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Article

Witness Preparation at the International Criminal Court

Towards a Legal Obligation to Protect Witnesses under Article 68 of the Rome Statute

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ABSTRACT

The case law on witness preparation at the International Criminal Court (ICC) does not provide a coherent answer to whether it is admissible. Similarly, scholars have examined this practice from different perspectives, but they have not come to a consensus, and no academic study focuses on the link between witness preparation and witnesses' well-being. This article analyses ICC case law on this issue and identifies three different approaches to witness preparation. It suggests that witness preparation corresponds to a legal obligation under Article 68 of the Rome Statute to protect witnesses' well-being. Additionally, Article 68 imposes an obligation to ensure witnesses are adequately prepared upon the entire ICC and not only its judges. This article recommends that the ICC should hold a broad consultation on witness preparation with different actors. Finally, given that the practice has the potential to be abused, this article provides some suggestions on how to balance witness preparation with the right to a fair trial and witnesses' rights.

1. INTRODUCTION

The first witness to appear before the International Criminal Court (ICC) was a former child soldier, abducted by the Congolese militia when he was 11.[1] On 9 February 2009, he started his testimony before the ICC judges, facing his former commander, Lubanga, who was standing as the accused on trial. Once the witness started his testimony, he began to fear that he was going to be prosecuted for his past actions and retracted his statements.[2] Only after that did ICC personnel explain to him how a trial works, and the judges decided to implement measures to protect the witness's well-being, such as giving him a pseudonym

[1] Transcript, *Lubanga* (ICC-01/04-01/06-T-122-Red-ENG), Trial Chamber I, 9 February 2009, at 55–56.
[2] *Ibid*., at 55–56.

('Dieumerci'),[3] placing a curtain to obscure him from Lubanga's view,[4] and ensuring his testimony was not interrupted.[5]

The story of Dieumerci illustrates how detrimental the court environment can be for unprepared witnesses and provides the perfect starting point for discussing witness preparation. The ICC Witness Preparation Protocol defines 'witness preparation' as a series of meetings between the witness and the calling party shortly before that witness gives testimony, with the double aims of helping to ensure that the witness gives relevant, accurate and structured testimony and of promoting their well-being.[6] Witness 'preparation' is a more invasive process than 'familiarization', because witnesses are allowed to refresh their memory of their evidence with the calling party. Conversely, during familiarization, witnesses only meet the Victims and Witnesses Unit (VWU), which explains to them the layout of the court and the role of the different parties and organizes a 'courtesy meeting' with the calling party to allow witnesses to become acquainted with them.[7] Witness familiarization is not controversial and is generally allowed by the ICC for all witnesses. In contrast, this article suggests that witness preparation is not only necessary, but also in fact a legal obligation for the ICC, because Article 68 of the Rome Statute imposes the protection of witnesses' well-being upon the ICC as a legal obligation. Given that witness preparation contributes to witnesses' well-being, it should be permitted in all cases before the ICC. In addition to being an obligation under the ICC legal framework, this procedure is also necessary because it helps to reduce witnesses' anxiety in giving evidence and being cross-examined in an unknown environment. It also has the potential to increase witnesses' confidence in the ICC, which is in itself vitally important, because the latter cannot compel witnesses to testify. If witnesses feel that their security, their well-being and their rights have been adequately protected, they will come forward more readily, which might indirectly increase the chances of successful prosecution. Additionally, witness preparation can also increase the efficiency and fairness of the trial.

This article advances the debate on the admissibility, and in fact the necessity, of witness preparation from two original angles. Not only does it approach this issue from the perspective of witnesses' well-being and their right to be protected under Article 68, but it also contends that witness preparation corresponds to a specific obligation of the ICC, which must be implemented by its different organs. Article 34 of the Rome Statute clarifies that the ICC is composed of the Presidency; an Appeals Division, a Trial Division and a Pre-Trial Division; the Office of the Prosecutor (OTP) and the Registry. However, not all ICC organs play a role as far as witness preparation is concerned. This responsibility is shared only among the Chambers, which decide on the admissibility of the procedure, and the OTP, which carries out the actual preparation. In addition, for defence witnesses, this procedure requires the participation of the calling Defence team.

Previous research on this topic raised awareness of the need for witness preparation within the domestic and international criminal law discourse.[8] The *Leiden Journal of*

[3] R. Irwin, 'Lubanga Trial, Week 3: Child Soldier Tells of Killing', *International Justice Monitor*, 13 February 2009, available online at https://www.ijmonitor.org/2009/02/lubanga-trial-week-3-child-soldier-tells-of-killing/ (visited 7 May 2023).

[4] Transcript, *supra* note, 10 February 2009, at 2.

[5] *Ibid*., at 3.

[6] ICC, Witness Preparation Protocol (ICC-01/12-01/18-666-Anx), 17 March 2020, § 1.

[7] *Ibid.*

[8] B. Allison, 'Witness Preparation from the Criminal Defence Perspective', 30 *Texas Technology Law Review* (1999) 1333–1342, at 1333; S.V. Vasiliev, 'From Liberal Extremity to Safe Mainstream: The Comparative Controversies of Witness Preparation in the United States', 9 *International Commentary on Evidence* (2011) 1–67, at 1; G. Boas, *The Milosevic Trial: Lessons from Conduct of Complex International Criminal Proceedings* (Cambridge University Press, 2007), at 9.

International Law tackled it in 2008. On behalf of the editorial board, van Sliedregt welcomed a debate on this underexplored topic following the rejection of this procedure by Trial Chamber (TC) I in *Lubanga*.[9] The controversy had, on one side, Ruben Karemaker, Don Taylor and Thomas Wayde Pittman, legal officers in the Chambers Legal Support Section of the International Criminal Tribunal for the former Yugoslavia (ICTY), and, on the other, Kai Ambos, Professor at the University of Göttingen. The former argued that the ICC should reconsider its refusal to adopt witness preparation because it is not explicitly prohibited by the Rome Statute and it enhances the efficiency, integrity and legitimacy of the truth-seeking process.[10] Conversely, Ambos argued that witness preparation would not align well with the mixed adversarial — inquisitorial procedures stipulated by the Rome Statute.[11] In their reply to Ambos's article, Karemaker, Taylor and Pittman contrasted the ICC legal framework against the ad hoc tribunals' procedural regime and argued that the ICC judges are trained to manage any risk associated with witness preparation.[12]

Both sides linked witness preparation to the tension between adversarial and inquisitorial legal systems and considered the problem from three different perspectives: the administration of justice, judges' expertise and the defendants' right to a fair trial.[13] No attention was given to witnesses' well-being. Similarly, subsequent scholarship investigated ICC practice in terms of the procedural rules of its predecessors and sided with one position or another.[14] In 2020, the Independent Expert Review (IER) of the ICC and the Rome Statute System followed a similar approach in analysing witness preparation from the angle of the efficiency of the judicial process and the right to a fair trial. It claimed that whenever witness preparation is used in pre-trial proceedings, those proceedings become unduly long.[15] However, its final report concluded that this matter does not require a common approach, but it can be left to the discretion of each Chamber or Presiding Judge.[16] Finally, it suggested that it would be possible to introduce a new Regulation of the Court if an absolute majority of judges wished to do so.[17] Once again, the IER looked only at the judges' involvement in the matter and disregarded the role of other actors. Additionally, it seems that ICC judges could not agree on this procedure since witness preparation is left out of the new Chambers

[9] E. van Sliedregt, 'Witness Proofing in International Criminal Law: Introduction to a Debate', 21 *Leiden Journal of International Law* (*LJIL*) (2008) 681, at 681.

[10] R. Karemaker, B.D. Taylor, and T.W. Pittman, 'Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence', 21 *LJIL* (2008) 683–698; K. Ambos, '"Witness Proofing" before the International Criminal Court: A Reply to Karemaker, Taylor, and Pittman', 21 *LJIL* (2008) 911–916.

[11] Ambos, *supra* note 10. On this point, see also, K. Ambos, '"Witness Proofing" ante la Corte Penal Internacional: Ni Legalmente Admissible, ni Necesario', in K. Ambos and M. De Hoyos (eds), *Cuestiones Esenciales en La Jurisprudencia de la Corte Penal International* (Editorial Comares, 2008), at 1; K. Ambos, '"Witness Proofing" before the ICC: Neither Legally Admissible nor Necessary', in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill, 2009) 599–614.

[12] R. Karemaker, B.D. Taylor, and T.W. Pittman, 'Witness Proofing in International Criminal Tribunals: Response to Ambos', 21 *LJIL* (2008), 917–923.

[13] In favour, see Karemaker, Taylor, and Pittman, *supra* note 10; Against see Ambos, *supra* note 10.

[14] S. Vasiliev, 'Proofing the Ban on "Witness Proofing": Did the ICC Get it Right?' 20 *Criminal Law Forum* (2009) 193–261; W. Jordash, 'The Practice of "Witness Proofing" in International Criminal Tribunals: Why the International Criminal Court should Prohibit the Practice', 22 *LJIL* (2009) 501–523; S. Finnin, 'From Lubanga to Ruto: Witness Proofing under the Applicable Law of the ICC', in T. Mariniello (ed.), *The International Criminal Court in Search of its Purpose and Identity* (Routledge, 2016) 242–262; C. Schön, 'Telling Their Stories In Their Own Words: Witness Familiarisation at The International Criminal Court', 81 *Revue Internationale de Droit Pénal* (2010) 189–208; B. Schmitt, 'Legal Diversity at the International Criminal Court', 19 *Journal of International Criminal Justice* (*JICJ*) (2021) 485–510.

[15] ICC, *Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report*, 2020, available online at asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf (visited 19 April 2023), at § 483.

[16] *Ibid.*, at § 551.

[17] *Ibid.*

Practice Manual, which is the product of collective discussions on the recommendations made in the Report.[18]

In 2015, Ngane adopted a different approach, arguing that witness preparation enhances the protection and well-being of witnesses, especially the most vulnerable.[19] She concluded that it corresponds to a moral obligation of the ICC.[20] Similarly, Jackson and Brunger clarified that witness preparation should be based on 'principled pragmatism' and the guiding principle of witnesses' well-being.[21] This article builds on this and argues that protecting witnesses' well-being through witness preparation is not just a guiding principle or moral obligation for the ICC, but is in fact a legal obligation under Article 68 of the Rome Statute.

In arguing that, the first part of this article (Sections 2–5) reviews the entire ICC case law on this issue. This article maps all 13 ICC cases in which witness preparation has been discussed, not simply from a chronological perspective, as has previously been done.[22] Using content analysis,[23] it identifies three distinct approaches, based on Articles 21, 64 and 68. It critically engages with the reasoning of the Chambers in the use of Articles 21 and 64 of the Rome Statute, on the law applicable to the ICC and the functions and powers of the TC.

Exploring the reasoning of the Chambers helps to deconstruct the judges' divergent approaches to witness preparation and builds new foundations for the obligations laid down in Article 68(1) of the Rome Statute (Section 6). This analysis is grounded on the literal interpretation of Article 68(1) of the Rome Statute's *travaux préparatoires* and the teleological interpretation of the object and purpose of the treaty.[24] Additionally, it clarifies that Article 68(1) identifies the right to a fair trial as a limit to the admissibility of witness preparation.

Engaging with the scholarly debate on whether and why witness preparation infringes the right to a fair trial, the third part of this article (Section 7) refutes this theory and focuses on how to improve the current practice of witness preparation with regard to the risk of evidence manipulation and threats to a fair trial. It acknowledges the utility of a Preparation Protocol, tailored training and the need for an ethical code for the parties conducting witness preparation. While the role of sanctions is not far-reaching in present practice, the ICC should include witness preparation in the Regulation of the Court to give a clear direction to all actors involved. Additionally, given that cross-examination and video recording might not be deemed a sufficient safeguard, it would be useful to automatically provide the recording of the sessions to the counterpart or to allow both parties or members of the Registry to attend preparation meetings. Finally, witness preparation has been considered a party-driven process, whose admissibility is decided by the Chamber concerned. However, more generally, witness preparation merits a wider discussion among the different actors, including the Registry, investigators, the International Bar Association, members of the victims' community and, ultimately, representatives of both victims and witnesses. Such a broad debate has yet to be seen, and this article concludes that it is needed.

[18] ICC, *Chambers Practice Manual*, International Criminal Court, 7th edn. 2023, available online at https://www.icc-cpi.int/sites/default/files/2023-07/230707-chambers-manual-eng.pdf (visited 4 October 2024).

[19] S.N. Ngane, *The Position of Witnesses Before the International Criminal Court* (Brill, 2015), 255–257.

[20] *Ibid*.

[21] J.D. Jackson and Y.M. Brunger, 'Witness Preparation in the ICC: An Opportunity for Principled Pragmatism', 13 *JICJ* (2015) 601–624, at 601–602.

[22] Jordash, *supra* note 14; Finnin, *supra* note 14.

[23] M.A. Hall and R.F. Wright, 'Systematic Content Analysis of Judicial Opinions', 96 *California Law Review* (2008) 63–122, at 81.

[24] Arts 31–33, Vienna Convention on the Law of Treaties, 23 May 1969 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969).

2. WITNESS PREPARATION AT THE ICC

In *Lubanga*,[25] *Katanga*[26] and *Bemba*,[27] the judges vetoed witness preparation, while TC V adopted a more permissive approach for both Kenyan cases.[28] This more permissive approach was then followed in *Ntaganda*,[29] but reversed again in *Gbagbo and Blé Goudé*,[30] *Bemba et al.*[31] and in *Ongwen*.[32] Similarly, in 2020, TC X agreed to allow witness preparation in the *Al Hassan* case,[33] while TC V adopted a more restrictive approach in *Yekatom and Ngaïssona*.[34] Finally, TC VI and TC I permitted witness preparation, respectively, in *Said*[35] and *Abd-Al-Rahman*.[36] The content analysis of the relevant decisions of those cases undertaken by the author identified that the ICC judges have used three different Articles in the Rome Statute to determine the admissibility of witness preparation (Articles 21, 64 and 68), which fall into three different approaches. Table 1 presents a synopsis of the resulting three different approaches, which are explained in the following sections.

3. APPROACH 1: ARTICLE 21 AND THE APPLICABLE LAW

The first time the ICC focused on the admissibility of witness preparation was in the *Lubanga* case when the OTP invited some witnesses to attend a few preparation sessions to refresh their memory before their testimony.[37] Considering that this practice was not envisaged in the ICC legal framework, Pre-Trial Chamber (PTC) I assessed whether Article 21 of the Rome Statute provided legal coverage for it. The ICC had opted for a more civil law approach, which means that judges should verify whether the implementation of any procedure in any given case is supported by legal provisions.[38] Article 21 offered the best starting point for this interpretative exercise because it ranks the sources of international criminal law. It establishes that the highest place in the hierarchy of applicable law is held by the Rome Statute, Elements of Crimes and it is the Rules of Procedure and Evidence (RPE), followed by all the other sources listed in sections (b) (applicable treaties and the principles

[25] Decision on the Practices of Witness Familiarisation and Witness Proofing, *Lubanga* (ICC-01/04-01/06-679), Pre-Trial Chamber I, 8 November 2006 and Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, *Lubanga* (ICC-01/04-01/06-1049), Trial Chamber I, 30 November 2007.

[26] Decision on a number of procedural issues raised by the Registry, *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1134), Trial Chamber II, 14 May 2009, and Decision on the Modalities of Victim Participation at trial, *Katanga and Ngudjolo Chui* (ICC-01/04-01/07-1788-tENG), Trial Chamber II, 22 January 2010.

[27] Decision on the Unified Protocol on the practices used to prepare familiarize witnesses for giving testimony at trial, *Bemba* (ICC-01/05-01/08-1016), Trial Chamber III, 18 November 2010.

[28] Victims and Witnesses Unit's Unified Protocol on the practices used to prepare and familiarize witnesses for giving testimony, *Ruto and Sang* (ICC-01/09-02/11-259), Pre-Trial Chamber II, 12 August 2011 and Victims and Witnesses Unit's Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony, *Muthaura, Kenyatta and Ali* (ICC-01/09-02/11-260), Pre-Trial Chamber II, 22 August 2011.

[29] Decision on witness preparation, *Ntaganda* (ICC- 01/04-02/06-652), Trial Chamber VI, 16 June 2015.

[30] Victims and Witnesses Unit's Unified Protocol on the practices used to prepare and familiarize witnesses for giving testimony and Protocol on the vulnerability assessment and support procedure used to facilitate the testimony of vulnerable witnesses, *Gbagbo* (ICC-02/11-01/11-93), Pre-Trial Chamber I, 16 April 2012.

[31] Decision on Witness Preparation and Familiarisation, *Bemba et al.* (ICC-01/05-01/1), Trial Chamber VII, 15 September 2015.

[32] Decision on Protocols to be Adopted at Trial, *Ongwen* (ICC-02/04-01/15-504), Trial Chamber IX, 22 July 2016.

[33] Decision on witness preparation and familiarisation, *Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (ICC-01/12-01/18-666), Trial Chamber X, 17 March 2020.

[34] Decision on the Prosecution Request for Leave to Appeal the Decision on Protocols at Trial, *Yekatom and Ngaïssona* (ICC-01/14-01/18-726), Trial Chamber V, 11 November 2020.

[35] Directions on the Conduct of Proceedings, *Mahamat Said Abdel Kani* (ICC-01/14-01/21-251), Trial Chamber VI, 9 March 2022.

[36] Directions on the conduct of proceedings, *Ali Muhammad Ali Abd-Al-Rahman ('Ali Kushayb')* (ICC-02/05-01/20-478), Trial Chamber I, 4 October 2021.

[37] *Lubanga*, *supra* note 25, §§ 37–40.

[38] G. Sluiter, 'Trends in the Development of a Unified Law of International Criminal Procedure', in C. Stahn and L. van den Herik (eds), *Future Perspectives on International Criminal Justice* (T.M.C. Asser Press, 2009) 585–599.

Table 1. Summary of the 12 cases in which witness preparation was discussed

Case	Date	Chamber	Witness preparation called for/allowed				Legal basis
			Prosecution	Defence	Final decision	Dissenting	
Lubanga	8 November 2006 and 30 November 2007	Pre-Trial Chamber I and Trial Chamber I	Yes	No	**No**	N/A	Article 21
Katanga	22 January 2010	Trial Chamber II	No	No	**No**	N/A	None
Bemba	18 November 2010	Trial Chamber III	Yes	Yes—withdrawn	**No**	Yes	None Article 64 (dissenting)
Ruto and Sang	12 August 2011	Trial Chamber V	Yes	No	**Yes**	Yes	Article 64 Article 68(1) (dissenting)
Muthaura, Kenyatta and Ali	22 August 2011	Trial Chamber V	Yes	No	**Yes**	Yes	Article 64 Article 68(1) (dissenting)
Ntaganda	16 June 2015	Trial Chamber VI	Yes	Yes	**Yes**	N/A	Article 64
Bemba et al.	15 September 2015	Trial Chamber VII	Yes	No	**No**	N/A	Article 64
Gbagbo and Blé Goudé	02 December 2015	Trial Chamber I	Yes	Yes	**No**	Yes	Article 64
Ongwen	22 July 2016	Trial Chamber IX	Yes	No	**No**	N/A	Article 64
Al Hassan	17 March 2020	Trial Chamber X	Yes	No	**Yes**	N/A	Article 64 Article 68(1)
Yekatom and Ngaïssona	8 October 2020	Trial Chamber V	Yes	No	**No**	N/A	Article 64
Abd-Al-Rahman	4 October 2021	Trial Chamber I			**Yes**	N/A	None
Said	9 March 2022	Trial Chamber VI	Yes	No	**Yes**	N/A	None

and rules of international law) and (c) of Article 21 (general principles of law derived from national laws of legal systems of the world).

First, PTC I observed that the provisions of the ICC Statute, RPE, and Elements of Crimes do not cover witness preparation. Secondly, it analysed the OTP's argument that witness preparation is 'widely accepted practice in international criminal law' under Article 21(1)(b).[39] The OTP supported its point of view with references to the ICTY *Jelisić*[40] and *Limaj* cases[41] and the Special Court for Sierra Leone's *Sesay* case.[42] The ICC judges rejected the OTP's position because the OTP did not refer to any of the International Criminal Tribunal for Rwanda's (ICTR) decisions, and they noted that the *Sesay* and *Jelisić* cases did not make any reference to witness preparation. The *Sesay* case dealt with the exclusion of supplemental statements of prosecution witnesses on the grounds that they introduced new allegations against the accused.[43] The *Jelisić* case related to the contact between witnesses and the party calling them after the solemn undertaking and, therefore, fell outside the scope of preparation. The only relevant case was *Limaj*, where the ICTY had to decide on a defence motion requesting the cessation of the witness preparation carried out by the OTP. [44] Thus, PTC I concluded that witness familiarization was not a widely accepted practice in international criminal law.

PTC I went on to analyse whether witness preparation can be considered applicable law under Article 21(1)(c), which refers to general principles of law derived by the Court from various domestic and national legal systems. Several jurisdictions, such as Brazil, Spain, France, Belgium, Germany, Scotland, Ghana, England and Wales and Australia, consider this practice either unethical or unlawful.[45] Thus, PTC I concluded that witness preparation is not admissible under Article 21(1)(c).[46]

In its following decisions, the ICC judges continued to rely on Article 21 as a legal basis to reject witness preparation.[47] They found that the practice of engaging in some kind of question and answer session with the witness directly prior to their evidence in court is allowed in Canada and Australia[48] but not in England and Wales, where no conversation between witnesses and the calling party is permitted.[49] Two states are not enough to establish a 'widespread practice' among national legal systems under Article 21(1)(c).[50] Similarly, it would not be possible to automatically apply to the ICC the rules of procedure of the *ad hoc* tribunals under Article 21(1)(b).[51] In conclusion, TC I agreed with the findings of PTC I in prohibiting witness preparation before the ICC because 'this [practice] could lead to a distortion of the truth and may come dangerously close to constituting a rehearsal of in-court testimony'.[52]

[39] *Lubanga*, *supra* note 25, § 33.

[40] Decision on Communication between Parties and Witnesses, *Jelisić* (IT-95-10), Trial Chamber, 11 December 1998.

[41] Decision on the Defence Motion on Prosecution Practice of "Proofing Witnesses", *Limaj et al.* (IT-03-66-T), Trial Chamber II, 10 December 2004.

[42] Decision on the Defence Motion for the Exclusion of Certain Portions of Supplemental Statements of Witness TF1-117, *Sesay* (SCSL-2004-15-T), Trial-Chamber, 27 February 2006.

[43] *Lubanga*, *supra* note 25, ICC-01/04-01/06-679, § 37.

[44] *Limaj et al.*, *supra* note 41, § 2.

[45] *Lubanga*, *supra* note 25, ICC-01/04-01/06-1049, § 37.

[46] *Ibid.*, § 42.

[47] *Ibid.*, § 35.

[48] *Ibid.*, § 40. Please note that the same ICC had mentioned that Australia considers witness preparation unethical in its previous decisions (see footnote 44).

[49] *Ibid.*, § 42.

[50] *Ibid.*, § 41.

[51] *Ibid.*, § 44.

[52] *Ibid.*, § 51.

Similarly, TC II in the *Katanga* and *Ngudjolo Chui* cases and TC III in *Bemba* did not adopt witness preparation. TC II only acknowledged structural and technical differences between the ICC and the *ad hoc* tribunals, which made impossible the adoption of this procedure.[53] With regard to *Bemba*, the Defence requested authorization to contact witnesses before the beginning of the trial to prepare them for their testimony.[54] However, when the VWU filed the Unified Familiarization Protocol, a less invasive procedure by the VWU aimed at explaining to witnesses the layout of the court and the role of the different parties, the defence did not reiterate its observations.[55] Thus, the judges considered the defence's requests on witness preparation to have been withdrawn and rejected them without considering their merits.[56]

The judges had used the rigid structure of Article 21 to impose a ban on witness preparation, but the situation changed when Judge Kuniko Ozaki developed a new approach, one based on Article 64 in her partly Dissenting Opinion to the *Bemba* case.[57] As explained in the following sections, judges elaborated on her initial suggestion more fully in subsequent cases.

4. APPROACH 2: ARTICLE 64 OF THE ROME STATUTE AND THE DISCRETIONARY POWER OF THE CHAMBERS

Article 64 clarifies that the Rome Statute is not a rigid instrument: it gives judges discretion to adapt the ICC procedures to guarantee the right to a fair and expeditious trial with due regard to witnesses' and victims' necessities.

The first time an ICC judge mentioned Article 64 in relation to whether witness preparation should be permitted was in *Bemba*. As clarified in the previous section, TC III rejected witness preparation in *Bemba*.[58] However, in her partly dissenting opinion, Judge Kuniko Ozaki argued that Article 64(2) and (3)(b) might provide legal coverage for witness preparation as far as this procedure does not infringe on the accused's right to a fair trial.[59] Drawing on her experience as a judge at the ad hoc tribunals, she found that the ICC could benefit from the interpretation of Rules 89(B) of the ICTY and ICTR RPE, which granted wide discretion to the judges of both tribunals.[60] In *Karemera*, the ICTR noted that the ICTR Statute and RPE did not directly address the issue of witness preparation, but its justification was found in Rule 89(B) of the Rules, which 'confers discretion on the TC 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'.[61]

Once Judge Ozaki established the relevant legal framework, she focused on the merits of this practice, arguing that it would ameliorate the ill-structured, confused and incomplete presentation of evidence in court, have a positive impact on the OTP's obligation of

[53] *Ibid.*, § 8.

[54] *Bemba*, *supra* note 27, § 321.

[55] *Ibid.*, § 35.

[56] *Ibid.*, 34.

[57] Partly Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the Unified Protocol on the practices used to prepare and familiarize witnesses for giving testimony at trial, *Bemba* (ICC-01/05-01/08-1039), Trial Chamber III, 24 November 2010.

[58] *Bemba*, *supra* note 27.

[59] Partly Dissenting Opinion of Judge Kuniko Ozaki, *supra* note 57.

[60] Rules 89(B) of the ICTY and ICTR RPEs read that '[i]n cases not otherwise provided for in this Section, a Chamber shall 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'.

[61] *Bemba*, *supra* note 27, § 11. Decision on Interlocutory Appeal Regarding Witness Proofing, *Karemera et al.* (ICTR-98-44-AR73.8), Appeals Chamber, 11 May 2007, § 8.

disclosure and protect witnesses' well-being.[62] First, many witnesses are not familiar with the ICC's environment; moreover, they testify on events that occurred several years before their testimony, and on complicated exhibits.[63] Therefore, witness preparation might increase the efficiency of testimonies and help the judges to obtain complete and well-structured evidence. Secondly, if new information is discovered during a preparation session run by the OTP, this might be disclosed in advance to the defence, saving the time necessary for an adjournment of the hearing. Finally, preparation would be beneficial to vulnerable witnesses because familiarization is not enough. Conversely, allowing witnesses to tell their stories in advance to the parties calling them would safeguard witnesses' well-being and serve as a substantive preparation for their testimony.[64] In conclusion, Judge Ozaki underlined that some safeguards against potential risks might be necessary, such as clear guidelines, specific training for lawyers, recording of the preparation sessions and the presence of a VWU representative.[65]

Ozaki was the first judge to agree to the necessity of carrying out preparation in the ICC proceedings. Her partly dissenting opinion led the way to a positive decision on preparation by TC V, of which she was the Presiding Judge. Indeed, it seems possible that her point of view on preparation inspired TC V to adopt a different approach in the Kenyan cases.

In the twin Kenyan decisions of *Ruto and Sang* and *Ali, Muthaura and Kenyatta*, TC V concluded that prohibiting witness preparation was 'neither practical nor reasonable'.[66] The OTP used Article 64 to provide a legal basis for witness preparation, arguing that it was justified by the specific circumstances of the Kenyan cases, where a high rate of witness interference was alleged.[67] Conversely, the defence in *Ruto and Sang* argued that the Rome Statute does not provide any legal basis for witness preparation.[68] This position was echoed by the defence in the *Ali, Muthaura and Kenyatta* case, according to whom witness preparation would impair the accused's right to a fair trial because it might require additional evidentiary disclosures and allow further investigations.[69]

TC V agreed with the findings of Judge Ozaki in her earlier partially dissenting opinion in *Bemba*, and held that Article 64(2) and (3)(a) grant ICC judges a high degree of flexibility in administering the trial.[70] Thus, it analysed the merits and potential risks of witness preparation. As far as merits are concerned, it concluded that it protects witnesses' well-being and also facilitates a fair and expeditious trial, because Article 69(2) sets up the principle of primacy of oral evidence but witnesses are often unable to provide all the relevant information on the numerous exhibits shown to them for the first time in court.[71] Referencing the ICTY *Limaj* case,[72] TC V argued that showing exhibits and determining the best way to question each witness during the preparation meeting would improve witnesses' performance during their testimonies.[73]

As far as the potential risks of witness preparation are concerned, TC V focused on the three main points put forward by the defence.[74] The first relates to the risk of witnesses

[62] *Bemba*, *supra* note 27, § 21.
[63] *Ibid.*, §§ 21–22.
[64] *Ibid.*, § 24.
[65] *Ibid.*, §§ 26–27.
[66] *Ruto and Sang*, *supra* note 28, § 52; *Muthaura and Kenyatta*, *supra* note 28, § 52.
[67] *Ibid.*, § 7; *Ibid.*, § 7.
[68] *Ibid.*, § 15.
[69] *Muthaura and Kenyatta*, *supra* note 28, § 17.
[70] *Ruto and Sang*, *supra* note 28, § 27; *Muthaura and Kenyatta*, *supra* note 28, § 31.
[71] *Ibid.*, §§ 31–36; *Ibid.*, §§ 35–40.
[72] *Limaj et al.*, *supra* note 41, § 2.
[73] *Ruto and Sang*, *supra* note 28, §§ 31–36; *Muthaura and* Kenyatta, *supra* note 28, §§ 35–40.
[74] *Ibid.*, § 38; *Ibid.*, § 42.

altering the content of their testimony. To this concern, TC V replied that the Chambers could adopt some guidelines.[75] Secondly, the defence argued that witness preparation should be conducted during the investigative phase because it might provide new evidence. However, TC V did not share the defence's concerns since the aim of the investigation phase is to collect evidence while the aim of witness preparation is to improve the efficiency of the proceedings.[76] Finally, the defence claimed that witness preparation would breach the OTP's obligation of disclosure. However, the ICC judges believed that witness preparation is used to review the content of testimony and not as a tool to further investigate the matter.[77] In the event, TC V proposed its enforcement of additional safeguards, such as witness cross-examination, video recording meetings and the use of a clear set of guidelines.[78]

In *Ntaganda*, TC VI did not share any concern about the negative impact of witness preparation on the right to a fair trial.[79] It argued that, given the complexity of the case, preparation could contribute to the expeditiousness of the proceedings because it might help witnesses to deliver effectively their testimony.[80]

Against the background of these two cases, the idea that Article 64 can be used to endorse a more permissive approach is misleading, however. Using Article 64, several Chambers prohibited witness preparation — in *Bemba et al.*, [81] *Gbagbo and Blé Goudé*,[82] *Ongwen*,[83] Al-Hassan[84] and *Yekatom and Ngaïssona*[85] — because of its negative consequences for the right to a fair trial.[86] More specifically, TC VII and TC I, respectively, in *Bemba et al.* and *Gbagbo and Blé Goudé*, distinguished their cases from the particularity of the Kenyan cases, [87] but did not discuss the more favourable approach adopted by the other Chambers.[88] Finally, in both *Said* and *Abd-Al-Rahman*,[89] the ICC's judges provided no legal or practical justifications for allowing witness preparation. When questioned by the defence about it, in the *Said* case, the judges unsatisfactorily commented that:

> The Chamber agrees with the analysis of other Chambers that have adopted witness preparation protocols and determined that the present case should proceed on this basis. In these circumstances, the Chamber does not consider it conducive to the efficiency of proceedings to re-litigate these matters in the present case.[90]

[75] *Ibid.*, § 39; *Ibid.*, § 43.

[76] *Ibid.*, §§ 40–41; *Ibid.*, §§ 44–46.

[77] *Ibid.*, § 42; *Ibid.*, § 45.

[78] *Ibid.*; *Ibid.*

[79] Decision on witness preparation, *Ntaganda* (ICC- 01/04-02/06-652), Trial Chamber VI, 16 June 2015.

[80] *Ibid.*, §§ 17–18.

[81] *Ibid.*, §§ 21–22.

[82] Decision on witness preparation and familiarisation, *Gbagbo and Blé Goudé* (ICC- 02/11-01/15-355), Trial Chamber I, 2 December 2015.

[83] *Ongwen*, *supra* note 32, §§ 9–10.

[84] *Al Hassan*, *supra* note 33, §§ 9–10.

[85] Decision on Protocols at Trial, *Yekatom and Ngaïssona* (ICC-01/14-01/18-677) Trial Chamber V, 8 October 2020, § 17.

[86] Decision on Witness Preparation and Familiarisation, *Bemba et al.* (ICC-01/05-01/13-1252), Trial Chamber VII, 15 September 2015, §§ 21–22. Decision on witness preparation and familiarization, *Gbagbo and Blé Goudé* (ICC- 02/11-01/15-355), Trial Chamber I, 2 December 2015, §§ 17–19; *Ongwen*, *supra* note 32, §§ 9–15; Decision on Protocols at Trial, *Yekatom and Ngaïssona* (ICC-01/14-01/18-677) Trial Chamber V, 8 October 2020, § 17.

[87] *Bemba et al. supra* note 86, § 23; *Gbagbo and Blé Goudé*, *supra* note 86, § 19.

[88] For a different approach, see Partially Dissenting Opinion of Judge Henderson, Gbagbo and Blé Goudé (ICC-02/11-01/15-355-Anx1), Trial Chamber I, 3 December 2015, § 12.

[89] Directions on the Conduct of Proceedings, *Said* (ICC-01/14-01/21-251), Trial Chamber VI, 9 March 2022, § 44; Directions on the Conduct of Proceedings, *Ali Kushayb* (ICC-02/05-01/20-478), Trial Chamber I, 4 October 2021, § 54.

[90] *Said*, *supra* note 89, § 27.

The use of Article 64 thus helped the ICC to find a legal basis for witness preparation. It allowed the ICC to maintain judicial independence on the matter and it ensured the necessary level of flexibility to adjust to the characteristics of each prosecution. However, this legal argument had an important limitation. TC V approached the issue from the defendant's perspective, in that it allowed witness preparation as long as it does not infringe on the right to a fair trial. In this, the judges neglected their obligations towards witnesses under Article 68 of the Rome Statute, and in more general terms, they neglected the vital role of witnesses, who are still seen as 'passive vessels' of the international criminal justice system.[91] While the Kenyan cases mitigated the former concern by making reference to Article 68 and the witnesses' well-being, the judges did not fully explore the scope of this provision and did not address the latter consideration.

5. APPROACH 3: ARTICLE 68 IN THE INTERPRETATION OF THE ICC CHAMBERS

TC V in the Kenya cases was the first Chamber to advocate witness preparation for the safeguarding of witnesses' well-being, which is one of the interests protected by Article 68(1).[92] Judges argued that this procedure might help witnesses beyond the logistics of trial proceedings and address witnesses' concerns deriving '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'.[93] Although the ICC offered courtesy meetings as part of the familiarization procedures, they were not deemed insufficient to fulfil the obligation to protect witnesses under Article 68(1).[94] Meetings where witnesses can encounter the people who are going to question them could increase their confidence. The majority of the judges in TC V believed that witness preparation was welcome to reduce the psychological burdens of testimony following interference with witnesses in the Kenyan investigations.[95]

This last aspect was at the centre of Judge Eboe-Osuji's partly dissenting opinion in the *Ruto and Sang* case. He pushed this argument forward by suggesting that not only witnesses in the Kenya cases but also the 'average' witness would benefit from witness preparation.[96] He pointed out that several witnesses in the ICC's cases more generally had come from rural areas of developing countries.[97] Witnesses, especially vulnerable ones, might be stressed by an international flight to a foreign country, a change of time zone, jet lag and the unknown faces inside the ICC courtroom. Knowing what was going to happen in the courtroom would enhance witnesses' confidence and reduce their stress and anxiety.[98] He found legal support for witness preparation in Article 68, as witness preparation could be deemed to be 'part of the "appropriate measures" that the Court is required to take to protect the

[91] K.K. Lynn and M.J. David, *The Witness Experience: Testimony at the ICTY and its Impact* (Cambridge University Press, 2017), at 52.

[92] *Ruto and Sang*, *supra* note 28, § 37; *Muthaura and Kenyatta*, *supra* note 28, § 37.

[93] *Ibid.*, § 41; *Ibidi.*, § 41.

[94] *Ibid.*, § 37; *Ibid.*, § 41.

[95] ICC, Office of the Prosecutor, 'Statement of the Office of the Prosecutor regarding the reported abduction and murder of Mr Meshak Yebei', 9 January 2015, available on line Statement of the Office of the Prosecutor regarding the reported abduction and murder of Mr Meshak Yebei | International Criminal Court (icc-cpi.int) (visited 7 May 2023).

[96] Partly Dissenting Opinion of Judge Eboe-Osuji, Decision on witness preparation, *Ruto and Sang* (ICC-01/09-01/11-524), Trial Chamber V, 2 January 2013, § 8; Partly Dissenting Opinion of Judge Eboe-Osuji- Decision on witness preparation, *Muthaura and Kenyatta* (ICC-01/09-02/11-588), Trial Chamber V, 3 January 2013, § 8.

[97] *Ruto and Sang*, *supra* note 28, § 8; *Muthaura and Kenyatta*, *supra* note 28, § 8.

[98] *Ibid.*, §§ 8–9; *Ibid.*, §§ 8–9.

psychological well-being and dignity of witnesses'.[99] Similarly, in *Ntaganda*, TC VI did not share any concern about the negative impact of witness preparation on the right to a fair trial.[100] Rather, it argued that, given the complexity of the case, preparation might help witnesses to deliver their testimony effectively, thereby contributing to the expeditiousness of the proceedings.[101]

The reasoning of TC V and TC VI acknowledges the fact that witness preparation is a human process, not simply a cold clinical operation. However, both decisions focus on the extraordinary challenges faced in the investigations and do not acknowledge that Article 68 imposes some legal obligations on the ICC.

The existence of a legal obligation upon the ICC was also briefly mentioned in *Al Hassan*, where TC X permitted witness preparation on the basis of both Article 64 and the obligations towards witnesses deriving from Article 68.[102] This was the first time the judges recognized that Article 68 imposes an obligation to protect witnesses' well-being through witness preparation, although the issue was not developed further.

6. ARTICLE 68 AND WITNESSES' WELL-BEING

While the ICC's position on witness preparation is far from settled, this article argues that the ICC has a specific obligation under Article 68 of its Statute to adopt witness preparation, especially for those particularly vulnerable, such as children, victims of sexual and gender-based violence. This argument is supported by the literal interpretation of Article 68(1), by the intention of the parties and the Rome Statute's preparatory works and, finally, the object and the purpose of the treaty.[103]

Paragraphs 1 and 2 of Article 68 provide that:

> 1) The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. In so doing, the Court shall have regard to all relevant factors, including age, gender as defined in Article 7, paragraph 3, and health, and the nature of the crime, in particular, but not limited to, where the crime involves sexual or gender violence or violence against children. … These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
> 2) As an exception to the principle of public hearings provided for in Article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.

Donat-Cattin argues that the literal interpretation of the first sentence of Article 68(1) imposes an 'unconditioned obligation on all organs of the Court, at all stages of the proceedings, to protect the life, dignity and the physical and moral integrity ("well-being") of victims

[99] *Ibid.*
[100] Decision on witness preparation, *Ntaganda* (ICC-01/04-02/06-652), Trial Chamber VI, 16 June 2015.
[101] *Ibid.*, §§ 17–18.
[102] *Al Hassan*, *supra* note 33, § 10.
[103] Vienna Convention on the Law of Treaties, 23 May 1969 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969).

and witnesses'.[104] As explained below in this section, this article agrees with his view, according to which Article 68 created both a non-derogable right to protection for witnesses and a corresponding duty upon the ICC.[105] The first 11 years of practice of the ICC also confirmed this interpretation.[106]

More specifically, to protect witnesses' well-being, the ICC should use 'appropriate measures'. However, neither the Rome Statute nor the *travaux préparatoires* defines those measures.[107] The forerunner of Article 68 was Article 43 of the ILC Draft Statute of 1994, which was entitled 'Protection of the accused, victims and witnesses'.[108] Article 43 was modelled after Article 22 of the ICTY Statute and Article 21 of the ICTR Statute and contained a very general clause to protect the defendant, witnesses and victims through a non-exhaustive list of measures.[109] During the making of the Rome Statute, several proposals stressed the necessity to separate the protection of witnesses and victims from the protection of the defendant.[110] Canada further elaborated this article to catch a wide array of situations and included a list of elements that the ICC should protect, including life, dignity and well-being of witnesses.[111] This list confirms the open-ended character of the term 'appropriate' measures[112] because it suggests that the interpretation of 'appropriate measures' can be stretched to the point of encompassing any measure that is able to protect any of the interests and rights included in Article 68. This article specifically focuses on the witnesses' psychological well-being.

Testimony can have psychological consequences for witnesses.[113] Their testimony generally pertains to the traumatic events they experienced during the war,[114] and they run the risk of being further distressed (or even re-traumatized) when confronted with reminders of that trauma.[115] In addition, testifying can be daunting because it involves international travel, communicating personal experiences in court, recalling events that happened several years earlier and coping with cross-examination. While case law gives limited attention to helping witnesses cope with stress,[116] it is recognized in the general literature that witnesses

[104] D. Donat-Cattin, 'Article 68', in O. Triffterer and K. Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (Nomos, 2016) 1681–1711, at 1683.

[105] *Ibid.*

[106] *Ibid.*

[107] United Nations 'Preparatory Committee on the Establishment of an International Criminal Court' (14 August 1997) UN Doc A/AC.249/1997/L.8/Rev.1, § 204; Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997, UN Doc A/AC.249/1997/L.8/Rev1, 14 August 1997, §§ 36–37.

[108] United Nations, *Report of the International Law Commission on its Forty-Sixth Session, Draft Statute for an International Criminal Court*, UN Doc A/49/10 (1994), 2 May–22 July 1994, at 119.

[109] *Ibid.*

[110] United Nations, *Report of the Preparatory Committee on the Establishment of the International Criminal Court*, UN Doc A/51/22 (1996), Vol. II, at 204.

[111] United Nations, *United Nations Diplomatic Conference*, UN Doc A/CONF-183/C-1/WGPM/L-58, 6 July 1998, at 1.

[112] Donat-Cattin, *supra* note 104, at 1689.

[113] B. Hamber, *Transforming Societies after Political Violence: Truth, Reconciliation, and Mental Health* (Springer, 2009); E. Stover, *The Witness: War Crimes and the Promise of Justice in the Hague* (University of Pennsylvania Press, 2005).

[114] K.L. King and J.D. Meernik, The Witness Experience: Testimony at the ICTY and Its impact (Cambridge University Press 2017), 118.

[115] S. Bandes 'Victims, Closure, and Sociology of Emotion', 72 *Journal of Law and Contemporary Problems* (2009) 1–26; N. Henry, 'Witness to Rape: The Limits and Potential of International War Crime Trials for War Time Sexual Violence', 3 *International Journal of Transitional Justice* (2009) 114–134; N. Henry 'The Impossibility of Bearing Witness: Wartime Rape and the Promise of Justice', 16 *Violence Against Women* (2010) 1089–1119; J.L. Herman, 'The Mental Health of Crime Victims: Impact of Legal Intervention', 16 *Journal of Traumatic Stress* (2003) 159–166. On the view that testifying helps the process of healing, see K.C. Moghalu, 'Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecution', in R. Thakur and P. Malcontent (eds), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* (United Nations University, 2004) 197–223, at 216, Stover, *supra* note 113. For the contrary view, see Bandes, *ibid.*, at 16; J.N. Clark, 'Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship', 11 *International Criminal Law Review* (*ICLR*) (2011), 241–261.

[116] *Limaj et al.*, *supra* note 41, § 2.

need sufficient time and information to prepare for testifying, for the sake of their own well-being.[117]

In international law, the concept of well-being is generally associated with the protection of the right to privacy.[118] More specifically, its interpretation in the context of international criminal law poses some challenges. For instance, Article 68 of the Rome Statute lists both well-being and privacy as things to be protected by the ICC. In the absence of any guidance on how to interpret these terms according to the *travaux préparatoires* as clarified earlier in this section,[119] it can be presumed that their inclusion was not an oversight by the drafters. Rather, it can be inferred that they meant to protect both the well-being and the privacy of witnesses, as separate but related concepts which might blur one into one another.[120]

More importantly, as already anticipated at the beginning of this section, the inclusion of well-being within the interests protected by Article 68 has two consequences. First, it creates an obligation for the ICC to protect witness well-being with 'appropriate measures'. Secondly, considering that for each obligation established by law, there is a corresponding right,[121] witnesses at the ICC have the right to have their well-being protected by the ICC. This interpretation expands the protection granted to witnesses by the ICC because it adds to 'pure human rights', which witnesses enjoy because they are human beings, and the 'status human rights', which derive from their status as actors at trial.[122]

The teleological interpretation of Article 68(1) validates further the view that the ICC has an obligation to apply witness preparation for two reasons. First, the systematic reading of all the parts of the ICC Statute on procedural matters suggests that one of its main goals is the search for truth.[123] Thus, scholarship believes that Article 68 'set[s] a standard for the progressive development of the law relating to effectively functioning systems of criminal justice',[124] because the protection of witnesses is a corollary to the accomplishment of the ICC's functions. Secondly, under Article 21(3) of the Rome Statute, ICC judges should interpret and apply Article 68(1) in accordance with internationally recognized human

[117] S.S. Cody et al., *Bearing Witness at the International Criminal Court: an Interview Survey of 109 Witnesses* (University of California, 2014); P. Wald, 'Dealing with Witnesses in War Crimes Trials: Lessons from Yugoslavia Tribunal', 5 *Yale Human Rights and Development Law Journal* (2002) 1–21; S. Gluščič et al., *Protecting Witnesses of Serious Crime: Training Manual for Law Enforcement Agencies and Judiciary* (Council of Europe Publishing, 2006), at 20-and-204; T. Ingadottir, F. Ngendahayo, and P.V. Sellers, 'The Victims and Witness Unit: Article 43.6 of the Rome Statute', in I. Thordis (ed.), *The International Criminal Court: Recommendations on Policy and Practice* (Transnational Publishers, 2003) 1; S. Arbia and C. McLaughlin, 'Victim and Witness Measures of the International Criminal Court: A Comparative Analysis', 6 *The Law and Practice of International Courts and Tribunals* (2007) 189–220; C. Mahony, *The Justice Sector Afterthought: Witness Protection* (African Institute for Security Studies 2010) 1; C. Kunst, *The Protection of Victims and Witnesses in International and Internationalized Criminal Courts: The Example of the ECCC* (Wolf Legal Publishers, 2013).

[118] For case law, see *A, B, and C v Ireland* (App no. 25579/05), ECHR, 16 December 2010; *Rivas Quintanilla v El Salvador*, Preliminary Objections, Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C No. 37, 25 October 2012; *Y v Argentina*, Merits, Reparations and Costs, Inter-American Courts of Huan Rights, Series CC No. 38, 15 October 1996. For scholarship see M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Engel, 2005), 385; S. Gruskin and A. Hendriks, 'The Right to Privacy: Some implications for Confidentiality in the context of HIV/AIDS', in T.S. Orlin, A. Rosas and M. Scheinin (eds), *The Jurisprudence of Human Rights Law: A Comparative Interpretative Approach* (Åbo by Åbo akademi University Press, 2000), 227.

[119] United Nations, 'Preparatory Committee on the Establishment of an International Criminal Court' (UN Doc A/AC. 249/1997/L.8/REV.1), 14 August 1997, 204; Decisions Taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997 (UN Doc A/AC.249/1997/L.8/Rev1), 14 August 1997, 36–37.

[120] R. Pulvirenti, 'Protecting victims who testify before the ICC: Tensions and balances with the defendants' right to a fair trial', in J.P. Pérez León Acevedo and J. Nicholson (eds), *Defendants and Victims in International Criminal Justice: Ensuring and Balancing Their Rights* (Routledge, 2020) 161, at 166.

[121] Donat-Cattin, *supra* note 104, at 1683.

[122] Y. McDermott, 'Rights in Reverse: A Critical Analysis of Fair Trial Rights Under International Criminal Law', in W.A. Schabas, Y. McDermott, N. Hayes (eds), *The Ashgate Research Companion to International Criminal Law* (Ashgate, 2015) 165, at 166.

[123] Donat-Cattin *supra* note 104, at 1683.

[124] *Ibid*., 1689.

rights.[125] Therefore, when judges must decide whether to apply witness preparation or not, they should prefer the interpretation of Article 68(1) that is most consistent with Article 21(3). Now, considering that the list of individuals' rights and interests of Article 68(1) stems from existing norms of international human rights law,[126] it is possible to infer that judges must allow witness preparation. This view is also in line with the scholars that believe that Article 21(3) attributes an additional 'generative'[127] or 'gap-filling'[128] power, which allows the ICC to go beyond the strict letter of the Rome Statute to protect human rights.

The second sentence of Article 68(1) corroborates further this obligation. This provision was drafted to protect witnesses and victims from secondary victimization, intended as 'victimization that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim'.[129] Among the circumstances that the Court shall take into consideration when granting protective measures, the second sentence of Article 68(1) lists age, gender, health, and the nature of the crime. The reference to 'health' acts as a reminder of the term 'well-being' in the previous sentence.[130] Thus, it confirms the view that Article 68 imposes an obligation upon the ICC to use any available measures (including, witness preparation) to protect vulnerable witnesses' well-being and health.

Article 68(2) of the Rome Statute does not contradict the literal and teleological interpretation of Article 68(1). Drafted under pressure from non-governmental organizations (NGOs) to protect certain witnesses (victims of sexual violence and children),[131] it includes an exception to the principle of public hearing. The latter right is protected by the last sentence of Article 68(1), which imposes a limit to application of appropriate measures when it states that they shall not be prejudicial to or inconsistent with the rights of the accused to a fair trial. Thus, Article 68(2) contains the assumption that the ICC judges should use *in camera* proceedings and electronic or other special means even if this is in contrast with the right to a public trial.[132] With this background in mind, it can be inferred that it is possible to create additional exceptions to the principle of a fair trial if the ICC judges read Article 68(1) together with Article 21(3). Additionally, it has not been demonstrated that witness preparation interferes with the defendant's right to a fair trial, as it will be explained in the remainder of this article.

7. IMPROVING CURRENT PRACTICE IN RESPECT OF THE RIGHT TO A FAIR TRIAL

Although there is compelling legal and policy evidence that corroborates the view that witness preparation should be included within the obligations of Article 68(1) of the Rome Statute, witness preparation will never be free from criticism, because there is a risk that it will impact the defendants' right to a fair trial. Section 7.A discusses two main objections to the practice of witness preparation focusing on witness familiarization and the risk of unduly influencing witnesses.

[125] K. Zeegers, *International Criminal Tribunals and Human Rights Law: Adherence and Contextualization* (T.M.C. Asser Press, 2016) 1, at 73.

[126] Donat-Cattin, *supra* note 104, at 1683.

[127] D. Sheppard, 'The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21(3) of Rome Statute', 10 *ICLR* (2010) 43–71, at 57–63.

[128] R. Young, '"Internationally Recognised Human Rights" Before the International Criminal Court', 60 *International and Comparative Law Quarterly* (2011) 189–208, at 201.

[129] Handbook on Justice for Victims, *Handbook on Justice for Victims*, UN Doc E/CN.15/1998/CRP.4/Add. 1, at 12.

[130] J.R.W.D. Jones, 'Protection of Victims and Witnesses', in P. Gaeta, A. Cassese, and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) 1355–1370, at 1360.

[131] *Ibid*., at 1359 and 1361.

[132] *Ibid*., at 1367.

To counter that view, the remainder of this article will consider how to mitigate the potential negative impacts of witness preparation on the right to a fair trial. The Rome Statute incorporates the right to a fair trial in different provisions, such as Articles 22 (*nullum crimen sine lege*), 23 (*nulla poena sine lege*), 55 (rights of persons during an investigation), 66 (presumption of innocence) and 67 (right of the accused). The last provision includes some specified minimum guarantees, but these can be extended by the ICC judges, who have an obligation to interpret and apply the ICC Statute consistently with internationally recognized human rights.[133] Section 7.B below examines the safeguards that the ICC could put in place to make sure that witness preparation is not unduly prejudicial to such human rights, namely the right to a fair trial.

A. Continuing Objections to the Practice of Witness Preparation

The following two sections address two continuing objections to the practice of witness preparation (witness familiarization and undue influence on witnesses) and demonstrate that witness preparation is necessary to safeguard witnesses' well-being.

1. Witness Familiarization

Those who deny the admissibility of witness preparation believe that witness familiarization is sufficient.[134] This article argues that familiarization is not enough and that, in addition, witness preparation is useful because it minimizes witnesses' psychological discomfort by offering a roadmap of what they can expect.[135] Both procedures serve to increase witnesses' well-being and they are complementary to each other. In addition to the reasoning of the ICC's judges,[136] already discussed in Sections 1, 2 and 3 of this article, this view is supported by extensive research in the field. Ngane, Jackson and Brunger argued that witness preparation improves witnesses' well-being because it reduces the psychological burdens of testimony.[137] Similarly, Stover's empirical research on ICTY witnesses confirmed this view.[138] Those witnesses spoke highly of the support provided by the VWU but also expressed a need to engage with the person who was going to interrogate them in court.[139] This need was not met. Likewise, several witnesses expressed some discomfort with the idea that they do not know the weight of their testimony.[140] Such a positive engagement with the parties would be possible only if the ICC allows witness preparation. The subsequent research of King and Meernik agrees with Stover's finding and those authors claimed that witnesses' well-being was influenced by a positive courtroom experience along with the perception of having been treated fairly by both parties.[141] This experience goes beyond what is allowed by witness familiarization but is linked to the scope of witness preparation. Finally, this view that witness preparation is beneficial to witnesses' well-being is further endorsed by scholars who have studied its use in some domestic jurisdictions.[142]

Both doctrinal and empirical research shows that witness familiarization is not enough to protect witnesses' well-being. A stronger interaction between the witness and the calling

[133] Art. 21(3) ICCSt.
[134] Schmitt, *supra* note 14, at 504.
[135] J.S. Applegate, 'Witness Preparation', 86 *Texas Law Review* (1989) 277–352, at 278.
[136] C. Van den Wyngaert, 'Victims Before the International Criminal Courts: Some Views and Concerns of the ICC Trial Judge', 44 *Case Western Reserve Journal of International Law* (2011) 475–496, at 479.
[137] Ngane, *supra* note 19, at 255; Jackson and Brunger, *supra* note 21.
[138] E. Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press, 2007).
[139] *Ibid.*, at 90.
[140] *Ibid.*
[141] King and Meernik, *supra* note 114, at 80–82.
[142] Allison, *supra* note 8, at 1335; Applegate, *supra* note 135, at 298; Vasiliev, *supra* note 8, at 17.

party before the testimony is necessary to improve the witnesses' well-being and make the witnesses feel they are a vital part of the international criminal system.[143] However, in order to avoid any confusion between the two procedures, this article (Section 7.B.1.) agrees with the ICC Chambers on the use of Witness Preparation Protocols.

2. Does Witness Preparation Unduly Influence Witnesses? Is it a Form of Rehearsal of Testimony?

Schmitt believes that witness preparation is too close to a testimony rehearsal, a sort of 'mock questioning', which would undermine the positive benefits of the principle of immediacy.[144] However, this view is based on the false myth that spontaneity guarantees authenticity.[145] The former scholars wrongly believe that immediacy is synonymous with 'surprise'.[146] Witnesses are generally aware of the reasons they have been called to testify.[147] This is particularly true for international criminal trials because witnesses are generally interviewed by investigators when there are as yet no indictments. When the prosecutorial team reviews the available information in light of the charges, witness preparation would help to establish a more accurate and complete recollection of the facts linked to the specific indictments.[148] This would also reduce the length of each testimony and therefore of the overall trial.

Additionally, scholars have argued that witness preparation could jeopardize the probative value of testimony because the calling party might either intentionally or accidentally influence witnesses.[149] This view is mainly shared by judges with a civil law background, such as Judge Schmitt, who suggests that the power imbalance between the examiner and the witness might allow the examiner to manipulate the witnesses' perception of the facts.[150] Also, judges could struggle to understand whether preparation was too invasive.[151] Ambos recalls that a clear distinction between witness preparation and rehearsing or coaching is not easy to make.[152] However, the same author volunteers a solution to the problem, which lies in the legal and moral obligations of the lawyers to abide by certain ethical standards.[153] This should prevent the misuse of witness preparation.

B. Measures

Regardless of the risk that witness preparation could jeopardize the probative value of testimony, this article stresses that the ICC cannot escape the obligations set by the Rome Statute and should take care of witnesses' well-being. In light of this, the ICC should permit witness preparation but with measures in place to counter such jeopardy. This could be assured through the drafting of ethical standards for both parties, as suggested above and detailed below in Subsection B; an obligation to videorecord each witness preparation session and to release the recording automatically to the other party; and, finally, the possibility to

[143] *Ibid.*

[144] Schmitt, *supra* note 14, at 504.

[145] Ambos, *supra* note 10, at 915; Vasiliev, *supra* note 8, 18; Applegate, *supra* note 135, 300–310; P. William, *Trials without Truth: Why Our System of Criminal Trials Has Become an Expensive Failure and What we Need to Do to Rebuild it* (New York University Press, 1999) 125.

[146] Karemaker, Taylor, and Pittman 2008, *supra* note 10, at 693.

[147] Karemaker, Taylor, and Pittman 2008, *supra* note 12, at 921.

[148] R. Mahoney, 'Witness Conferences', 24 *Criminal Law Journal* (2000) 297–330, at 301; Decision on Defence Motion on Prosecution on Practice of 'Proofing Witnesses', *Limaj, Bala and Musliu* (IT-03-66-T), Trial Chamber II, 10 December 2004, at 2–3. See Decision on Defence Motions to Prohibit Witness Proofing, *Karemera, Ngirumpatse and Nzirorera* (ICTR-98-44-T), 15 December 2006, at 17.

[149] Schmitt, *supra* note 14, at 504.

[150] Schmitt, *supra* note 14, at 504; Ambos *supra* note 10, at 914.

[151] Ambos *supra* note 10, at 914.

[152] Ambos *supra* note 10, at 913, Vasiliev *supra* note 8, at 25.

[153] *Ibid.*, at 914, *Ibid.*, at 8.

have both parties or a representative of the VWU present at the witness preparation sessions.

1. The Preparation Protocol

The Witness Preparation Protocol has clarified which conduct on the part of the judges, the parties and, in general, any participants in the preparation sessions is permissible and what is prohibited.[154] This is necessary because the ICC judges, lawyers, prosecutors and defence attorneys come from all over the world and have different legal cultures and different ideas of what is acceptable in terms of witness preparation.[155] The need to work together can create tensions, as people with different backgrounds do not necessarily have a shared standard on witness preparation. The Preparation Protocol ensures that all the parties involved play with the same deck of cards.

Although the Protocol has made good steps in better outlining this procedure, some grey areas persist.[156] Jackson and Brunger discuss whether the parties could, during the preparation sessions, read the questions that the witnesses are going to be asked, or whether this falls within the prohibited conduct of 'practicing questions'.[157] While waiting for these uncertainties to be solved with a more refined Preparation Protocol, this article suggests that the ICC should organize some training sessions on witness preparation open to its personnel (that deals with witness preparation) and defence counsel, to make everyone more comfortable with the entire process.[158] Those sessions, held by independent and third-party professionals, would be aimed at clarifying what witness preparation is, what is expected from each participant in this context and which conduct is allowed or prohibited. These sessions could also be accompanied by some footage of good and bad practices and some guidance or tailored feedback following role-play activities based on fictitious scenarios.

2. Ethical Standards for Prosecution and Defence

Scholars believe that the ICC should set ethical standards for Prosecution and Defence because the uncertainty of deontological code can lead to abuse of the criminal justice system.[159] This is not a new problem for the ICC. During the Nuremberg Trials, for instance, the examination of the witness, Gisevius, made it clear that ethical rules were necessary to counter the increased risk of error, manipulation and bias of testimony in the politically charged atmosphere of an international criminal trial.[160] Despite this, the ad hoc tribunals and the subsequent international criminal courts and tribunals did not have a set of predefined rules on this matter. They worked under the presumption that counsel conducted interviews during the preparatory meeting in accordance with the ethical principles that

[154] Victims and Witness Unit's Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, *Bemba* (ICC-01/05-01/08-972 and public Annex, ICC-01/05-01/08-972-Anx), 22 October 2010; *Ruto and Sang*, *supra* note 28, § 42; *Muthaura and Kenyatta*, *supra* note 28, § 45; Annex 1 (Unified Protocol on the Practices used to prepare and familiarise witnesses for giving testimony at trial to the Decision on Protocols at Trial, *Yekatom and Ngaissona* (ICC-01/14-01/18-677), Trial Chamber V (ICC-01/14-01/18-677-Anx1) 8 October 2022.

[155] J. Jackson and Y. M'Boge, 'The Effect of Legal Culture on the Development of International Evidentiary Practice: From the 'robing room' to the "melting pot"', 26 *LJIL* (2013) 947–970.

[156] Jordash, *supra* note 14, at 512.

[157] *Ibid*. On this point, see also Dissenting Opinion of Judge Eboe-Osuji, *supra* note 96, § 49.

[158] No reference to witness preparation in the ICC Annual Reports.

[159] Vasiliev, *supra* note 14, 252–253.

[160] United States Holocaust Memorial Museum, Gisevius testimony at Nuremberg Trial, available online at Gisevius testimony at Nuremberg Trial — Collections Search — United States Holocaust Memorial Museum (ushmm.org) (visited 7 May 2023); A. Sarvarian, Ethical Standards for Prosecution and Defence Counsel before International Courts: The Legacy of Nuremberg, 10 *JICJ* (2012) 423–446, at 439–44 and 445.

govern the legal profession in their respective home countries and that applied, *mutatis mutandis*, before the tribunals.[161]

Similarly, no specific ethical rules exist on how to carry out witness preparation at the ICC. According to the Code of Professional Conduct for Counsel (Code of Professional Conduct), the Counsel shall maintain the integrity of evidence and shall not introduce evidence that they know to be incorrect.[162] The Code of Professional Conduct also applies to the OTP[163] and, thus, to both parties calling the witnesses. This provision can be used as a safeguard against influencing witnesses during witness preparation. However, it is not clear whether influencing witnesses can be defined as misconduct under Article 31, which states that misconduct is committed when one 'violates or attempts to violate any provisions of this Code, the Statute, the Rules of Procedure and Evidence and the Regulations of the Court or of the Registry in force imposing a substantial ethical or professional duty on him or her'. Witness preparation is not mentioned within the ICC legal framework. Thus, this provision is of little help.

Furthermore, the Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals (Hague Principles on Ethical Standards), published by the International Law Association in 2011, are not helpful in preventing the abuse of the system.[164] These standards, common to all international criminal courts and tribunals, represent a continuation of the rules mentioned above. Counsel are expected to present evidence in a fair and reasonable manner and refrain from presenting or relying on evidence that they believe to be false or misleading.[165] The Hague Principles do not prohibit witness preparation, or indeed any pre-testimonial communication with witnesses, as long as it is respectful of the rules that each international criminal institution has adopted.[166] Thus, they rely on the discretion of the particular institution concerned and leave the debate on ethical boundaries for witness preparation unsolved.

Sarvarian pointed out that despite the fact that they leave a few issues unsolved, the Hague Principles on Ethical Standards are a useful tool to promote fairness and integrity in international criminal trials.[167] The present article agrees with the view that ethical standards represent an important guarantee against the risk of evidence manipulation, but it stresses that this is not enough. The system has no enforcement mechanisms and ethical standards need some sanctions in the event of non-compliance.

3. Sanctions

The current sanction system with regard to an improper use of witness preparation is weak because the ICC relies on domestic rules regarding the professional conduct of counsel.[168] First, some national systems might not envisage any sanctions for the improper use of this

[161] Decision on Bizimungu's Urgent Motion Pursuant to rule 73 to Deny the Prosecutor's Objection Raised During the 3 March 2005 Hearing, *Bizimungu et al.* (ICTR-00-56-T), Trial Chamber II, 1 April 2005; *Limaj et al.*, *supra* note 41, § 3; Decision on Defence Motions to Prohibit Witness Proofing, *Karemera et al.* (ICTR-98-44-T), Trial Chamber III, 15 December 2006, § 24; Decision on Joseph Nzirorera's Interlocutory Appeal, *É Karemera, Ngirumpatse And Nzirorera* (ICTR-98-44-AR73.6), Appeals Chamber, 28 April 2006, § 17; Judgment, *Kordić and Čerkez* (IT-95-14/2-A), Appeals Chamber, 17 December 2004, § 183.

[162] ICC, Code of Professional Conduct for counsel, Resolution ICC-ASP/4/Res.1, 2 December 2005, Art. 25.

[163] Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, *Kenyatta* (ICC-01/09-02/11-747), Trial Chamber V(B), 31 May 2013.

[164] International Law Association Study Group, 'The Hague Principles on Ethical Standards for Counsel Appearing before International Courts and Tribunals', 10 *Law and Practice of International Courts and Tribunals* (2011), 1–15.

[165] *Ibid.*, § 6.1.

[166] *Ibid.*, § 6.2.

[167] Sarvarian, *supra* note 160.

[168] Partially Dissenting Opinion of Judge Henderson, *Gbagbo and Blé Goudé* (ICC-02/11-01/15-355-Anx1), Trial Chamber I, 3 December 2015, § 12.

practice. Furthermore, even if the practice is allowed, each national system has its own permitted and prohibited conduct, which might not align with practice in other countries, and the type and extent of penalties may also differ. This disaggregated system of sanctions is inefficient because it does not guarantee a concerted answer to the risks deriving from witness preparation.

At the level of the ICC, because neither the Code of Professional Conduct nor the Hague Principles on Ethical Standards contain any sanctions that can be applied in case of a failure to meet ethical standards for witness preparation, the final deterrent remains the spectre of prosecution under Article 70 of the Statute for offences against the administration of justice.[169] However, this is not a viable option because Article 70 criminalizes *corruptly* influencing witnesses rather than just influencing them.[170] There are no doubts about the non-criminal character of witness preparation, as confirmed by TC I.[171] It remains to be ascertained whether a lower level of (mis)conduct, such as not corruptly influencing witnesses, should trigger the attention of the ICC Prosecutor and whether this would be time and cost-efficient.

Finally, consideration should be given to including witness preparation within the ICC RPE, which would give it a legally binding effect. Considering the vacillating approach of the ICC, this solution might be premature. However, it would have the advantage of giving clear guidance to all the involved actors and would give a greater chance for the jurisprudence to develop what is and what is not allowed, including for the well-being of the witnesses, because that aspect is mostly overlooked.

Given that it would take time for the ICC framework to be updated, it is worth exploring how the current practice could be improved in the shorter term.

4. Beyond Videorecording

Scholars believe that cross-examination[172] and the ability of professional judges to review the evidence presented to them[173] represent good practice to safeguard the defendant's right to a fair trial. In addition, the Preparation Protocol establishes further guarantees, such as the videorecording of meetings, accompanied by a note detailing where the meeting was held, its length and the people who attended the session.[174] The recording is not automatically shared with the other parties to the proceedings. The Protocol establishes that where the Chamber or the opposing party have concerns, the record of the witness preparation session should be disclosable to counsel representing the opposing party, who should be able to conduct a thorough cross-examination to explore any perceived irregularities.[175] During the Kenyan cases, TC V clarified that the party should prove the threshold has been met for the 'concrete and credible basis for the request'.[176] However, this threshold might be difficult to demonstrate, especially in cases that want to uncover what is happening behind

[169] *Ibid.*

[170] D.K. Piragoff, 'Article 70', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (C. H. Beck-Hart-Nomos, 2008), at 1340.

[171] *Lubanga*, *supra* note 25, § 36. For a different view, which calls for an explicit permissive norm, see Ambos, 'Witness Proofing', *supra* note 10, at 603.

[172] Karemaker, Taylor, and Pittman, *supra* note 10, at 695; Vasiliev, *supra* note 14, at 250. On a different view, see J.H. Langbein, 'The German Advantage in Civil Procedure', 52 *University of Chicago Law Review* (1985) 823–866, at 833; Applegate, *supra* note 135, at 311. For a different point of view, see Ambos, *supra* note 10, at 915.

[173] Karemaker, Taylor, and Pittman, *supra* note 10, at 696. For a different point of view, see Ambos, *supra* note 10, at 915.

[174] *Muthaura and Kenyatta*, *supra* note 28, §§ 50–51.

[175] *Ibid.*

[176] *Ibid.*, at §§ 47–50.

closed doors[177] or in cases of intended influence.[178] Moreover, the opposite party might have no 'concrete and credible basis' until someone accesses the video. Jackson and Brunger therefore believe that it would be safer to automatically release the recording.[179] Another option to mitigate the power imbalance created by the absence of the other party during the preparation sessions could be to allow the other party or an impartial third person (like staff from the Registry and/or the VWU) to attend the preparation meetings. This approach would also help to go beyond the traditional dichotomy of Prosecutor versus Defence team that has characterized the debate on witness preparation so far.

5. Beyond Traditional Dichotomies: Prosecutor vs Defence Team

Witness preparation is a party-driven process mainly because it cannot be entrusted to other ICC staff or third parties who are not bound by a code of ethics.[180] However, neither the OTP nor defence counsel work in a legal vacuum and both need to cooperate closely with different actors. For instance, both parties work closely with the Registry, which organizes the terms of witnesses' stay in the Netherlands.[181] To minimize the disruption to witnesses' lives and to be mindful of their well-being, it could be useful to explore alternative ways of organizing preparation sessions, for instance via video-link, so that witnesses do not need to travel to The Hague in advance of the actual hearing. However, this solution poses some economic and security challenges for the ICC, which would have to organize an expensive mission in the field to assess the security of both the witnesses and the personnel involved.

Additionally, the actual preparation of a case starts when the investigation begins, long before the actual trial. Both parties rely on the material collected by investigators, who take statements from potential witnesses in the field. The investigators' job is challenging because they interview a large number of people in a limited amount of time and in different languages (with the help of interpreters). There is consequently some room for error in both direct testimony and article testimony under Rule 68(1) of the ICC RPE. Thus, both parties might require some clarification on the facts recalled by each witness before the actual trial. However, the role of the investigators within the preparation process is underexplored. Here, witness preparation might help to uncover any error in the investigation phase, and also allow the same investigators to modify the way they gather evidence on the basis of the rules in force at the ICC.

At present, ICC judges have the ultimate decision over whether to allow witness preparation or not. Not only does the ICC's case law seem to suggest that the issue is strictly linked to the right to a fair trial, but also the IER includes the discussion on witness preparation under 'Judicial process and fair trial rights'. Some scholars would welcome a decision of the Appeals Chamber to resolve this sensitive issue once and for all.[182]

While it advances the current debate on the topic and provides further insight on the ICC's reasoning, this article suggests that the ICC should shift perspective when looking at witness preparation and understand how the ICC, as an institution, could address the

[177] R.C. Wydick, 'The Ethics of Witness Coaching', 17 *Cardozo Law Review* (1995), 1–52, at 23 and B.L. Gershman, 'Witness Coaching by Prosecutors', 23 *Cardozo Law Review* (2001–2002) 829–830, at 833 and 851.

[178] *Lubanga*, *supra* note 19, Vasiliev, *supra* note 14, at 248.

[179] Jackson and Brunger, *supra* note 21.

[180] E. Lewis, 'Witness Preparation: What is Ethical and What is Not', 36 *Litigation* (2010) 41–45, at 41–42; R. Alcorn, 'Aren't You Really Telling Me? … Ethics and Preparing Witness Testimony', *Arizona Attorney* (March 2008) 14, at 19; P.J. Kerrigan, 'Witness Preparation', 30 *Texas Technology Law Review* (1999) 1367–1382, at 1371.

[181] ICC, Witness Preparation Protocol (ICC-01/12-01/18-666-Anx), 17 March 2020, §§ 5–7.

[182] Jackson and Brunger, *supra* note 21.

concerns linked to this procedure. Witness preparation should be discussed at a Court-wide level, rather than be dealt with on a case-by-case basis. For this reason, this research encourages any opportunity for a wide debate and welcomes the idea of a roundtable or discussion with partners and participants to hear their views and understanding of the procedure. In addition to the parties calling the witnesses, this wider debate should include the International Bar Association, members of the victims' community and, ultimately, representatives of both victims and witnesses. This wider roundtable would represent a stepping stone towards a more thorough regulation of the matter.

8. CONCLUSION

This article discusses both the legitimacy and the utility of witness preparation, which is still a controversial procedure at the ICC. It contributes to the scholarly debate contending that witness preparation should be recognized as corresponding to a legal obligation for the ICC under the framework of Article 68 to protect witnesses, especially the vulnerable ones.

The analysis of the ICC's case law revealed inconsistent interpretive practice between the different Chambers, which have mainly used three approaches, based on Articles 21, 64 and 68, respectively. This article argued that the ICC judges should rely on the link between Article 68 of the Rome Statute and witness preparation. Article 68 imposes upon the ICC a legal obligation to protect witnesses' well-being. Despite this, some concerns remain that this practice seems too close to witness coaching and could lead to the distortion of evidence and so be detrimental to the right to a fair trial. Based on the analysis of ICC's judgments, this article discussed how the most concerning aspects of witness preparation might be addressed. For instance, the Preparation Protocol would be a good starting point to refine this procedure and make it respectful of the rights of both witnesses and defendants. However, some borderline conduct remains unregulated. In the absence of clear boundaries, an ethical code could make both parties more scrupulous. Additionally, the lack of contempt powers and sanctions for those who break those rules leads to an inefficient system. The ICC could include witness preparation in the Regulation of the Court, with clear guidance for all the involved actors, promoting consistent practice in line with the principle of legality and predictability. In the meantime, videorecording witness preparation sessions would represent an additional safeguard. Not only should these recordings be readily available to the parties but also both parties (or members of the Registry) should attend preparation meetings. Finally, witness preparation is a party-driven process, and its implementation has mainly been a matter of judicial discretion. Although the Appeals Chamber has not had the opportunity to consider this issue, its decision might not be conclusive in any event. Witness preparation needs a broader consultation, and this article suggests expanding the discussion and the cooperation with different actors, at a Court-wide level, such as the Registry, investigators, the International Bar Association, members of the victims' community and, ultimately, representatives of both victims and witnesses.

The position of the ICC on witness preparation is far from settled. While it is part of the natural growth of an institution to adjust to new challenges, the ICC is no longer an emerging system. In addition to having an obligation towards its witnesses, the ICC has a responsibility towards different actors to give consistency to this procedure. First, clear guidelines would save time for judges and the calling parties. It would also ensure consistency and fairness of the proceedings for all the actors at the highest standards. Secondly, and more

importantly, it would do justice to witnesses with full respect for their rights and well-being. Individuals (as both witnesses and victims)[183] and victim-oriented justice[184] are at the centre of the debate about the ICC's use of witness preparation, but it is difficult for judges, lawyers, court officials and outreach officers to transform those ideals into workable policies and rules. Victims and witnesses have too often been instrumentalized and have been given little in return.[185]

[183] ICC, Press Release, 'Statement to the Press by the Prosecutor of the International Criminal Court (Abidjan, Cote d'Ivoire', 20 July 2013, available online at https://www.icc-cpi.int/news/statement-press-prosecutor-international-criminal-court-abidjan-cote-divoire-20-july-2013 (visited 7 May 2023).

[184] L. Catani, 'Victims at the International Criminal Court', 10 *JICJ* (2012) 912–916, at 915; J. de Hemptinne, 'Challenges Raised by Victims' Participation in the Proceedings of the Special Tribunal of Lebanon', 81 *JICJ* (2010) 16; S. Vasiliev, 'Article 68(3) and the Personal Interests of Victims in the Emerging Practice of the ICC', in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Brill, 2009) 635–691.

[185] L.E. Fletcher, 'Refracted Justice: the Imagined Victim and the International Criminal Court', in C. De Vos, S. Kendall and C. Stahn (eds), *Contested Justice: the Politics and Practice of International Criminal Court Interventions* (Cambridge University Press, 2015) 302–326; S. Kendall and S. Nouwen, 'Representation Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood', 76 *Law and Contemporary Problems* (2013) 235–262; K. McEvoy and K. McConnachie, 'Victims and Transitional Justice: Voice, Agency and Blame', 22 *Social and Legal Studies* (2013) 489–513; S. Nouwen, 'Justifying Justice', in J. Crawford and M. Koskenniemi (eds), *Cambridge Companion to International Law* (Cambridge University Press, 2012) 327–352.

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