Chapter 5

The International Criminal Court (ICC) Witness Scheme

This chapter shall concentrate on five components of the ICC witness scheme i.e. practicalities, testimony, protection, cooperation and sanctions. Section one discusses practicalities such as witness modelling, sourcing, familiarisation and proofing. While sections two to five each examine the drafting of the key witness provisions taking into account proposals and debates during the drafting years. Followed by, an analysis on each of the provisions while making reference to academic commentary, scholarly debates and ICC case-law/jurisprudence. The chapter seeks to establish whether through its practice and jurisprudence the ICC exhibits cosmopolitan features. It also ascertains ICC judicial authority, jurisdiction over witnesses and the justification for imposing sanctions on witnesses. Like the other criminal tribunals evidence before the ICC, are to a considerable degree dependent on witness testimony. For instance, in Lubanga much of the evidence introduced, took the form of oral testimony. The Judges heard 67 witnesses, the prosecution called 36 witnesses, including 3 experts and the defence called 24 witnesses. Three victims were also called as witnesses following a request from their legal representatives.¹

The importance of witnesses can also be illustrated with the use of the word witness/witnesses found throughout the ICC Statute and RPE. Importantly the following Articles demonstrate this: Article 93(1)(e) dealing with cooperation; Articles 68(1) and 43(6) on protection; Articles 64(6)(b) and 69 on testimony; and Articles 70 and 71 on sanctions.

Before proceeding to examine the ICC witness scheme, it is best to briefly explore the legislative history. At Rome there was a shared understanding that issues pertaining to witnesses should be addressed and incorporated in the treaty so as to enable them assist the Court. According to Claus Kress, the negotiators of the Statute and RPE faced a great many varying national solutions with respect to many aspects of the position of witnesses in criminal

¹ Prosecutor v. Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T.Ch. 1, 14 March 2012, para. 11 (hereinafter, Lubanga Judgment); see also number of witnesses at Prosecutor v. Katanga et al.; Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, ICC-01/04-01/07, 21 November 2012, para. 3.
The International Criminal Court (ICC) Witness Scheme proceedings be it in response to the most basic question who can be a witness, be it regarding the scope of privileges or be it concerning the counselling and the compensating of witnesses.\(^2\) With the diversity of national laws the negotiators had to consider possible peculiarities of international criminal proceedings when reflecting about the procedural rules on witnesses. In some of these areas the finding of consensus solutions was possible thanks to the genuine spirit of compromise including all the readiness of negotiators to move away from national procedural perspectives.\(^3\)

The key witness provisions mentioned above are deemed to be part of the context for the purposes of interpretation of the ICC treaty according to Article 31 of the Vienna Convention on the Law of Treaties (VCLT). As shall be examined in this chapter, the provisions were adopted with reference to national law, custom, treaty law, rules and concepts of international law. Also, the will of the parties drafting the provisions determined what laws and rules of procedure could be applicable. Consideration was taken as to the nature of the law and rules, their purpose as well as what would be the reasonable way to apply them. Thereby, enhancing the fact that the text was not constructed in a literally narrow way, its context thus acts as guidance of interpretation.\(^4\) Furthermore, material sources external to the Statute are thus relevant in the interpretation of witness provisions. Recourse may also be had to supplementary means of interpretation, including the preparatory work of the Statute and the circumstances of its conclusion, in order to confirm and determine the meaning resulting from the application and interpretation of the treaty according to VCLT Article 31.\(^5\)

In light of the above, in 1993 the International Law Commission (ILC) worked diligently on the preliminary draft of the Rome Statute.\(^6\) The provisions on witnesses first appeared in the draft, with various commentaries on


\(^3\) Ibid. p. 312.

\(^4\) VCLT Article 31(2).

\(^5\) VCLT Article 32.