter, massage or obscure their evidence. Because of fears about falling into this in practice, combined with a suspicion that role-playing is ethically dubious, the great majority of solicitors do not practise witnesses.[31]

30. It may be observed, in passing, that a legal regime that permits lawyers in the role of solicitors (who instruct the barristers) to engage in witness preparation in this manner[32] does not portray the full picture, when the spotlight of what is permissible is trained upon only the barrister who works in an articulated relationship with the solicitor and the witnesses. Notably, in the US and Canada, as in the international

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[28] See Code of Conduct of the Bar of England and Wales, §705(a)
[29] Andrew Watson, 'Witness Preparation in the United States and England and Wales' (2000) 164 *Criminal Law and Justice Weekly (formerly Justice of the Peace)* 164 JPN 816 [14 October 2000]. See also Crown Prosecution Service, 'Pre-Trial Witness Interviews by Prosecutors: a Consultation Paper' (2003) paras 1, 2, 3, 6, 7 and 10.
[30] Watson, *supra.*
[31] *Ibid.*
[32] See also Crown Prosecution Service, 'Pre-Trial Witness Interviews by Prosecutors: a Consultation Paper', *supra*, paras 4 and 5.

arena, a litigation lawyer performs the functions of both barrister and solicitor. He or she may then do what is permissible of a solicitor to do in England, while still performing the functions of a barrister.

31. But even for barristers in England and Wales, the practice is now evolving in the matter of witness preparation. Since the England Court of Appeal case of *R v Momodou*,[33] the practice at the English Bar has now more explicitly recognised witness preparation by barristers. In the words of Lord Justice Judge, writing for the Court: 'Sensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible. Such experience can also be provided by out of court familiarisation techniques. The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process. Nevertheless the evidence remains the witness's own uncontaminated evidence.'[34]

32. The English reform is much more circumscribed in its reach than what obtains in practice in the United States and Canada. For instance, the Court of Appeal in *Momodou* signalled a stance against 'discussions about proposed or intended evidence' and that permissible witness preparation training 'should not be arranged in the context of nor related to any forthcoming trial ...'.[35] Notably, the concerns that moved the England Court of Appeal in forbidding that manner of witness preparation include those expressed as follows:

> The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved". These dangers are present in one-to-one witness training.[36]

33. The sum of these concerns really says no more than that the risk of false testimony is an inherent feature of the courtroom process. It is, with respect, not a revealing thought at all; and, therefore, not a wholly satisfactory basis to forbid

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[33] *R v Momodou* (2005) EWCA 177.
[34] *Ibid*, para 62.
[35] *Ibid.*
[36] *Ibid*, para 61.

witness preparation. The risk of false testimony is a cardinal reason for the adversary system of justice, in which there is a prominent job for the cross-examiner. In my opinion, the better view on the matter is that expressed by the US Supreme Court when in *Geders v United States* it observed that the 'opposing counsel in the adversary system is not without weapons to cope with "coached" witnesses.'[37] Opposing counsel may cross-examine a witness as to the extent of any coaching. Skilful cross-examination could develop a record which counsel in closing argument might well exploit by raising questions as to the witness's credibility, if it reasonably appears that counsel had, in fact, coached the witness as to how to respond during both the examination-in-chief and cross-examination.[38]

34. In the England Bar Council Guidance on Witness Preparation obtaining in the post-*Momodou* era, it is considered 'also appropriate, as part of the witness familiarization process, for barristers to advise witnesses as to the basic requirements for giving evidence, e.g., the need to listen to and answer the question put, to speak clearly and slowly ... and to avoid irrelevant comments.'[39]

35. Also of significance in this process of evolution are developments in the cognate field of English civil litigation practice. Instructive in this regard is what Watson describes as follows:

> Since the introduction in civil cases of carefully drafted witness statements, which the Judge usually directs to stand as evidence-in-chief, the position about barristers and witness preparation has become somewhat more complicated. This is because solicitors send draft witness statements to barristers, instructed in cases, for their approval or, increasingly, instruct them to draft witness statements. Both activities may involve the barrister requesting the solicitor to ask the witness more questions, elaborate on certain areas already dealt with, and to turn the witness's attention to other evidence which apparently conflicts.[40]

36. Although the reformed English regime remains at a remarkable distance from what is generally accepted witness preparation practice in Canada and the USA, *Momodou*, the Bar Council Guidance and the reformed civil practice signal progressive developments in England and Wales, away from a past professional culture that was more critical of any form of witness preparation on the part of barristers.[41]

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[37] *Geders v United States* 425 US 80 (1976) [US Supreme Court] p 89.
[38] See *ibid*, pp 89—90.
[39] Bar Council of England and Wales, 'Guidance on Witness Preparation', §5.
[40] Watson, *supra*.
[41] See Watson generally, *supra*.

Victim-Witnesses of Sexual Violence

37. Of particular importance in this discourse is the evidence of victims of sexual violence and other vulnerable witnesses, such as children or persons with learning difficulties. Women victims of sexual violence find their experience as witnesses particularly humiliating and distressing, leaving some with feelings of re-victimisation and deep embarrassment.[42] Research indicates that the factors that account for such distressing experience include the following: having to encounter or confront the defendant in the courtroom; recounting in a public courtroom full of strangers intimate details of the sexual attack, often asked to speak up for everyone present to hear those details; and, having to endure probing cross-examination by counsel for the defendant. Studies suggest that the effects of these features of the adversarial criminal justice system are not palliated by a legal professional culture that insists upon an arms-length relationship or perfunctory contact between the victim and the prosecutors.[43] It likely compounds it, especially when a victim-witness—a stranger to the justice system—looks in vain to host counsel for assistance in the manner of thorough preparation for the testimony. The better approach, then, lies in a system that encourages thorough, ethically appropriate preparation of the victim-witnesses about the evidence that they are called upon to give.[44]

Professional Ethics and Witness Preparation

38. To recognize the place of proper witness preparation in a manner that squarely engages the testimony to be given in court is not to ignore the risk of discreditable conduct of witness 'coaching'. As almost uniformly recognized in legal literature on witness preparation, the risk is ever present.[45] In popular arts, it is dramatized in Otto Preminger's classic movie *The Anatomy of a Murder* (1959). The dramatization is realistic enough, considering that the movie was based on the novel of the same name published in 1958 by a former district attorney, John D Voelker, under the pen name of Robert Traver. He later served as justice of the Michigan Supreme Court.[46]

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[42] See Stern, *supra*, pp 15, 79 and 96. See also Ellison, *supra*, 30—31.
[43] See Stern, *supra*, pp 81—83 and 97. See also Sara Payne (Victim's Champion), 'Rape: The Victim Experience Review' [Home Office, November 2009] p 22.
[44] See generally Louise Ellison, 'Witness preparation and the prosecution of rape' (2007) 27 *Legal Studies* 171.
[45] See, for instance, Finlay, Cromwell and Iatrou, *supra*, chapter 9 generally. See also Applegate, *supra*, generally.
[46] In the relevant scene, in the movie version, the defence lawyer, Paul Biegler, played by James Stewart, delivers 'the Lecture' to his client, Frederic Manion, a lieutenant in the army, as part of 'a few questions and answers that might be of some help in [the client's] defence.' Manion is seen labouring under the impression that an 'unwritten law' affords him a defence in his murder of the victim whom he claims had raped his wife. The Biegler disabuses his mind of the notion of any such 'unwritten law'. The discreditable 'lecture' is played out in the following exchange between lawyer and client:

39. But the risk of such professional misconduct has not led the ad hoc Tribunals and the legal systems of America and Canada to reject proper and ethical witness preparation as it is supposed to be practised in those jurisdictions. Their retention of the practice presumes a realisation that its overall benefits to the administration of justice outweigh the risks of unethical conduct by lawyers.

40. I must recognise here an oft-heard concern about slippery slope. As one commentator put it: '[E]everyone knows that it is wrong to ask a witness to lie. What is not known is how far a lawyer can properly push the witness short of that.'[47] The chief fallacy of that concern is that it is at the same time both unduly patronising of

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Biegler: ... Now, Lieutenant, there are four ways I can defend murder. No 1: It wasn't murder. It was suicidal or accidental. No 2: You didn't do it. No 3: You were legally justified—like the protection of your home or self-defence. No 4: The killing was excusable.
Manion: Where do I fit into this rosy picture?
Biegler: Well I'll tell you where you don't fit in. You don't fit in any of the first three.
Manion: Why? Why wouldn't I be legally justified in killing a man who raped my wife?
Biegler: Time .... Now if you'd have caught him in the act, the shooting might have been justified. But you didn't catch him in the act. And you had time to bring in the police and you didn't do that either. You are guilty of murder—premeditated and with vengeance. That's first degree murder in any court of law.
Manion: Are you telling me to plead guilty?
Biegler: When I advise you to cop out, you'll know.
Manion: Cop out?
Biegler: That's plead guilty and ask for mercy.
Manion: What—if you're not telling me to cop out, what are you telling me to do?
Biegler: I'm not telling you to do anything. I just want you to understand all the letter of the law.
Manion: Go on.
Biegler: Go on, with what?
Manion: Whatever it is you're getting at.
Biegler: You know, you're very bright, Lieutenant. Now, let's see how really bright you can be.
Manion: Well, I'm working at it.
Biegler: Alright. Now, because your wife was raped you'll have a favourable atmosphere in the court room. The sympathy will be with you if all facts are true. What you need is a legal peg so that the jury can hang up their sympathy on your behalf. You follow me?
Manion: Yes, Umm.
Biegler: What's your legal excuse, Lieutenant? What's your legal excuse for killing Barney Quill?
Manion: Not justification huh? [Pondering].
Biegler: Not justification.
Manion: Excuse, just excuse? [Pondering] Well—what excuses are there?
Biegler: How should I know? You're the one that plugged Quill.
Manion: Well, I must have been mad.
Biegler: How's that?
Manion: I said I must have been mad.
Biegler: No, bad temper is no excuse.
Manion: Well, I mean, er, I must have been crazy. Am I getting warmer? Am I getting warmer?
Biegler: Well I'll tell you that after I talk to your wife. In the meantime see if you can remember just how crazy you were. [Ends the interview.]

[47] Charles Silver, 'Preliminary Thoughts on the Economics of Witness Preparation' (1999) 30 *Texas Tech Law Review*1383 at 1383.

the ethical lawyer and unduly forgiving of the unethical one. The demarcation line for the ethical conduct is drawn around perjury. The line shines brightly enough for any lawyer to know, as a matter of professional ethics, not to nudge any witness in its direction. There is, therefore, no such thing as '*properly* push' the witness close enough but 'short of that'. To 'push' a witness any distance in its direction is a push too far, for that is the essence of an oath or solemn declaration to tell 'the whole truth'. In its very important Opinion No 79, dealing specifically with the ethical limits of witness preparation, the Ethics Committee of the Bar of the District of Columbia, correctly observed as follows: 'It is not ... a matter of undue difficulty for a reasonably competent and conscientious lawyer to discern the line of impermissibility, where truth shades into untruth, and to refrain from crossing it.'[48]

41. That every lawyer knows when they reach the line of perjury is usefully illustrated in the novel version of *Anatomy of a Murder*. In the course of the initial interview between Mr Biegler, the lawyer, and his prospective client, Lt Manion, Biegler reaches a point in a series of questions and answers in which Manion reveals that approximately one hour had passed between his alleged discovery that Barney Quill had raped Manion's wife and Manion's shooting and killing Quill. At which point, Biegler's aside proceeds as follows: 'I had reached a point where a few wrong answers to a few right questions would leave me with a client—if I took his case—whose cause was legally defenseless. Either I stopped now and begged off and let some other lawyer worry over it or I asked him the few fatal questions and let him hang himself. Or else, like any smart lawyer, I went into the Lecture.'[49] And, 'the Lecture' is described in another aside as follows: 'The Lecture is an ancient device that lawyers use to coach their clients so that the client won't quite know he has been coached and his lawyer can still preserve the face-saving illusion that he hasn't done any coaching. For coaching clients, like robbing them, is not only frowned upon, it is downright unethical and bad, very bad. Hence the Lecture, an artful device as old as the law itself, and one used constantly by some of the nicest and most ethical lawyers in the land. "Who, me? I didn't tell him what to say," the lawyer can later comfort himself. "I merely explained the law, see." It is good practice to scowl and shrug here and add virtuously: "That's my duty, isn't it?"'[50]

42. The trouble with the foregoing illustration is not that Biegler is unaware that he crosses the line of subornation of perjury as he decides to deliver 'the Lecture'. But,

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[48] The District of Columbia Bar, Legal Ethics Committee, 'Opinion No 79' of 18 December 1979, reprinted in District of Columbia Bar, *Code of Professional Responsibility and Opinions of the District of Columbia Bar Legal Ethics Committee* (1991) 138 at p 139.
[49] Robert Traver (a pseudonym), *Anatomy of a Murder* [New York: St Martin's, 1958] p 32.
[50] *Ibid*, p 35.

what is ethically questionable about his decision to deliver 'the Lecture', when he does, is his motive. Indeed, a lawyer owes his or her client a duty of information, including fully giving to the client accurate legal opinion relevant to the facts. Absent a corrupting motive, the correctness of the timing of the rendering of such opinion is dictated more by questions of competence and efficiency. But motive will corrupt that duty if the aim is to create an alternate forensic reality, to be conveyed to a court of law, than what is originally suggested to the lawyer by the initial information clearly provided by a client fully in possession of his or her own wits.

43. The better approach lies then in stressing what would constitute unethical conduct of witness preparation, and in constantly discouraging lawyers from engaging in it. It does not lie in proscribing thorough witness preparation as to the substance of the testimony that he or she will give.

44. It should perhaps be said, at this juncture, that when witness coaching occurs, it is the lawyer that is entirely responsible for it as a matter of fact. A witness does not 'coach' himself. It thus makes the conduct something entirely within the normative regulation—and the resulting disciplinary mechanisms—of the legal profession. And there is much in the administration of justice that depends on such regulation, without throwing the baby out with the bath water. In the result, the administration of justice necessarily relies on the code of integrity of lawyers for much that is done in the courtroom; mindful that any lawyer against whom there is credible reason to suspect a violation risks much by way of unsavoury reputation and disciplinary action. As the Supreme Court of North Carolina rightly observed in this regard: 'The sanctions of the Code of Professional Responsibility are there for the attorney who goes beyond preparing a witness to testify to that about which the witness has knowledge and instead procures false or perjured testimony.'[51]

45. Consequently, the presumption—always rebuttable in specific cases—is that lawyers will discharge their functions ethically and honourably. It is a presumption of good faith that helps the court to navigate delicate passes in the administration of justice, especially when heavy handed judicial regulation may have unintended ill-effects in other important respects. With such a constant reiteration of the ethical limits of witness preparation, it might also assist, as a practical matter, to have at least a second lawyer (who is also aware of those ethical limits) in attendance at the witness preparation session, to reduce the odds of the unethical behaviour, while preserving the benefits of witness preparation.

[51] *State v McCormick, supra*, 298 N C 788 at p 792 and 259 S E 2d 880 at p 883.

46. In Opinion No 79, the DC Bar's Ethics Committee was prompted to address questions of the ethical limitations on a lawyer's freedom to: (i) suggest the actual language in which a witness's written or oral testimony is to be presented; (ii) suggest the inclusion in a witness's testimony information that was not initially furnished to the lawyer by the witness; and (iii) prepare a witness for testimony under live examination-in-chief or cross-examination, and whether by practice questioning or otherwise.

47. As a general proposition, the Committee expressed the view that a 'single prohibitory principle' governs the answer to all three questions. It is 'simply, that a lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading. So long as this prohibition is not transgressed, a lawyer may properly suggest language as well as the substance of testimony, and may—indeed, should—do whatever is feasible to prepare his or her witness for examination.'[52] With particular regard to the first question, the Committee opined 'that the fact that particular words in which testimony, whether written or oral, is case originated with a lawyer rather than the witness whose testimony it is has no significance so long as the substance of that testimony is not, so far as the lawyer knows or ought to know, false or misleading.'[53] Regarding the second question, the Committee advised that it appeared to them that 'the governing consideration for ethical purposes is whether the substance of the testimony is something the witness can truthfully and properly testify to. If he or she is willing and (as respects his or her state of knowledge) able honestly so to testify, the fact that the inclusion of a particular point of substance was initially suggested by the lawyer rather than the witness seems to us wholly without substance.'[54] And, as regards the third question, the Committee expressed the view that 'the only touchstones are the truth and genuineness of the testimony to be given. The mere fact of a lawyer's having prepared the witness for the presentation of the testimony is simply irrelevant: indeed, a lawyer who did not prepare his or her witness for testimony, having had an opportunity to do so, would not be doing his or her professional job properly.'[55] As concerns the matter of practising the witness before testimony, the Committee was of the view that '[i]t matters not at all that the preparation of such testimony takes the form of "practice" examination or cross-examination. What does matter is that whatever the mode of witness preparation chosen, the lawyer does not engage in suppressing, distorting or falsifying the testimony that the witness will give.'[56]

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[52] The District of Columbia Bar, Legal Ethics Committee, 'Opinion No 79', *supra*, at p 138.
[53] *Ibid*, p 139.
[54] *Ibid.*
[55] *Ibid.*
[56] *Ibid*, p 140.

48. Finally, to insist upon the practice of witness preparation for its benefits in spite of its inherent risk of abuse is wholly consistent with how life works in general. Society continues to permit many activities as legitimate, notwithstanding the inherent risks of the undesirable that are associated with such activities. The usual strategy is to recognise the risks and devise measures to minimise them. So, too, should it be with witness preparation.

Practicing or Rehearsing

49. Before concluding, I must turn to a question on which a slight disagreement persists with my colleagues. I do not agree with the suggestion that 'practising'—which may also be understood as 'rehearsing'—a testimony is, as a general proposition, necessarily incompatible with the ethics and the more welcome aspects of witness preparation. I note that 'practising' or 'rehearsing' is not discouraged in Canada and US—two jurisdictions typically known to permit witness preparation. Quite the contrary, it is generally encouraged, as has already been indicated in this opinion.[57]

50. In my view, practising the testimony can be a sensible and quite practical way of not only imbuing the witness with some measure of confidence, but also to identify and possibly tease out problem spots with delivery for purposes of enhancing efficiency in court-room testimonies. The same is the case with rehearsing or practising for any other public presentation—including counsel's own opening and closing speeches. The benefits include the following: the witness is enabled with simulated experience as (s)he goes into the witness box; counsel sees where witness may have trouble with the testimony in terms of comprehension, awkwardness or emotional difficulty of the question being asked and the words employed in asking the questions; with specific regard to sexual violence cases, a witness is given an early opportunity to confront or deal with habitual personal or cultural sensitivity or resistance to public reference to body parts or the recall of events that might involve very deep invasions of personal autonomy.

51. In my opinion, the main problem with rehearsing or practising lies in the risk that it could be overdone—to the point of encouraging witnesses to memorise veritable scripts in terms of the anticipated substance of the testimony as well as the sequence of how the testimony should unfold. Even so, this is not ethically

[57] See paragraphs 22 and 26 above.

problematic, if no perjury is involved. The risk rather is that such memorisation may back-fire, where an astute cross-examiner or a question from the bench takes the witness off his or her script. The risk is then one of damage to the witness and the host counsel. I am even able to accept that such memorisation exercises may, in this sense, pose a problem of efficiency in the administration of justice. But it does not pose a risk of general propriety or ethics.

52. Perhaps, it helps to define what is meant by 'practising'. I regret that my colleagues have not defined 'practising' in the entire manner that they prohibit it. In this connection, I feel it important to say that 'rehearsing' or 'practising' testimony is not the same thing as 'coaching'. I do not agree at all that they be banded together and tarred with the same prohibitory brush. 'Coaching', as indicated earlier,[58] involves counsel's heavier footprint in the testimony, in terms of influencing a witness not only as to how to say something, but also as to the thing to say in fact. I am firmly against 'coaching'. 'Practising' or 'rehearsing', on the other hand, may cover a range of helpful conducts—none of which involves the host-counsel in what a witness says or how the witness says it. Consider, for instance, a situation in which counsel has specific questions to ask a witness in an examination-in-chief. Counsel meets the witness during one or two preparatory sessions, and does one of two things or a combination of them, as the situation warrants. In the first scenario, perhaps involving a simple testimony covering a limited number of questions, counsel specifically asks those few questions straight through. In doing that, counsel never suggests—by speech or hint—the answer that the witness should give to any of the questions or that the witness has given the right or wrong answer. The point of the exercise here would be that the questions 'practised' are no longer strange or new to the witness, or that counsel knows whether or not the witness has any difficulty in handling the terminology employed by counsel (including any concerns relating to explicit reference to body parts or the triggering of post-traumatic stresses) in asking the questions. And, in the second scenario, perhaps involving a more complex testimony, counsel uses the occasion of those questions and answers not only to accomplish the same objectives indicated in the first scenario, but also to clarify the witness's testimony and deal with potential confusion and inconsistencies. [As in: 'The answer you gave to an earlier question is the same as the answer you give now to a different question. Are we talking about the same thing?' and vice versa]. And, as with the first scenario, all the while counsel never suggests, by speech or hint, the answer that the witness should give to any of the questions or that the witness has given the right or wrong answer.

[58] See paragraph 27 above.

53. In judicial decisions, it is important for clear and rational thought to be brought to bear in expressing what is wrong with any of these. Mere visceral reaction that they are bad or a negative feeling against the word 'practising' is not good enough; especially when such a questions run-through exercise is done only once or never repeated in any manner that permits memorisation. I do not agree that such type of 'practising' or 'rehearsing' should at all be prohibited.

Conclusion

54. Perhaps, the usefulness and modalities of witness preparation is best summed up in the following words of Judge Susan Steingass in a very thoughtful piece she published in the *ABA Journal* in 1985:

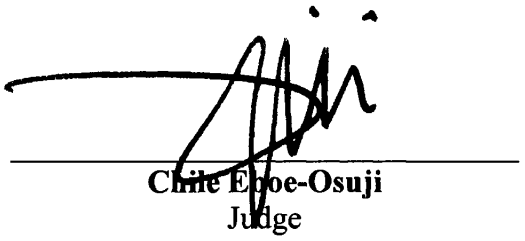
> Like the rest of us, [witnesses] lose memory with time, become emotionally involved with what happened and recount events accordingly. They have trouble organizing their thoughts into relevant and coherent categories and have difficulty verbalising their recollections. If counsel puts a witness on the stand without adequate preparation, the witness will suffer from these infirmities.
>
> Witness preparation is not to be confused with giving the witness a script of questions and answers. This can almost always be spotted by the jury and the judge for what it is: the lawyer's testimony. It leaves the impression that the story is cooked up. The testimony comes off stilted, and witnesses who rely on this heavy-handed preparation lack the flexibility to roll with the give and take of cross-examination. That comes only to witnesses who have been prepared to deal, in their own words, with the facts and their legal ramifications.
>
> Counsel should never forget how nervous all but the most seasoned courtroom hands are at the prospect of appearing in a trial. Anything counsel can do to alleviate that nervousness is productive, beginning with thorough preparation for questions and answers on direct examination and for as clever and diabolical a cross-examination as opposing counsel can manage. Even prepared witnesses can be shaky on the stand. It might help to take them to the courtroom before the actual event and ask questions from behind the counsel table so that they have the experience of having to answer at a distance from the comfort of counsel.[59]

55. Judge Steingass' observations highlight all the essential points that recommend the practice of witness preparation. The only qualifier necessary will be to insist that what counsel do in the manner of witness preparation must remain within bounds of the ethics that guide the legal profession. But the unusual presumption that counsel will act unethically in matters wholly within their control is a strange and highly unsatisfactory basis to reject the superior value of something that so clearly assists the search for the truth.

[59] Susan Steingass, 'A Judge's 10 Tips on Courtroom Success' (1985) 71 *American Bar Association Journal* 68 at p 70.

56. In light of the foregoing, while agree with the outcome of the Chamber's decision and with much of the Chamber's reasoning, I find the Majority's decision on witness preparation to be much narrower than it needs to be.

Dated this 2 January 2013, at The Hague



Chile Eboe-Osuji
Judge