

# Table of Contents

A. Introduction	13
I. Foundations	13
1. Witness Evidence in Criminal Proceedings	13
2. ‘Material’ and Procedural Truth in Criminal Proceedings	14
3. The Role of Witness Evidence in Determining Truth	15
4. The Conflict Between Pure Evidence and Participatory Rights	16
5. Narrowing the Focus: Preparing Witnesses for Trial	17
a. Pivot Point	17
(1) Object	17
(2) Purpose	18
b. Systemic Dimension of ICC Witness Preparation	18
c. Pragmatic Considerations	20
6. Restraints	22
II. A Note on Terminology	23
III. Structure of the Analysis	25
IV. On the Relevance of Legal Psychology within the Framework of this Analysis	26
B. National Level	27
I. Reason and Purpose of Turning to the National Level	27
1. Reasons	27
2. Purpose	31
II. USA	32
1. Legal Framework	33
a. Model Code	34
b. Jurisprudence	39
c. Result for Legal Regime	43
2. Professional Guidelines	44
a. ABA Handbook	44
b. ASTC Professional Code	45

3. Witness Preparation as a Regular Practice: Ethical Dimensions	47
a. Goals and Methods	48
b. Actors	51
c. Result	53
4. Critical Assessment	54
III. UK	57
1. Legal Framework	58
a. Criminal Law Prohibitions	58
b. Professional Rules	59
(1) Barristers	59
(2) Solicitors	60
(3) Prosecutors	61
(4) Informal Actors	62
c. Result	64
2. Jurisprudence	65
3. Liberal Tendencies	67
4. Ethical Concerns	69
5. Critical Assessment	70
IV. Germany	71
1. Legal Framework	71
a. Law of Criminal Procedure	71
b. Substantive Criminal Law	74
c. Law of the Lawyer's Profession	76
d. Constitutional Law	78
e. Result	79
2. Legal Proxies for Preparing Witnesses for the Criminal Trial	80
a. 'Nebenklage'	81
b. 'Zeugenbeistand'	83
c. 'Kronzeugenvertreter'	85
3. Professional Ethics of Criminal Defence Lawyers as Guideline?	86
a. BRAK Theses	87
b. The Lawyer as an Independent Entity of the Judicial System	88
c. Result	89
4. Terminological Simulacrum	89

5. Preparing the Witness for a Criminal Trial: Terra Incognita	90
6. In Sum: The Boundaries of Preparing the Witness	91
7. Witness Preparation on the Fringes of the Criminal Process	93
a. Formal Actors	93
b. Informal actors	94
c. Discussion	95
8. Result	96
V. Comparison	97
1. Different Procedural Systems	97
2. Common Elements	98
3. Differing Practice Despite Common Elements	98
4. Reasons for Differing Practice	99
5. Guiding Elements Derived from Differing Practice	100
a. Ethical Awareness	101
b. Empirical Testing	102
c. Scepticism Towards a Potentially Prejudicial Practice	103
C. International Level	105
I. ICTY	105
1. IT-03-66-T (Limaj et al.), Decision on 10 Dec. 2004	106
2. IT-05-87-T (Milutinovic et al.), Decision on 12 Dec. 2006	108
3. IT-04-84-T (Haradinaj et al.), Decision on 23 May 2007	112
4. ICTY Manual on Established Practice	115
II. ICTR	117
1. Karemera et al., TC, Decision on 15 Dec. 2006	118
2. Karemera et al., TC, Decision on 14 March 2007	119
3. Karemera et al., AC, Decision on 11 May 2007	120
III. SCSL	122
1. Sesay et al., TC, Decision on 26 Oct. 2005	123
2. VWU Recommendation Study	124
IV. ICC	126
1. ICC-01/04-01/06 (PTC, Prosecutor v. Lubanga, 08. Nov. 2006)	126
2. ICC-01/04-01/06 (TC, Prosecutor v. Lubanga, 30. Nov. 2007)	131

3. ICC-01/04-01/06 (TC, Prosecutor v. Lubanga, 23 May 2008)	133
4. Intermediaries' Influence on ICC Witnesses?	137
a. De Facto	137
b. De Jure	137
(1) ICC-01/04-01/06, (TC, Prosecutor v. Lubanga, 8 July 2010)	137
(2) ICC-01/04-01/06 (AC, Prosecutor v. Lubanga, 8 October 2010)	138
c. Discussion	139
V. Comparison: Inter-tribunal Influence?	139
VI. Discussion: Control Over Proceedings, Participation Rights, Finding Truth	141
1. Legal Area of Tension	142
2. No 'Right of Ownership' over Witnesses	145
3. Fairness of Proceedings	146
a. Terminology	146
(1) Expeditionness of Proceedings	146
(2) Participation Rights, Especially the Right to an Effective Defence	148
(3) Transparency of Pre-trial Preparation as a Matter of Fairness?	149
b. Result	151
4. Safeguards Against the Admitted Dangers of Proofing	151
5. Truth-Finding and the Psychology of Perception, Memory and Interrogations	154
a. General Notions	156
(1) Perception	157
(2) Memory	157
(3) Reproduction, Especially Interrogation and Suggestibility	158
b. Psychology of Witness Preparation	162
c. Result for Witness Preparation in ICC Proceedings	165
6. Preparing the Vulnerable Witness as a Necessity?	167
7. Art. 68 (1) ICC St., Witness Dignity and the Rights of the Accused	169
8. Excursus: Reviewing Statements and the Interests of Victim-Witnesses	171
a. Reviewing Prior Statements	172

b. Discrete Interests of Victim-Witnesses and Compensation	173
c. Result	174
9. Summary	175
a. A ‘Clash of Legal Cultures’?	175
b. In Favour of the Pragmatic Solution: Psychological Dimensions	177
c. The Need for a Durable Solution	178
d. Guiding Principles from National Jurisdictions	178
e. Conclusion	180
D. Conclusions	181
I. Results – Consequences for Witness Preparation at the ICC	181
1. Results Derived from the National Level	181
a. Ethical Dimension	181
b. Empirical Testing	182
c. General Scepticism and Transparency	183
2. Results Derived from the International Level	184
a. The Legal Situation before the ICC	184
b. Practice of International Courts and Tribunals as Guidance?	185
c. The Need for a Procedural Rule	185
d. Empirical Findings in Support of the Need for a Procedural Rule	186
II. Suggestion: Codification within the RPE	187
1. Necessity to Codify: A Policy Decision	187
a. Legal Certainty	187
b. Efficacy of Proceedings	188
c. Cost-Efficiency	189
d. Installation of a Rule on Witness Preparation	189
2. Draft Rules on ICC Witness Preparation	189
a. Proper Location for Codification	189
b. Codification within the Provisions on the VWU	191
(1) Functions of the VWU	191
(2) Disclosure	192
(3) Minutiae of Witness Familiarisation	192
c. Telos of the Modifications	194
d. A Right to Familiarisation?	196

*Table of Contents*

3. Consequences of Infringing the Rules	196
III. Outlook: Testing Witness Preparation Empirically	199
E. Theses	201
Bibliography	205