Absent Witnesses and the Right to Confrontation: The Influence of the Jurisprudence of the European Court of Human Rights on International Criminal Law

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I Introduction

The right of an accused person to challenge the witnesses and evidence against them is a universal fair trial right, which is reflected in the Statutes of the international criminal tribunals. Arguably, it is more challenging for international criminal tribunals to respect this right compared to their domestic counterparts. This is because the tribunals themselves have to ensure the safety and appearance of witnesses who may be unwilling to come forward; unlike domestic courts, they do not have a police force that they can rely upon in this regard.\(^1\) In addition, because the events tried by international criminal tribunals have often happened years (or sometimes decades) before the trial, witnesses may no longer be alive or available to testify. To this end, Trial Chambers may be asked to rely on a previous statement made by a witness in lieu of his or her live testimony in court,\(^2\) or on the hearsay evidence


of another person with whom the unavailable witness spoke about the events at issue.\(^3\)

In admitting such evidence, international criminal tribunals have to consider the fact that witnesses in international criminal trials ‘are precious commodities’,\(^4\) and as such, they should not be endangered or excessively inconvenienced by their cooperation with the tribunal, as that may well discourage future witnesses from coming forward and without witnesses, there can be no trials. However, the tribunals also have to ensure that their judgments are adequately founded in a solid evidentiary base, as to do otherwise would seriously hamper the legitimacy and reputation of their institutions.\(^5\) Moreover, the admission to the evidentiary record of the testimony of witnesses who are not present poses a threat to the accused’s right to confrontation, as that testimony cannot be subjected to the same level of scrutiny as it would face if the witness were present before the court.

These challenges are not unique to the international criminal context, of course. Domestic courts frequently make decisions on whether to admit the testimony of a witness in written form, or to accept the testimony of another person whom that witness spoke to in place of his or her first-hand account. Unsurprisingly, a not insignificant number of such cases have later re-emerged before human rights tribunals when the defendant convicted in such trials alleges that his or her right to confront the witnesses against him or her was not respected. Before the European Court of Human Rights (ECtHR), a quite detailed body of case law has developed on this question. As shall be shown, the ECtHR’s standards on the conformity of convictions that were based in no small part on the accounts of unavailable witnesses with the right to a fair trial has evolved significantly over time.

This chapter examines the influence of that case law on the practice of the international criminal tribunals. Part II sets out the ECtHR standards on the right of confrontation where witnesses are unavailable. It will show that

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\(^3\) For example, Prosecutor v Akayesu, ICTR-96-4-A, Judgment, Appeals Chamber, 1 June 2001, paras 277–309; Prosecutor v Aleksovski, IT-95-14/1-AR73, Decision on Prosecutor’s Appeal on Admissibility of Evidence, Appeals Chamber, 16 February 1999, para. 15; Prosecutor v Lubanga, ICC-01/04-01/06-1399, Decision on the Admissibility of Four Documents, Trial Chamber i, 13 June 2008. See further the chapter of Yael Vias Gvirsman, in this volume.

\(^4\) See Wald (n 2) 238.