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WITNESS ANONYMITY AT THE INTERNATIONAL CRIMINAL COURT: DUE PROCESS FOR DEFENDANTS, WITNESSES OR BOTH?

*Tim Welch, Huma Haider, Martin Meenagh and Yassin M'Boge**

The question of how far and in what way to extend protection to witnesses in trials has manifested itself in institutions as diverse as the European Court of Human Rights (ECHR), the Committee of the International Covenant on Civil and Political Rights (ICCPR), the ad hoc criminal tribunals (International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone), and most recently the International Criminal Court (ICC). This is not surprising; as David Lusty has pointed out in his seminal analysis of the use of anonymous accusers, the question has arisen in almost every legal deliberative body for the past two thousand years.¹

The question poses a dilemma in the operation of the rule of law, since an accused has a well-established right to a fair trial. By almost any recorded standard, fairness is identical to the rights of due process, and those in turn have been elaborated in multiple fora. In the ICCPR, the right to examine or have examined the witnesses against oneself and to obtain their attendance and examination is a 'minimum guarantee'.² Article 6(3)(d) of the European Convention on Human Rights defines as a 'minimum right' the chance of an

* Tim Welch (LLB, LLM Dunelm) and Huma Haider (LLB, LLM, MBA) worked in the Prosecution Section of the War Crimes Chamber, Court of Bosnia and Herzegovina in 2007. Tim is now a Barrister (Inner Temple), a Visiting Lecturer on the LLM in International Criminal Law and Procedure at London South Bank University, and a director of City Law Tutors in London; Huma is a Research Fellow at the Governance and Social Development Resource Centre, University of Birmingham; Martin Meenagh (DPhil, MSt, MA Oxon) is a Barrister (Middle Temple), a Lecturer and Tutor based in London; finally, Dr Yassin M'Boge PhD (Queen's University Belfast), LLM (Nottingham), is a Research Fellow at the School of Law, University College Dublin.

¹ D Lusty "Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials" (2002) 24 *Sydney Law Review* 361.

² Article 14 (3) ICCPR.

accused to examine or have examined the witnesses against him' on the same terms as those laid out in the ICCPR. Article 21 of the Statute for the International Criminal Tribunal for the former Yugoslavia (ICTY) incorporates this minimum guarantee.³ So does that of the International Criminal Tribunal for Rwanda (ICTR), though it allows under rule 69 (A) of its procedures for the protection of the identity of a witness in 'exceptional circumstances'.⁴ The Rome Statute of the International Criminal Court provides similarly for the rights of the accused in Articles 67.⁵

Despite this impressive body of statutes and rules—and an equally impressive variety of cases which will be examined later in this article—the rights of the accused have frequently and extensively been qualified in international jurisprudence. This is because trials require witnesses. Witnesses of massacres, serious and traumatic crimes, mass rapes, or against vast criminal conspiracies often cannot be expected to come forth into the open. By doing so, in many cases, they would place their own psychological or physical health at risk, and may endanger themselves or their families.

Witness protection has been a key concern of the international criminal system since the establishment of international criminal tribunals in the decade before the ICC. The ICTY and ICTR have incorporated in their statutes an explicit call for the protection of victims and witnesses, alongside respect for the rights of the accused. Amongst the first decisions in *Prosecutor v Tadić* at the start of the Yugoslav trials, the ICTY emphasised that the obligation to protect witnesses represented recognition of the challenges at the time of operating during a conflict, without a witness protection programme.⁶ This necessitated the development of complex rules within the trial process.

The ICTY subsequently established a witness protection programme, as did the other ad hoc tribunals. The ICC also has a Victims and Witnesses Unit (VWU) concerned with protection, in addition to its court statute and rules. The Rome statute has the most extensive provision for the protection of victims and witnesses of all the international criminal tribunals.⁷ The VWU has been characterised as one whose resources could be very significantly stretched and therefore fall under pressure should the work required of the

³ Article 21(4)(e) Statute of the International Criminal Tribunal for the Former Yugoslavia.

⁴ Article 20, Article 21 Statute of the International Criminal Tribunal for Rwanda, and Rules of Procedure and Evidence 69 (A).

⁵ Specifically, article 67(1)(e) of the Rome Statute of the ICC.

⁶ *Prosecutor v Tadic*, Decision on Prosecution Motion for Protective Measures for Witnesses, IT-94-I-T 10 August 1995 paras 26-27.

⁷ Article 68, Rome Statute.

ICC accelerate.⁸ Indeed, this pressure has resulted in a perceived tension between the unit and the Office of the Prosecutor of the ICC, who in 2008 were ‘unable to agree on the extent of their respective responsibilities for witnesses’.⁹

In the face of this, the ICC has adapted to what could be termed a ‘creative tension’ within its founding Rome statute regarding the rights and protections of the accused on the one hand and victims and witnesses on the other. Specifically, Article 64(2) specifies that ‘the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses’; Article 67 outlines the rights of the accused and Article 68 the protection of victims and witnesses. The ICC has responded to this tension by considering the protection of witnesses through anonymity based on the circumstances before it in its expanding number of cases. This practice, as this article will show, can be considered at odds with other established international jurisprudence.

At the time of writing, aspects of the protection of defendants and the question of the appropriate balance between the protection of the defendant, witness and victim, are in dispute between the English and Welsh Courts and the European Court of Human Rights.¹⁰ Given that the International Criminal Court, unlike the ad hoc tribunals, is permanent, the way in which this question plays out in the ICC is likely to be of even greater significance.

This article will outline the protections offered to witnesses and victims by the ICC and the rights of the accused within that body. It will then focus upon the extension of anonymity to witnesses, and shall place those aspects within the international jurisprudence of witness protection generally.

THE LEGACY OF THE ICTY AND ICTR

Before the ICC came into existence in July 2002, a debate was ongoing on witness protection and the rights of the accused in the international criminal tribunals then in operation in Yugoslavia, Rwanda and Sierra Leone. In particular, Article 21(2) and Article 22, and Rule 69(A) of the ICTY statute and rules of procedure, and ICTY decisions related to these provisions, attracted attention. Article 21(2) rendered the accused’s right to a fair trial subject to the need to protect witnesses and victims (Article 22). This included

⁸ International Bar Association Monitoring and Outreach programme *Balancing Rights: The International Criminal Court at a Procedural Crossroads* (May 2008) para 11, p 12.

⁹ *Ibid* p 20.

¹⁰ Cf Lord Phillips in *R v Horncastle* [2009] EWCA Crim 964 at para 14, commenting on exceptions to Article 6(3)(d) of the European Convention on Human Rights.

‘non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal’ (Rule 69(A)). These combined provisions thus qualified the right of an accused to a ‘fair’ trial by allowing for anonymity for victims and witnesses.

The justification offered in *Prosecutor v Tadic*, one of the first and most important cases, was that the ICTY had an ‘affirmative obligation’ to protect victims and witnesses, but that this could be done in the context of trial rules as much as in witness protection programmes.¹¹ The principle of balancing interests thus began in the tribunals.¹² It was initially grounded, however, on the basis that such a balance operated in ‘exceptional circumstances’ (in the Tadic case, ‘in the context of the armed conflict and...terror and anguish’ of the wars in former Yugoslavia).¹³ The Trial Chamber in Tadic laid out five criteria to apply in determining the applicability of anonymity:

"[f]irst and foremost, there must be real fear for the safety of the witness or her or his family [...]. Secondly, the testimony of the particular witness must be important to the Prosecutor's case [...]. Thirdly, the Trial Chamber must be satisfied that there is no prima facie evidence that the witness is untrustworthy [...]. Fourthly, the ineffectiveness or non-existence of a witness protection programme is another point that has been considered in domestic law and has a considerable bearing on any decision to grant anonymity in this case [...]. Finally, any measures taken should be strictly necessary."¹⁴

The International Criminal Tribunal in Rwanda, operating a year *after* the war there nevertheless applied the reasoning of the ICTY ‘mechanically’.¹⁵ However, both courts were ultimately self-limiting, and, after Tadic, the

¹¹ Above n 6. The reason for the emphasis on rules in Tadic is perhaps explained by the way in which threats to the family of an alleged rape victim, leading to a reluctance of the victim to testify, caused charges to be withdrawn by the Prosecutor. A discussion of the point can be found in M P Scharf & A Kang ‘Errors and Missteps; Key Lessons The Iraqi Special Tribunal Can Learn From the ICTY, ICTR And SCSL’ (2005) 38 *Cornell International Law Journal* 911-937, and also at S Suscinski *Witness Protection* (Memorandum from Case Western Reserve University School of Law International War Crimes Research Lab) to the Office of the Prosecutor 1 (Nov. 2002), www.law.case.edu/war-crimes-research-portal.

¹² N A Affolder ‘Tadic, the Anonymous Witness and the Sources of International Procedural Law’ (1997-1998) 19 *Michigan Journal of International Law* 445.

¹³ See C Chinkin ‘Due Process and Witness Anonymity’ (1997) 91(1) *The American Journal of International Law* 75-9.

¹⁴ *Tadic*, para 62-66.

¹⁵ J Pozen ‘Justice Obscured: The Non-Disclosure of Witnesses’ Identities in ICTR Trials’ (2006) 38 *NYUJ Int’L L & Pol* 281 at 282

ICTY did not extend unqualified anonymity again; nor did the granting of such anonymity become a feature of the ICTR jurisprudence.¹⁶

WITNESS PROTECTION AT THE ICC

The ICC represents a ‘step change’ from the previous ad hoc and temporary tribunal system. It is instead a permanent international court at the Hague, with expanded terms of reference and a founding statute which built upon but went beyond those of the ad hoc tribunals. As noted, it adopted the most extensive provision for the protection of victims and witnesses of all the international criminal tribunals.

The growth of the ICC’s remit and activities has been striking. Since July 2002, when the Rome Statute entered into force, the ICC has conducted over twenty cases. At the time of writing, trials are ongoing or imminent in Sudan, the Democratic Republic of the Congo, the Central African Republic, Uganda and Kenya. In addition, the Office of the Prosecutor has reported ‘preliminary examinations’ in Afghanistan, Colombia, Côte d’Ivoire, Georgia, Guinea and Palestine.¹⁷ For such states, witness protection is not only a costly exercise, but also often one that requires deeper bilateral exchanges and discussions amongst states than is extant.¹⁸

Drawing in part upon the short history of international criminal tribunals, and upon its own jurisprudence, the ICC has evolved its own methods of witness protection which seek to balance the minimum rights of the accused against what may be termed the duty to witnesses, or their ‘due process’ rights.¹⁹

Colin T. McLaughlin has identified six ways in which witnesses can be legally protected by the Court.²⁰ These methods correspond with the following articles from the Rome Statute and rules from the ICC Rules of Procedure and Evidence:

¹⁶ Ibid at 291-294. The issue has, however, been discussed in other contexts since, see, for example, C Mahony *The Justice Sector Afterthought; Witness Protection in Africa* (Pretoria Institute for Security Studies 2010) which addresses anonymity in Kenya, Uganda, Sierra Leone and South Africa.

¹⁷ Report of the International Criminal Court, Note by the Secretary-General to the General Assembly of the United Nations 19 August 2010 A/65/313.

¹⁸ Ibid paras 4, 20 and 102.

¹⁹ A Beltz “Prosecuting Rape in International Criminal Tribunals; the Need to Balance Victim’s Rights with the Due Process Rights of the Accused” (2008) 23 *St Johns Journal of Legal Commentary* 167 at 183-4.

²⁰ C T McLaughlin “Victim and Witness Measures of the International Criminal Court: A Comparative Analysis” (2007) 6 *The Law and Practice of International Courts and Tribunals* 189 at 190.

- (i) *non-disclosure of identity*, associated with Rule 76(4) on pre-trial disclosure;
- (ii) *protection from media and public photography, video and sketch*, associated with Rule 87 (3) on protection measures;
- (iii) *protection from confrontation with the accused*, also covered by Rule 87(3). In particular, Rule 87(3)(c) allows for testimony to be presented by electronic or other special means; and Rule 87(3)(d) allows the use of a pseudonym;
- (iv) *anonymity*, while not directly discussed can be addressed by the same Rules above and by Articles 64(6)(e) and 68(1), which provide for the general protection of victims and witnesses;
- (v) *reparations to victims*, dealt with by Article 75; and
- (vi) *protection for victims of sexual assault*, comprehensively covered by Articles 68(1); Article 68(2), which provides for in camera proceedings for victims of sexual assault; and Article 43(6), which calls for staff within the VWU to be trained in dealing with trauma from sexual violence. These provisions are complemented by Rule 88, which gives a Chamber the power to order special measures on the basis that the witness or victim is a child, an elderly person, a victim of sexual violence, or simply traumatised.²¹

Going beyond protection of victims and witnesses, the ICC is unique in its provision for the participation of victims in the trial process beyond the role of witness. This process is expected to contribute to expiation and recovery of victims. Article 68(3) states:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

The ICC in *Prosecutor v Lubanga* has permitted victims to remain anonymous in their new participatory roles. The accused Thomas Lubanga Dyilo was charged with using children as soldiers in the Democratic Republic of Congo (DRC). The ICC Pre-Trial Chamber allowed anonymous participation at the confirmation hearing, citing the deterioration of the safety

²¹ H Haider and T Welch “The Use of Protective Measures For Victims and Witnesses and the Balance of Competing Interests Under International Law: The Special Case of War Crimes Trials” (2010) 28 *L’Observateur des Nations Unies* Special Edition on “The Place of the Victim in International Law” 37-62.

situation in certain areas of the DRC which had undermined the ability to protect victims and witnesses living in these areas.²² The defence opposed such anonymity claiming that the accused should know who is bringing legal proceedings against him and seeking compensation.²³ The Chamber attempted to strike some kind of balance by stating that anonymity would be granted at the expense of limiting the extent of participation. It stressed that :

"[t]he fundamental principle prohibiting anonymous accusations would be violated [if victims] were permitted to add any point of fact or any evidence at all to the Prosecution's case file against Thomas Lubanga Dyilo in the notification of charges document and the list of evidence".²⁴

The participation of anonymous victims was limited to accessing public documents and being present during public hearings. More controversially, their representatives were allowed to make opening and closing statements during the confirmation hearing and to intervene with the authorization of judge.²⁵ The Chamber indicated that victims who consented to the disclosure of their identity to the defence could participate to a greater extent. The ICC has thus set out a principle that anonymity should not be viewed favourably but has not ruled out its use in particular circumstances.²⁶

The ICC trials in the DRC have proven particularly illuminating, in part because they represent the first workings of the court, and they have therefore produced many judgments on modalities and procedures. For example, the trials of Thomas Lubanga Dyilo, Germain Katanga, and Mathieu Ngudjolo Chui alone led to requests from over 400 victims to participate in the proceedings or to give evidence. Over 600 filings and decisions were

²² ICC, *Situation in the Democratic Republic of the Congo*, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 22 September 2006, ICC-01/04-01/06-462, in JOUET (M), "Reconciling the Conflict Rights of Victims and Defendants at the International Criminal Court" (2007) 26(2) *Saint Louis University Public Law Review* 264-265.

²³ ICC, *Situation in the Democratic Republic of the Congo*, Defence Observations Relative to the Proceedings and Manner of Participation of Victims a/0001/06 to a/0003/06, 4 September 2006, ICC-01/04-01/06-379, in JOUET (M), *ibid*, 263.

²⁴ ICC, *Situation in the Democratic Republic of the Congo*, above n 24, 265.

²⁵ ICC, *Prosecutor v Lubanga*, Decisions on the Arrangement for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, Pre-Trial Chamber I, 2 September 2006, ICC-01/04-01/062, cited in ZAPPALÀ (S), "The Rights of the Victims v The Rights of the Accused" (2010) 8(1) *JICJ* 150.

²⁶ See ZAPPALÀ (S), *ibid*, 151.

delivered. Many concerned anonymity.²⁷ Of the rights of a victim or witness, those relating to anonymity have proven to be particularly complicated, and indeed controversial, especially once anonymity moves from victim participation to witness evidence.

Controversy initially arose because the ICC appears to have moved away from previous practice in the ICTY concerning a hierarchy of rights. In the face of anonymity requests at the Tribunal, the rights of the accused to due process were considered a priority. At the time of writing, the issue in the ICC remains unresolved.²⁸

The rules of the ICC make resolution difficult. Anonymity of witnesses is neither specifically granted nor specifically forbidden by the Rome Statute or the ICC Rules of Procedure and Evidence. This has allowed since *Lubanga* a creative tension to exist, wherein Articles 64(6)(e) and 68(1) are balanced with Article 67. Creative tension allows for discretion, but it also allows for inconsistent judgments, and opens the ICC to a kind of cultural blindness that may result in injustice.

Criticisms of the discretion have tended to fall into two camps. The first represents a strain of ‘procedural’ criticism. Writing specifically about criminal prosecution and sexual violence, Anne-Marie de Brouwer, for example, has suggested that the ICC should extend discussion of anonymity to defence advocates, and that it should draw on national traditions and the characteristics and circumstances of victims in general in making its decisions.²⁹

The second is a line of ‘substantive’ or ‘culturally aware’ criticism that draws upon the unfolding of the idea of anonymity as witness and victim protection in international jurisprudence generally. Critics have argued that anonymity cannot be reconciled with the right to a fair trial.³⁰ Some have focused on the need to avoid blanket amnesty across tribunals. Joanna Pozen, for example, argues that minimum rights should be placed in context and ‘tailored’.³¹ In making specific recommendations for the ICC, Pozen suggests that anonymity should be factored through four filters.³² One is the existence

²⁷ International Bar Association Monitoring and Outreach programme, *Balancing Rights: The International Criminal Court at a Procedural Crossroads* May 2008 9.

²⁸ W Schabas “Article 67 Rights of the Accused” in Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (1999) 845-868, 867.

²⁹ A de Brouwer *Supranational Criminal Prosecution of Sexual Violence; the ICC and the Practice of the ICTY and ICTR*, (2005) 252-254.

³⁰ A Beltz “Prosecuting Rape in International Criminal Tribunals: The Need to Balance Victim’s Rights with the Due Process Rights of the Accused” (2008) 23 *St John’s Journal of Legal Commentary* 190.

³¹ Above n 8.

³² Pozen, “Justice Obscured...” above n 15, at 321-22.

of any ongoing conflict or war, and the existence of any viable witness protection programme. A second is the extent of any threat of bodily harm to witnesses. A third is the cultural issues and practices regarding identities of witnesses. A fourth relates to the cultural traditions that may influence the importance of cross-examination (eg conflating hearsay with firsthand experiences in Rwanda) and thus the acceptance of anonymity. Amanda Beltz suggests that guidelines and a balancing test that considers both due process for the accused and protection of witnesses can ensure that witness anonymity is reserved for the ‘most egregious of cases’. These are situations where a victim would be placed in ‘significant peril’ in the absence of such protection.³³

The ICC is a young institution. Despite its unique mandate, it may be that the court can gain from an appreciation of other systems of witness protection, in other regimes. It is to those that we now turn.

INTERNATIONAL LEGAL STANDARDS INTERNATIONAL CONVENTIONS

(i) The European Convention on Human Rights

Article 6(3) ECHR provides that:

“Everyone charged with a criminal offence has the following minimum rights:

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him...”³⁴

As with the ICCPR, the right to confront witnesses under the ECHR is an important and indeed ‘minimum right’. The significance of which was made clear by the Strasbourg Court in *Kostovski v Netherlands*³⁵ which observed that:

“If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculcating an accused may well be

³³ Beltz, above n 33 at 200.

³⁴ Article 6(3)(d) European Convention on Human Rights.

³⁵ *Kostovski v Netherlands* (1990) 12 EHRR 434.

designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious"³⁶

Nevertheless, unlike the Human Rights Committee, the Strasbourg Court has recognised that there are exceptions. In a number of cases the court has ruled that the constituent rights in Article 6 are not in themselves absolute.³⁷ The Court has accepted the need to strike a balance between competing interests of victims and witnesses and the accused. Where restrictive measures are to be applied, they must be 'strictly necessary' to be permissible under Article 6.³⁸

The application of such exceptions, however, has been unsystematic. The Law Commission of England and Wales has observed that the Strasbourg jurisprudence is "difficult to predict with confidence"³⁹. Nevertheless a review of the Strasbourg case law shows that the court has placed weight on the existence of counterbalancing measures which seek to ensure a fair trial. It will ultimately find a violation of Article 6(3)(d) though based on the extent to which a conviction is based on the evidence of anonymous witnesses.

COUNTERBALANCING

In various cases the Strasbourg Court has placed importance on counterbalancing measures. These are varied but include the opportunity of the defence and/or trial judge/magistrate to put questions to witnesses even if by proxy through a police officer.⁴⁰ However the extent to which counterbalancing measures will prevent a violation of Article 6(3)(d) is unclear. In finding a violation of Article 6(3)(d) the court in *Kostovski*⁴¹ placed weight on the lack of counterbalancing and in *Van Mechelen v*

³⁶ Ibid at para 42.

³⁷ See for example *Edwards v United Kingdom* (1992) 15 EHRR 417, paras 33-34; *Mialhe v France* (No 2) (1996) 23 EHRR 491, para 43; *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, para 59. *Adolf v Austria* (1982) 4 EHRR 313, 324-325, para 36, where the Court, citing *Guzzardi v Italy* (1980) 3 EHRR 333, 361, para 88, and *X v United Kingdom* (1981) 4 EHRR 188, 202, para 41; *Salabiaku v France* (1988) 13 EHRR 379.

³⁸ *PS v Germany* (2003) 36 E.H.R.R. 61; [2002] *Criminal Law Review* 312.

³⁹ Law Commission No.245, Hearsay and Related Matters 1997 (Report No 245); available at <http://www.lawcom.gov.uk/docs/lc245.pdf> at para 5.1.

⁴⁰ *SN v Sweden* (2004) 39.

⁴¹ Above n 20.

*Netherlands*⁴² the court observed that “Article 6(1) taken together with Article 6(3)(d) requires that the handicaps under which the defence labours be sufficiently counterbalanced by the procedures followed by the judicial authorities.”⁴³ In *Kok v Netherlands*⁴⁴ the court observed that:

“in assessing whether the procedures involved in the questioning of the anonymous witness were sufficient to counterbalance the difficulties caused to the defence due weight must be given to the above conclusion that the anonymous testimony was not in any respect decisive for the conviction of the applicant.”

Similar statements have been made in *Visser v Netherlands*⁴⁵ and in *Luca v Italy*.⁴⁶ In *Doorson v Netherlands*⁴⁷ it was held that “even when ‘counterbalancing’ procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements”.⁴⁸ This position is supported in the most recent Strasbourg ruling on Article 6(3)(d) of *Al-Khawaja and Tahery v United Kingdom*.⁴⁹ Here the court observed that:

“while it is true that the Court has often examined whether the procedures followed in the domestic courts were such as to counterbalance the difficulties caused to the defence, this has been principally in cases of anonymous witnesses whose evidence has not been regarded as decisive and who have been subjected to an examination in some form or other.”⁵⁰

Arguably this settles the issue and counterbalancing measures will not prevent a violation, even, if as Doak and Huxley-Binns point out “*a plethora of counterbalancing measures has been put in place*”⁵¹. The real issue therefore is the extent to which a conviction is based on the evidence of anonymous witnesses.

⁴² *Van Mechelen v Netherlands* (1998) 25 E.H.R.R. 647.

⁴³ *Ibid* at para 54.

⁴⁴ *Kok v The Netherlands* (Application No 43149/98).

⁴⁵ *Visser v The Netherlands* at paras 45-46.

⁴⁶ *Luca v Italy* (2003) 36 EHRR 46 at para 40.

⁴⁷ *Doorson v Netherlands* (1996) 22 E.H.R.R. 330.

⁴⁸ *Ibid* at para 76.

⁴⁹ *Al-Khawaja and Tahery v United Kingdom* [2009] ECHR 26766/05

⁵⁰ *Ibid* at para 76.

⁵¹ J Doak and R Huxley-Binns “Anonymous Witnesses in England and Wales: Charting a Course from Strasbourg?” (2009) 73(6) *Journal of Criminal Law* 508.

SOLELY OR TO A DECISIVE EXTENT

The Strasbourg Court will evaluate the weight attached to evidence from anonymous witnesses. The most recent decision of *Al-Khawaja and Tahery*⁵² has made clear that where a conviction is based solely or to a decisive extent on the evidence of anonymous witnesses, a violation will be found. A review of the Strasbourg jurisprudence taken as a whole however, reveals that there is little consistency on this issue.

In *Windisch v Austria*⁵³ the court found a violation of Article 6 where the applicant's conviction was based 'to a large extent'⁵⁴ on statements made by anonymous witnesses to the police. Here the court observed that "the right to a fair administration of justice hold so prominent in democratic society that it cannot be sacrificed."⁵⁵ In *Unterpertinger v Austria*⁵⁶ the court found a violation of Article 6(3) where the applicant was convicted 'mainly' on statements of witnesses who did not attend court. This decision is difficult to reconcile with the later ruling in *Artner v Austria*:⁵⁷ in both cases there were absent witnesses with corroborating medical evidence, but in *Artner* no violation was found. Three dissenting judges in *Artner* viewed the cases as indistinguishable.⁵⁸

The term *solely or to a decisive extent* appears to have been first used in *Doorson*⁵⁹ and then referred to in *Luca*⁶⁰ where the court held that "where a conviction is based *solely or to a decisive extent*⁶¹ on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Art.6."⁶² Similar dicta⁶³ can also be found in the *Kostovski*⁶³ decision.

⁵² Above n 34.

⁵³ *Windisch v Austria* (1991) 13 E.H.R.R. 281.

⁵⁴ *Ibid* at para 31.

⁵⁵ *Ibid* at para 30.

⁵⁶ *Unterpertinger v Austria* (1991) 13 E.H.R.R. 175.

⁵⁷ *Artner v Austria* (1992) Series A No.342.

⁵⁸ *Ibid*. The decision was based on a five to four vote and provoked a strong dissent. See Joint Dissenting Opinion of Judges Walsh, Macdonald and Palm who held that without the use of the statements no conviction could have been obtained.

⁵⁹ See *R v Horncastle* [2009] EWCA Crim 964 at para 44.

⁶⁰ Above n 31.

⁶¹ Emphasis added.

⁶² Above n 31 at H 8 (d).

⁶³ Above n 20 at para 44.

It is confusing though that while the words ‘to a large extent’ and ‘mainly’ were used in *Windsch*⁶⁴ and *Unterpertinger*⁶⁵, *Luca*⁶⁶ and *Kostovski*⁶⁷ use ‘solely or to a decisive degree’. However, in *Ludi v Switzerland*⁶⁸ it was enough that the evidence ‘played a part’ in the conviction.⁶⁹ In *Krasniki v Czech Republic*⁷⁰ a conviction based solely on the evidence of anonymous witnesses was not considered unsafe, but the court held that the need for anonymity must be clearly established.

Nevertheless in *Al-Khawaja and Tahery*⁷¹ the court found a violation where the applicant’s convictions were based on the hearsay evidence of witnesses unable to testify at trial. The court found that Article 6(3)(d) “in principle required that all evidence had to be produced in the presence of the accused at a public hearing with a view to adversarial argument.”⁷² *Luca* was referred to and the solely/decisive rule maintained. There is academic opinion arguing that *Al-Khawaja and Tahery* leaves the Strasbourg position on anonymous witnesses “relatively clear”.⁷³ However the United Kingdom Government has referred the decision to the Grand Chamber at Strasbourg and the UK Supreme Court has ‘squared up’ to Strasbourg⁷⁴ on the issue in *R v Horncastle*.⁷⁵ Here Lord Phillips was highly critical of the Strasbourg Court’s approach to making exceptions to the Article 6(3)(d) principle which he observed “has resulted in a jurisprudence that lacks clarity”.⁷⁶

Questions have also been raised in respect of the meaning of decisive. In *Van Mechelen* Judge van Dijk argued, dissenting, that the solely or decisive extent test “is difficult to apply, because if the testimony of anonymous witnesses is used by the court as part of the evidence, that will always be because the court considers it a “decisive” part of that evidence, making the proof complete or at least sufficient.”⁷⁷ This view is shared by Lord Phillips who in *Horncastle* argued that a strict adherence to the solely/decisive test

⁶⁴ *Windisch v Austria* (1991) 13 E.H.R.R. 281.

⁶⁵ Above n 41.

⁶⁶ *Luca v Italy* (2003) 36 EHRR 46.

⁶⁷ Above n 20 at para 44.

⁶⁸ *Ludi v Switzerland* (1993) 15 E.H.R.R. 173.

⁶⁹ W O’Brian “The Right of Confrontation: US and European Perspectives” (2005) 121 *Law Quarterly Rev* 481.

⁷⁰ *Krasniki v Czech Republic* (Application No. 51277/99).

⁷¹ Above n 34.

⁷² *Ibid* at para H3.

⁷³ J Doak and R Huxley-Binns R above n 51.

⁷⁴ See J R Spencer “Squaring up to Strasbourg: Horncastle in the Supreme Court” *Archbold Review* 2010.

⁷⁵ *R v Horncastle* [2009] EWCA Crim 964.

⁷⁶ *Ibid* at para 14.

⁷⁷ Above n 27 at para 88.

could result in injustice: “it will in some cases result in the acquittal, or failure to prosecute, defendants where there is cogent evidence of their guilt. This will be to the detriment of their victims and will result in defendants being left free to add to the number of those victims.”⁷⁸

It would seem on balance that the solely/decisive test is the current Strasbourg position. But the law is far from being settled. At the time of writing⁷⁹ the *Al-Khawaja and Tahery* case is days away from being heard by the Grand Chamber and the problems with the test remain.

RIGHTS OF WITNESSES/VICTIMS

An important issue, to which the Strasbourg authorities will have regard when assessing the permissibility of witness anonymity, is the Convention rights of the witnesses themselves.⁸⁰ Articles 2 and 8 ECHR mirror Articles 6 and 17 ICCPR providing protection for the right to life⁸¹ and for private and family life.⁸² In *Doorson* the court found there was sufficient reason to maintain the anonymity of drug addicts giving evidence against drug dealers and reasoned that “drug dealers frequently resorted to threats and actual violence against persons who gave evidence against them”.⁸³ Significantly the court observed that:

“It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate

⁷⁸ Above n 60 at para 105.

⁷⁹ *Al-Khawaja and Tahery v United Kingdom* (nos. 26766/05 and 22228/06).

⁸⁰ Article 2 ECHR provides “Everyone’s right to life shall be protected by law. No one shall be deprived of his life...” and Article 8 ECHR provides “Everyone has the right to respect for his private and family life, his home and his correspondence.”

⁸¹ Article 2(1) “Everyone’s right to life shall be protected by law...”

⁸² Article 8(1) “Everyone has the right to respect for his private and family life, his home and his correspondence...”

⁸³ Above n 32 at para 71.

cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.”⁸⁴

In the later case of *Van Mechelen* the court recognised that there can be special categories of witnesses and the “balancing of the interests of the defence against arguments in favour of maintaining the anonymity of the witnesses raises special problems if the witnesses in question are members of the police force of the state.”⁸⁵ Such witnesses interest in remaining anonymous is the court held “to some extent different from that of disinterested witnesses or victims.”⁸⁶ Particular regard was given to the preservation of undercover agents and protection of their families.⁸⁷

(ii) *The International Covenant on Civil and Political Rights*

Article 14(3) ICCPR provides that:

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees...

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.”

The rights set out in the Covenant are ‘minimum guarantees’ and are formulated without restriction.⁸⁸ State Parties are obligated to ‘respect and to ensure’ the rights of individuals within their jurisdiction.⁸⁹ The decisions and resolutions of the Human Rights Committee (“The Committee”) are “authoritative interpretation” and are not binding on States.⁹⁰

The Committee has been reasonably uncompromising in its application of Article 14(3)(e). In *Peart v Jamaica*⁹¹ a violation was found where the police failed to make a prosecution witness’ police statement available to the

⁸⁴ Above n 27 at para 70.

⁸⁵ Ibid at para 2.

⁸⁶ Ibid at para 56.

⁸⁷ Ibid.

⁸⁸ M Nowak (1993) UN Covenant on Civil and Political Rights: CCPR Commentary (2005 ed) 342.

⁸⁹ Pursuant to Article 2 ICCPR.

⁹⁰ Above n 4 at para 21.

⁹¹ *Peart v Jamaica Communication* No 464/1991 and 482/1991. U.N.Doc.CCPR/C/54/D/464/1991 (1995).

defence. This, the Committee held, “obstructed the defence in its cross-examination of the witness”.⁹² In *Espinoza de Polay* the Committee found that trials involving ‘faceless judges’ were a violation of Article 14(3).⁹³ Violations have also been found in relation to the withholding of the names of witnesses from the defence in drug trafficking trials in Columbia.⁹⁴

The Committee will not find a violation of Article 14(3) where the defendant has waived his rights to confrontation. In *Adams v Jamaica*⁹⁵ the police denied the defendant the opportunity to cross-examine prosecution witnesses. However the Committee noted that “even though counsel objected to its submission into evidence, from the record it appears that he did not request an adjournment or even ask for a copy of the statement.”⁹⁶ No violation of Article 13(3)(e) was found. Similar dicta can be found in *Compass v Jamaica*.⁹⁷

The Committee also does not appear to have formulated any exceptions to the right to confront witnesses, as the Strasbourg has.

THE RIGHTS OF WITNESSES/VICTIMS

The rights of witnesses/victims will be balanced by the Committee, against the rights of the defence when finding a violation of Article 14(3). Articles 6 and 17 of the Covenant provide for the right to life⁹⁸ and protection of privacy⁹⁹ respectively. Arguably these rights offer protection to witnesses giving evidence before courts and tribunals. State Parties have an obligation in accordance in Article 2 to “respect and to ensure to all individuals”¹⁰⁰ the rights set out in the Covenant. This includes taking “the necessary steps...to

⁹² Ibid at para 13.

⁹³ Communication No. 577/1994: Peru. 09/01/1998. U.N.Doc.CCPR/C/61/D/577/1994.

⁹⁴ Concluding Observations by the Human Rights Committee U.N.Doc.CCPR/C/79/Add.75, 9 April 1997 paras 21-40.

⁹⁵ *Michael Adams v. Jamaica*, Communication No. 607/1994, U.N. Doc. CCPR/C/58/D/607/1994 (1996).

⁹⁶ Ibid at para 8.3.

⁹⁷ *Compass v. Jamaica*, Communication No. 375/1989, U.N. Doc. CCPR/C/49/D/375/1989 (1993).

⁹⁸ “Every human being has the inherent right to life. This right shall be protected by law...”

⁹⁹ “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”

¹⁰⁰ Article 2(1).

adopt such laws or other measures as may be necessary to give effect to the rights recognized.”¹⁰¹

The rights of witnesses/victims giving evidence in court are also protected by the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Article 6 provides that: “The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system”.¹⁰²

CONCLUSION

The protection of witnesses is a complex and important issue that demands an integral balancing act against the rights of the accused.

An individual that find themselves facing an international trial at the ICC is guaranteed the right to a fair trial in accordance with international human rights standards as prescribed by international instruments such as the ICCPR and the ECHR. The Rome Statute of the ICC explicitly states in Article 21(3) that the Court must interpret law in accordance with “internationally recognized human rights”. The credibility and legitimacy of the ICC will depend on how far the Court is able to fulfil these guarantees.

The requirements of a fair trial generally include a public hearing in which the accused has an opportunity to examine witnesses against him or her. Nevertheless, the right of the accused to know and to confront prosecution witnesses is not absolute and must be balanced against other interests. The judges at the ICC will have to be proactive in order to the balance the right of the accused against the protection of victims and witnesses. The judges will have to carefully give appropriate weight to both sets of interests and not shift the balance too far either side. This is a difficult task.

The day to day interpretation and practice of the ICC over the issue of witness anonymity will be littered with challenges. As well as looking to the practice of other tribunals such as the ICTY and the ICTR, which will no doubt be useful and instructive, the ICC can forge and build on the shortcomings from such Tribunals. In addition, another source of informative and guidance on the issue of witness anonymity can be found in the realms of international human rights law in particular the ECHR where the scope of

¹⁰¹ Article 2(2).

¹⁰² Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. A/RES/40/34. 29 November 1985.

witness anonymity has come under the purview of the Chambers in Strasbourg. Yet, the Strasbourg jurisprudence is not without its problems. Many of the difficulties identified above relating to the use of counterbalancing measures to mitigate a potential violation and the test for determining the scope of witness anonymity are not without their own problems. The case of *Al-Khawaja and Tahery* may shed further light on the application of the solely/decisive test used in relation to witness anonymity. The decision of the Grand Chamber at Strasbourg on this case will not only be useful to national courts but will also be of value to the ICC when confronted with the issue. But what is clear is that the discussion of the issue of witness anonymity by the Strasbourg court demonstrates the tension faced by courts generally in dealing with the matter and balancing the protection of witnesses and the rights of the accused.

As former ICTY judge Patricia Wald commented, ‘witnesses in war crimes tribunal proceedings are precious commodities’ and accordingly have to be treated with respect and dignity. The use of protective measures such as anonymity is one of a number of means by which the ICC will be able to fulfil its obligation under Article 68 of the Rome Statute to take ‘appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.’ But so too the defendants must be afforded their basic rights and given a fair trial, in respect of which confrontation is an important aspect. Ultimately, it will fall to the judges at the ICC to determine the correct balance between fair trial rights of the accused and the protection of witnesses.