Chapter 31  “Witness proofing” before the ICC: Neither legally admissible nor necessary

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1. The object of the contention

In their jurisprudence, Pre-Trial Chamber (PTC) I and Trial Chamber (TC) I distinguish between “familiarisation” and “proofing” of witnesses.¹ The distinction goes back to a recent English Court of Appeal decision where it was described as “dramatic”.² The essence of familiarisation is to make the witness generally familiar with the court’s infrastructure and procedures in order to prevent him or her being totally taken by surprise or even re-victimised. Thus, the underlying idea of familiarisation is generally to prepare the witness to enable her to give oral evidence at trial in a satisfactory manner.³ For this purpose the Court’s Victims and Witnesses Unit (“VWU”) has been set up and its functions can be summarized, based on Article. 57 (3) (c), 68 (1) ICC Statute, Rules 16 (2), 17 (2) (b) and 87, 88 of the Rules of Procedure and Evidence (“RPE”), as follows:⁴

– Assisting witnesses when they are called to testify before the Court;
– Taking gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings;
– Informing witnesses of their rights under the Statute and the Rules;

¹ Pre-Trial Chamber I, Prosecutor v. Thomas Lubanga Dyilo, Decision on the practices of witness familiarisation and witness proofing, 8 November 2006, ICC-01/04-01/06, para. 18 et seq., 28 et seq.; Trial Chamber I, Prosecutor v. Thomas Lubanga Dyilo, Decision regarding the practices used to prepare and familiarise witnesses for giving testimony at trial, 30 November 2007, ICC-01-04-01/06, para. 28, 53, 57.
² R. v. Momodou, [2005] EWCA Crim 177 (England & Wales), para. 61; see more detailed infra fn. 54 et seq. and main text. Pre-Trial Chamber I, supra note 1, refers to this decision in para. 19, 39.
³ Pre-Trial Chamber I, supra note 1, para. 27.
⁴ Cf. Pre-Trial Chamber I, supra note 1, para. 22; conc. Trial Chamber I, supra note 1, para. 29.

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– Advising witnesses where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony;
– Assisting witnesses in obtaining medical, psychological and other appropriate assistance; and
– Providing witnesses with adequate protective and security measures and formulating long-term and short-term plans for their protection.

After initial confusion\(^5\) it is now clear that there is no disagreement between OTP and Chambers (PTC I and TC I) as to this practice. With its recent submission the OTP, reacting to the PTC I’s decision of 8 November 2006, explicitly concurred with the PTC’s characterisation of familiarisation and the respective competence of the VWU.\(^6\) In the result, one can say that familiarisation is not only allowed, but even required to a certain extent to comply with the Statute’s obligations with regard to the protection of victims.\(^7\)

As to the definition of proofing, there also seems to be agreement now. The OTP – following the case law of the International Criminal Tribunal for the Former Yugoslavia ("ICTY")\(^8\) – understands witness proofing as the “practice whereby a meeting is held between a party to the proceedings and a witness, before the witness is due to testify in Court, the purpose of which is to re-examine the witness’s evidence to enable more accurate, complete and efficient testimony.”\(^9\) More generally it is said that witness proofing serves to “discuss issues related to that witness’s anticipated evidence.”\(^10\) With this definition the OTP distinguishes proofing from familiarisation in that the former fundamentally focuses on the concrete evidence to be presented at trial. In fact, the OTP abandons its former, much broader definition whereby it did

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\(^5\) See for the initial submission of the OTP the summary in Pre-Trial Chamber I, *supra* note 1, para. 11 et seq.

\(^6\) Prosecution submissions regarding the subjects that require early determination: procedures to be adopted for instructing expert witnesses, witness familiarization and witness proofing, ICC-01/04-01/06-952, 12 September 2007, para. 14.

\(^7\) See Pre-Trial Chamber I, *supra* note 1, para. 20: “there are several provisions ... in order to assist the witness ... so as to prevent the witness from finding himself or herself in a disadvantageous position, or from being taken by surprise as a result of his or her ignorance ...”; and the Trial Chamber allows "the Victims and Witnesses Unit to work in consultation with the party calling the witness, in order to undertake the practice of witness familiarisation in the most appropriate way". See Trial Chamber I, *supra* note 1, para. 34. See also the recent decision of Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, Decision regarding the Protocol on the practices to be used to prepare witnesses for trial, 23 May 2008, ICC-01/04-01/06-1351, para. 38 et seq. where the Chamber concretely determines the scope of familiarisation, in particular whether the witness may receive a copy of his/her earlier statement made to an investigator.

\(^8\) See the definition in *Prosecutor v. Haradinaj* et al., Decision on Defence requests for audio-recording of prosecution witness proofing sessions, 23 May 2007 (IT-04-84-T), para. 8 which, however, includes preparing and familiarizing the witness.

\(^9\) See Prosecution submissions, *supra* note 6, para. 15.

\(^10\) See Prosecution submissions, *supra* note 6, para. 9.