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THE RIGHT OF AN ACCUSED TO CONFRONT PROSECUTION WITNESSES AS GENERAL PRINCIPLE OF LEGAL SYSTEMS OF THE WORLD: A COMPARATIVE ANALYSIS

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ABSTRACT

In its prescription of applicable laws, article 21(1)(c) International Criminal Court Statute ('ICC Statute') accommodates general principles of laws derivable from national laws of legal systems of the world provided that such general principles are in consonance with the International Criminal Court ('ICC')'s enabling instrument and international human rights standards. To this extent, this article assesses some legal systems of the world, notably the common and civil law systems, to determine the extent to which the right of an accused to confrontation ('RtC') and the obligation of international criminal tribunals ('ICTs') to protect witnesses have been balanced under International Criminal Law ('ICL'). The rationale for this inquiry is multiple-fold. Firstly, ICTs, in some unique ways, feature mixed legal culture of both legal systems, having been hatched by the international community ('IC'), which consists of members from the various legal cultures of the world, at one time or the other. Secondly, the ICC's statute provides that recourse may be had to general principles of legal systems of the world, as a secondary source of applicable laws. Finally, the two legal systems represent the adversarial and inquisitorial features which have instigated the bulk of the debate in this regard, it is imperative therefore that the extent to which the conflicting interests have been applied and interpreted by these distinct legal systems be explored. To execute this task, this article is divided into four (4) parts. Whilst Parts one and two will individually examine the features of the RtC under the common and civil law jurisdictions respectively, Part three will draw comparative comments on both legal systems' practices on the RtC. Part four will conclude the article and recommend appropriately. The comparative comments reveal that, though, there seems to be some sort of practice on confrontation under civil law jurisdiction, the practice, however, does not, in the estimation of this study, satisfy the obligation to guarantee the RtC under International Human Rights Law, and consequently, ICL. Therefore, this article recommends that ICTs should, in the bid to ensuring the right of an accused to 'examine' or 'have examined', defer customarily to the general principles on the RtC recognized under common law jurisdictions if the interest of justice is to be seen as the ultimate.

Keywords: Human Rights, Prosecution, Common Law, Litigation.

1. INTRODUCTION

Without any scintilla of controversy, a distinctive element of any democratic and civilized nation is its adherence to basic tenets of the rule of law. Prominent among these tenets is the right of an accused[1] to a fair trial (the 'RFT'), even for the most heinous crimes and under the worst circumstances. Adherence to this highly cherished 'fair trial' value is the bedrock on which every crime trying body, national and international, is built. The RFT, is, perhaps, better described than defined. The RFT represents the totality of rights which characterize a criminal trial as 'fair'. Central to this description are the rights of an accused to be subject to an impartial adjudicator, informed explicitly, in a language that he understands and without undue delay, of 'the nature, cause and content' of the charge(s) against him, given adequate time and facilities to prepare his defence, communicate with a counsel of his choice and be represented in person or through his chosen counsel, and where he lacks legal representation, to have legal assistance assigned to him, to be presumed innocent until proven guilty (and ostensibly so), to be afforded an unhindered but guided opportunity to confront prosecution witnesses put against him, before or during his trial, etc.

Streamlined to the immediate purpose of this article, the right of an accused to confront prosecution witnesses (the 'RtC'), as an integral constituent of the RFT, cannot be undermined under any circumstance. This proposition is germane on multiple grounds. It defeats the logic of reason that an accused person's trial would be designated 'fair' if he is only heard on his case and not allowed to confront his accusers. On this score, to insist on curtailing the RtC under exceptional circumstances, irrespective of its nature, would presuppose a deliberate attempt to try such accused person unfairly. This is so because, a trial bereft of any of the ingredients of 'fairness' in the eyes of the law cannot, by any otherwise standard, be designated 'fair'.

The process of cross-examination offers the most valid legal defensive tool for testing the credibility of a witness, the reliability of his testimony as well as the discovery of truth with respect to matters to which the testimony relates. It is debatable that the task of a judge in eliciting truth in core inquisitorial criminal justice atmosphere, unlike its adversarial counterpart, serves this end. However, what remain unresolved are the questions whether a judge in a given circumstance would question a witness beyond the superficial details of his testimony and, where the judge purports to put the accused person's questions to a witness, whether that process would ever equate to the stern confrontation required to elicit results from a witness.

Perhaps, most compelling, is the uncompromising character of the RtC as a 'minimum guaranteed right' in the eyes of the law. The RtC is constitutionally recognized and guaranteed in almost every democracy in the international community ('IC'). Similarly, at a collective level, this right is not only recognized, cherished and guaranteed but also radically promoted. As such, virtually all core international human rights instruments ('IHRI'), such as article 6 of the European Convention on Human Rights, 1950 ('ECHR'), article 8 of the Inter-American Convention on Human Rights, 1969 ('ACHR'), article 14 of the International Covenant on Civil and Political Rights, 1966 ('ICCPR'), article 7 of the African Charter on Human and Peoples' Rights, 1981 ('ACHPR'), etc., provide succinctly for the RtC. However, the extent to which prosecution witnesses are protected, during trials before international criminal tribunals ('ICTs'), such as, the twin *ad hoc* criminal tribunals for Rwanda and the former Yugoslavia ('ICTR' and 'ICTY' respectively), the Special Court of Sierra Leone ('SCSL'), other internationalized criminal tribunals and the supposed 'permanent' International Criminal Court

[1] For the purpose of this article, and unless otherwise stated, the terms 'accused', 'defence' and 'defendant' are used interchangeably and without any distinction, notwithstanding the weak argument that the term 'accused' presupposes guilt. Similarly, the term 'international criminal tribunal' is used as an umbrella term to describe all criminal tribunals and courts at the international level.

('ICC'), has the propensity and, apparently, tends to undermine, or, in the least, curtail the right of persons standing trial before them to confront their accusers.

Unfortunately, these violations occur in the face of well-enshrined provisions in the statutes establishing these ICTs and under the pretexts that the trials before them are of such exceptional character warranting certain protective measures to be taken to guarantee the safety, and, in some cases, integrity of witnesses and their families, protect their rights and encourage or persuade their willingness to testify in court. Although, ICTs have discretionary powers to protect witnesses under their statutes, in attempting to strike a balance between the *uncompromising* rights of an accused and those of witnesses, they tend to lean heavily in favour of witnesses'. This practice of ICTs raises the questions whether, strictly examining the statutes of ICTs, it is legally tenable to curtail the RtC under the pretexts of witnesses' protection and/or whether, on the authority of well established practices of major legal systems around the world, the RtC admits any exception at all.

On the former question, the statutes of the various ICTs provide adequately for the RtC and the discretionary powers of the tribunals to make orders granting protective measures for witnesses in appropriate circumstances. However, an evaluation of these statutory provisions reveals that the primary intention of the statutes, at least from their letters, and perhaps the intention of their makers, is to guarantee the RFT at all times, which, for all intents and purposes, encompasses the RtC.

On the latter vein, whilst it is vehemently disputed herein that the statutes of ICTs do not intend, by their witnesses' protection provisions, to curtail the RtC, as otherwise replete in and discernible from the respective jurisprudences of ICTs, there are evidence from the European Court on Human Rights' ('ECrHR') jurisprudence and some common law jurisdiction to show that certain circumstances may necessitate a 'denial of this right'. Not because there is an obligation or the need to trample on the RtC but because the accused, in the given circumstance, would have waived his right in this regard by his conduct.

Instances abound, as will be shown partly in chapters two and three, where an accused threatens or causes his accusers to be threatened or in a preliminary hearing during which course a witness's testimony is taken and the accused given an opportunity to confront such witness, either personally or through his counsel, and he declines. In the latter case, like any other constituent RFT, such accused would be deemed to have been fairly tried. This proposition is so because there is no obligation on the courts to compel an accused to exercise his RtC but within his sole prerogative. Therefore, if he declines to exercise his RtC, he cannot subsequently be heard claiming his RFT had been violated at his default.

As a precursor to the foregoing argument, it is not disputed that all but one of the ICTs were established to try atrocious crimes, which are of real concern to the international community, allegedly committed during certain conflict situations. As a plethora of academic and judicial authorities tend to contend, the horrendous nature of such crimes, however, does not in itself undermine certain basic legal stances. A criminal tribunal, notwithstanding its international or internationalized character or mandate, is founded on the rule of law. To which extent, it is bound to adhere to core international human rights standards at all times.

Accused persons standing trial before such ICTs cannot, in principle, be treated as innocent and, by conduct, confirmed guilty, simply on the basis of the supposed gravity of the crimes implicated. This proposition finds expression in the practices of the ICTs admitting written statement of anonymous or absent witnesses or hearsay evidence directly implicating an accused. The point need be clarified from the very outset that this study does not query, in its entirety, the admissibility of anonymous witnesses' testimonies, but insists that, in so doing, an accused person's RtC must be observed at all times.

Irrespective of the special circumstances necessitating setting up an ICT, such tribunal does not thereby qualify either as a 'truth commission' or a 'commission of inquiry' but maintains its special character as an independent judicial body expected to dispense justice to

all, not as it appeals to spectators, such as the general public or the supposed 'victims of the alleged crimes', or some powerful watchdogs in the IC but according to the dictates of the law, and the Law alone. So that in the final analysis, it would seem to all, including the accused, by-standers and posterity, that, indeed, justice was done.

On the backdrop of the foregoing, this article assesses some legal systems of the world, notably the common and civil law systems, to determine the extent to which the RtC and the obligation of ICTs to protect witnesses ('OPW') have been balanced under ICL. The rationale for this inquiry is multiple-fold. Firstly, ICTs, in some unique ways, feature mixed legal culture of both legal systems, having been hatched by the IC, which consists of members from the various legal cultures of the world, at one time or the other.[2] Secondly, the ICC's statute provides that recourse may be had to general principles of legal systems of the world, as a secondary source of applicable laws. Finally, the two legal systems represent the adversarial and inquisitorial features which have instigated the bulk of the debate in this regard, it is imperative therefore that the extent to which the conflicting interests have been applied and interpreted by these distinct legal systems be explored.

To execute this task, this article is divided into four (4) parts. Whilst Parts one and two will individually examine the features of the RtC under the common and civil law jurisdictions respectively, Part three will draw a comparative comments on both legal systems' practices on the RtC. Part four will conclude the article and recommend appropriately. The comparative comments reveal that, though, there seems to be some sort of practice on confrontation under civil law jurisdiction, the practice, however, does not, in the estimation of this study, satisfy the obligation to guarantee the RtC under International Human Rights Law, and consequently, ICL. Therefore, this article recommends that ICTs should, in the bid to ensuring the right of an accused to 'examine' or 'have examined', defer customarily to the general principles on the RtC recognized under common law jurisdictions if the interest of justice is to be seen as the ultimate.

2. COMMON LAW JURISDICTION

Characteristically, the common law system features adversarial components. It is thus not surprising that in the administration of justice, the RtC at common law system assumes an indispensable and long standing prominence.[3] This is so because the RtC at common law is regarded as a *sine quo non* to the fact-finding process of a court of law.[4]

On a general scope of the adversarial framework in this regard, the RtC envisages that an accused is afforded ample and effective opportunity to subject evidence put against him at his trial to rigorous examination. By implication, to fulfill this obligation to an accused, not only is it essential for accusing witnesses to be brought face-to-face with an accused at his trial, such witnesses' identity becomes highly imperative. The rationale of this practice is to enable an accused effectively test the reliability of such evidence against him and to assist the court in determining its credibility and trustworthiness.[5]

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[2] For comments on transportation of general legal principles, see Judge Antonio Cassese's Separate and Dissenting Opinion in *Prosecutor v Erdemovic*, (IT-96-22-A), Appeal Chambers Judgment of 7 October, 1997; see also FO Raimondo, 'General Principles of Law, Judicial Creativity and the Development of International Criminal Law' in S Darcy and J Powderly, (eds), *Judicial Creativity at the International Criminal Tribunals,* (Oxford University Press – Oxford, 2010) 45 at pp 47-48; For further reading on the influence of various legal systems on international criminal law, see M Delmas-Marty, 'Comparative Criminal Law as a Necessary Tool for the Application of International Criminal Law' in A Cassese, (ed), *The Oxford Companion To International Criminal Justice,* (Oxford University Press; Oxford, 2009) pp 97-103; GP Fletcher, 'The Influence of the Common Law and Civil Law Traditions on International Criminal Law' in A Cassese, (ed), *ibid,* pp 104-110.

[3] See the decisions of the courts in *Chambers v Mississippi*, 410 US 284, 294 (1973); *Kirby v United States*, 174 US 47, 55 (1899); *R v Hilton*, [1971] 1 QB 421, 423 (CA); *Jones v National Coal Board*, [1957] 2 QB 55, 65 (CA); *Kentucky v Stincer*, 482 US 730, 737 (1987).

[4] See *Ohio v Roberts,* 448 US 56, 65 (1980).

[5] See the decision of the court in *Maryland v Craig*, 497 US 836, 845 (1990); Lee v Illinois, 476 US 530, 540 (1986); also see comments in RD Friedman, 'Confrontation: The Search for Basic Principles', (1998) 86 Georgetown L J 1011, 1101-1112.

Equally implicated in this regard is the admissibility of prior recorded statements of absent or unavailable witnesses, as well as hearsay evidence. The substitution of prior recorded statements for oral testimony is recognized at common law. This is particularly justified under the exceptions to the hearsay evidence rule. Traditionally, hearsay evidence at common law is inadmissible.[6] However, the common law admits of highly restrictive exceptions to the hearsay rule*, to wit*: dying declaration; *res gestae*; and statements made in the course of business.[7] Though the concepts of hearsay and the RtC are different, these exceptions tend to qualify the RtC at common law.[8]

In addition to the above, there exist other recognized limitations to the RtC at common law. These limitations could be found in circumstances where there is evidence to show that detriment has emanated from or on behalf of an accused to a proposed accusing witness, or where an accused, haven been afforded opportunity to confront his accuser, fails to utilize the opportunity,[9] or where an accused absconds for a long time and at the time of the accused eventual trial, the key witness in the case is no more competent to give evidence due to certain bodily or health conditions.[10]

Although, the afore-stated represents an overview of the general principles at common law, the leverage enjoyed by an accused to confront accusing witnesses, even amongst various common law jurisdictions, varies and dependent on individual national legislative intervention. This proposition is particularly appreciated when various national practices and models are put in perspective. For instance, in the United States (the 'US'), the RtC is regarded as germane to procedural fairness.[11] Thus, the RtC is constitutionally enshrined in the Sixth Amendment to the US Constitution and, perhaps, represents the most famous and oft-cited statutory provision on the earth crust, even among non-US citizens. In the US, the RtC has been applied most literally to require at trial the physical presence of accusing witnesses.[12]

Following the decision of the US Supreme Court in *Crawford v Washington,*[13] over-ruling itself, partly, in *Ohio v Roberts,*[14] it is now settled under US jurisprudence in this regard that the RtC as recognized under the US Constitution prohibits the admissibility of testimonial statements of absent or unavailable witnesses without any opportunity, prior to or immediate at trial, afforded an accused to challenge such testimony.

The US Supreme Court in *Crawford* emphasized that the only recognized exception to the admissibility of such testimonial statements is that recognized by the US Constitution, *to wit*: the opportunity granted an accused to confront its maker.[15] It is worthy of note that this stern rule under the US jurisprudence applies only to testimonial statements. To this extent, non-testimonial statements may be admitted in evidence, without an opportunity granted an accused to confront its maker.[16] Notwithstanding this distinction, the above-exposition demonstrates a conscious effort at narrowing down the scope of admissible materials in evidence, which tend to deny an accused RtC.

In sharp contrast to the US model, the practice in the United Kingdom (the 'UK') assumes too many statutory exceptions that seek to water-down the potency of the RtC in the UK. Unlike the US where the RtC carries constitutional flavor, an accused enjoys a lesser status

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[6] See C Tapper, *Cross And Tapper On Evidence* (12th edition, Oxford University Press; Oxford, 2010) pp 604-605; see also A Keane and P McKeown, *The Modern Law of Evidence* (10th edition, Oxford University Press; Oxford, 2014) p 283; P Huxley, *Evidence – The Fundamentals* (1st edition, Sweet & Maxwell; London, 2008) pp 5, 93; the Decision of the English Court in *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at 970, *per* LMD De Silva

[7] *R v Davis*, [2008] UKHL 36, [2008] 1 AC 1128, 1138-1139 at para 6; *Lilly v Virginia,* 527 US 116, 140 (1999); *White v Illinois*, 502 US 346, 366 (1992).

[8] See *R v Horncastle*, [2009] UKSC 14, [2010] 2 WLR 47, 59-74 at paras 27-82.

[9] See the decisions of the US Supreme Court in *Davis v Washington* 547 US 813 (2006); and *Giles v California* 554 US 353 (2008).

[10] See *R v Keet* [2007] EWCA Crim 1924, [2007] 1 WLR 2716.

[11] See R LaMagna, '(Re) Constitutionalizing Confrontation: Reexamining Unavailability and the Value of Live Testimony' (2006) 79 *California Law Review* 1499 at p 1503.

[12] See *Coy v Iowa,* 108 S Ct 2798 (1988), per Scalia J; see also comments in JR Spencer, *Hearsay Evidence in Criminal Proceedings,* (2nd edition, Hart Publishing; United Kingdom, 2014) p 42, para 2.4.

[13] 541 US 36, 53-54 (2004).

[14] 448 US 56 (1980).

[15] *Supra,* note 13.

[16] See *Davis v Washington, supra,* note 10.

of the RtC in the UK. Though, the RtC remains, at least, in theory, central to criminal trials in the UK,[17] just as various provisions of the Criminal Justice Act, 2003 (the 'CJA') allude to the possibility of excluding testimonial statements in evidence, which are prejudicial to the RFT.[18] However, other statutory provisions exist, which, taken together, defeat entirely the traditional philosophy of the RtC. For instance, by virtue of section 114 CJA, a prior recorded statement not subject to confrontation may be admissible in evidence if permitted by statute, at common law, by agreement of parties and in the interest of justice. Similarly, section 116 CJA enumerates death, incompetence on health ground, outside jurisdiction, inability to locate and fear of death or injury of self or another or of financial loss as bases for admitting statements of unavailable witnesses.

Undoubtedly, the wordings of sections 114 and 116 CJA evince a deliberate catchall feature of evidentiary rule and a calculated attempt at diluting the RtC. This statutory invasion exposes the intent to open a floodgate for the admissibility of all manner of testimony in evidence and, consequently, increase convictions at criminal trials.

Undeniably, this apparent attempt at eroding the RtC through the statute may well explain the constant jurisprudential conflict between the UK Supreme Court (the 'UKSC')'s decisions and the ECrHR's on appeal. For instance, in *Al Khawaja v the United Kingdom*[19] the ECrHR found the admissibility of deposition of absent witness in evidence under the CJA, without any prior opportunity afforded an accused to confront its maker and ample counter-balancing measures, as contrary to the spirit of article 6(3)(d) ECHR. Also, in *R v Horncastle,*[20] the UKSC expressed its frustration over the ECrHR's restrictive approach to the scope of testimonial statements, otherwise admissible under the CJA. In that case, the UKSC over-laboured the issue stressing that the ECrHR's jurisprudence is bereft of clarity and that the legislative framework of the UK on admissibility of hearsay evidence contains sufficient procedural safeguards which renders the ECrHR's position on the point superfluous, redundant and unnecessary.[21]

Still in the UK, the issue of anonymous witness testimony was critically addressed by the House of Lords in *R v Davis*[22]. Whilst the Court reiterated the long standing philosophy underpinning the RtC at common law, the Court conceded that witnesses may be granted anonymity in appropriate circumstances, though, convictions based solely upon such testimony may be designated unfair, where no sufficient counter-balancing measures are ensured.[23] In pre *R v Davis* era, the UK courts were hesitant in pushing the frontiers of anonymous witness testimonies beyond the limits allowed at common law. However, with the enactment of the Criminal Evidence (Witness Anonymity) Act of 2008 (the 'CEWAA'), and despite safeguards provided there-under, it would seem that not only has the CEWAA lifted the restriction on the courts to grant anonymity to witnesses,[24] it has indirectly invaded the RtC at common law in the UK, and expectedly, the RtC may consequently be in for another round of unpredictable judicial maneuvers.[25]

The use of anonymous witness testimony similarly features in New Zealand criminal proceedings. In fact, the CEWAA was modeled after the New Zealand Evidence Act, 2006 which paved way for the exercise of this evidentiary discretion in this regard. Although, the RtC is considered important under the common law practiced by New Zealand,[26] it obviously suffers some seasonal miscarriage of justice[27] and statutory dilution of its potency.[28]

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[17] See R v Davis, *supra,* note 7.
[18] See sections 124-126 of the CJA.
[19] ECrHR Application No 26766/05, 49 Eur HR Rep 1, 17 at paras 41-43.
[20] *Supra,* at note 8, p 97, para 14.
[21] *Ibid*.
[22] *Supra,* note 7.
[23] *Ibid*, p 1137-1138, at para 5, 1147, at para 25.
[24] See sections 1-5 of the CEWAA.
[25] See comments in A Ashworth, 'Witness: Trial Judge Granting Anonymity to Witnesses – Whether Lawful under Common Law and Strasbourg Jurisprudence', (2008) 11 *Criminal Law Review* 915.
[26] See section 25(f) of the New Zealand Bills of Rights Act, 1990
[27] See for instance *R v Hovell,* [1987] 1 NZLR 610, 613 (CA).
[28] See, for instance, section 103(3) of the New Zealand Evidence Act, 2006; section 13B(4) and 13C(4) of the New Zealand Evidence (Witness Anonymity) Amendment Act 1997. For the position of the law on the right to confrontation in New Zealand, see generally M Dyhrberg, 'Barriers to Defence Access to Witnesses for the Prosecution: An Antipodean Perspective' available on

Under article 7 of the Canadian Charter,[29] the RtC is guaranteed as a constituent of the RFT. Whilst the courts have recognized the indispensability of the RtC in the assessment of the overall fairness of criminal trials,[30] the courts have also acknowledged the qualified nature of the RtC in appropriate circumstances. [31] Overall, despite the diversity in jurisdictional practices arising from legislative interventions, as shown above, the fundamental character of the right to subject accusing witnesses' testimonies to adversarial engagement in order to test the reliability of such testimonies, notwithstanding qualification thereto *per* circumstance, remains unwavering as a general principle at common law. To this extent, in deferring to the stance recognized at common law, the general principles, excluding the extent of jurisdictional variation, is required from the letters of article 21(1)(c) ICC Statute.

3. CIVIL LAW JURISDICTION

Under the civil law, otherwise referred to as the Continental or Inquisitorial legal system, the RtC is regarded less imperative. This subordination of right is not unconnected with the sharp nexus between the various but inter-related stages that characterize the inquisitorial system of trial.[32] Traditionally, the prosecution and the judiciary are actively involved in the investigating process. At the close of investigation, a dossier, detailing all records, inculpating and exculpatory, to be used at the examination stage and tendered in evidence at trial, is compiled, either by a prosecutorial or judicial officer.[33]

At the examination stage, investigating judges examine relevant witnesses, including the accused in appropriate cases, in order to elaborate on the records. Although, during this stage, an accused may be granted an opportunity to impinge on the trustworthiness of accusing witnesses, the accused could only do so through the investigating judge. Hence, the process of receiving information from accusing witnesses runs without any hindrance or direct confrontation from the accused or his counsel. At the end of this stage, materials deemed relevant in evidence would have been developed by the judicial and prosecutorial officers and ready for trial.

On the backdrop of the foregoing, it is not unexpected that at the trial stage the judges in inquisitorial system seize charge of the proceedings and the parties are rather relegated to participate passively. The extent of parties' activeness at trial is limited to intermittent follow-up suggestive inquiries or suggesting redirection of inquiry to the trial judge, and, perhaps, challenging the accusatory testimonies of prosecutor's witnesses with the accused defence.[34] This also explains the de-emphasis on the RtC and the infrequence of the cross-examination role of the defense counsel.

Unlike in the adversarial system, the principle of *procedure contradictoire,* rather than the RtC holds sway.[35] This principle, which does not subsume the RtC, is interpreted within the context of the inquisitorial system as essentially to notify an accused of allegations against the accused and to enable the accused answer to those allegations. In other words, an accused is afforded opportunity not to confront his accusers but to present his case, if the accused has any. To this extent, arguably, the RtC at trial, within the inquisitorial context, has rather been relegated to secondary consideration in the scheme of assessing the overall fairness of a trial. Like the blind spot of the UK's adversarial model and the consequential slam on UKSC's judicial decisions on appeal to the ECrHR, the wanton disregard of the RtC implicit in some

www.mariedyhrberg.co.nz/showfile.php?downloadid=410, last accessed on 23 September 2016 at 9:30pm.

[29] Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982.

[30] See *R v Khewalon* [2006] 2 SCR 787, *per* Charron J.

[31] See *R v Potvin,* [1989] 1 SCR 525, 542; *R v L (DO)*, [1993] 4 SCR 419, 459-460; *R v Levogiannis,* [1993] 4 SCR 475, 491; and *R v Tran,* [1994] 2 SCR 95, 1003.

[32] That is the investigation, examination and trial stages.

[33] See K Vanderpuye, 'Tradition in Conflict: The Internationalization of Confrontation' (2010) 43 *Cornell Int'l L J* 513, 518-521.

[34] See WT Pizzi and L Marafioti, 'The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation' (1992) 17 *Yale Journal of International Law* 1, at p 7.

[35] See DM Amann, 'Harmonic Convergence? Constitutional Criminal Procedure in an International Context', (2000) 75 *Indiana Law Journal* 809.

judicial decisions emanating from civil law jurisdictions, such as Austria,[36] France,[37] the Netherlands,[38] Belgium,[39] Germany,[40] Finland,[41] Ukraine,[42] etc., has encountered similar rejection before the ECrHR. In almost all cases, the ECrHR had, in holding a violation of the uncompromising right under article 6(3)(d) ECHR, conceded that the admissibility of prior recorded statements of absent or anonymous witnesses is not, *simpliter,* inconsistent with the RtC under article 6(3)(d) ECHR. The ECrHR, however, vehemently emphasized the need to afford an accused an opportunity to challenge the reliability of such statements, whether at the time of taking the statement or at the trial. More so that in circumstances where an accused is not privy to the identity of his accusing witness, the accused encounters an 'insurmountable handicap' disabling the accused to test, challenge and/or cast the requisite doubt on the reliability and credibility of the testimony of such witness.

4. COMPARATIVE ANALYSIS

Like the Indian proverbial narrative of the blind men and the elephant goes, whether there exists a wide or narrow difference between the adversarial and inquisitorial systems of criminal justice is dependent, in the main, on the subjectivity, experience and background of the commentators. It is arguable that the interplay between both jurisprudential traditions in recent times has curtailed the differences substantially.[43] Such that the distinguishing factor to determining whence the pendulum swings[44] is the system with the dominant traits.[45] Moreover, notwithstanding the practices and perceived excesses, the philosophy driving every criminal justice system is the need to dispense 'justice' as the system deems fit. A cursory examination of specific aspects of both traditions reveals otherwise.[46] Whilst the adversarial and inquisitorial

[36] See *Unterpertinger v Austria*, ECrHR Application No 9120/80, 24 November 1986 (conviction was based on statements of wife and step daughters, victims to the crime, who refused to testify at trial); *Windisch v Austria,* ECrHR Application No 12489/86, 27 September 1990 (conviction was based on untested anonymous witnesses' statements).

[37] See *Delta v France,* (1993) 16 EHRR 574 (on a charge of robbery against Mr Delta, conviction was based solely on the untested statements of victims to the robbery, Miss Poggi and Miss Blin, taken by the police after the alleged incidence); *Saidi v France,* (1994) 17 EHRR 251 (on a charge of possessing and supply of heroin and involuntary homicide, conviction was based solely on the untested statements of some smalltime drug dealers and drug addicts made to the police).

[38] See *Kostovski v The Netherlands*, (1990) 12 EHRR 434 (on a charge of armed robbery against Slobodan Kostovski, conviction was based to a decisive extent on the untested testimony of police informants made to the police); *Van Mechelen v The Netherlands,* (1998) 25 EHRR 647 (on a charge of armed robbery, attempted murder, or in the alternative, manslaughter, and threat of violence, conviction was based to a decisive extent on the untested statements of investigative police officers identified only by numbers furnished to the prosecutor).

[39] See *Vidal v Belgium,* ECrHR Application No 12351/86, 22 April 1992 (conviction was based on inchoate investigative process and the accused refused a right to confront key witnesses); *Bricmont v Belgium,* ECrHR Application No 10857/84, 7 July 1989 (conviction was based on untested testimony of a witness, Prince Charles, protected by article 510 and 511 of the Code of Criminal Procedure of Belgium, and doubling as a party seeking civil damages in the proceedings).

[40] See *PS v Germany,* (2003) 36 EHRR 61 (conviction was based on the untested testimony of an alleged sexually abused child made to the police through her mother).

[41] See *AL v Finland*, ECrHR Application No 23220/04, 27 January 2009 (conviction was based on the untested testimonies of an alleged sexually abused child, a girl of 14years described simply as R, made to the court); *AS v Finland,* ECrHR Application No 40156/07, 28 September, 2010 (conviction was based solely on the untested video-recorded testimony of an alleged sexually abused child, a boy described simply as A, made to the police).

[42] See *Kornev and Karapenko v Ukraine,* ECrHR Application 17444/04, 21 October 2010 (conviction was based on untested testimony of protected witnesses on a drug offence charge).

[43] See MR Damaska, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 *University of Pennsylvania Law Review* 506, 549.

[44] That is whether a country's is common or civil law

[45] JR Spencer, 'Introduction to European Criminal Procedures' in M Delmas-Marty and JR Spencer, (eds), *European Criminal Procedures*, (Cambridge University Press; Cambridge, 2002) p 5;

[46] See CJM Safferling, *Towards an International Criminal Procedure,* (Oxford University Press; Oxford, 2001) p 1; also see comments expressed in G Boas, 'A Code of Evidence and Procedure for International Criminal Law? The Rules of the ICTY' in G Boas and WA Schabas, (eds), *International Criminal Law Developments in the Case Law of the ICTY,* (Martinus Nijhoff; The Hague, 2003) p 20;

traditions may be geared towards administration of justice, the process leading to 'justice' in both differs. First, the stages of trial in the inquisitorial system, which ensures an active role for the prosecution and the judiciary, is worthy of note.

Unlike in the adversarial system where the RtC runs through the pre-trial and trial stages, depending on when the opportunity to confront is availed an accused, the fact that the judges at various stages are involved in collecting materials to be used in evidence and have, at some points, heard proposed witnesses, somewhat place the judiciary in too much informed position as to be regarded as pre-emptive of the eventual trial and, consequently, prejudiced. This proposition seems manifest in the dominant role assumed by judges at trials, the manner of disposing accused requests to call certain witnesses for confrontation at trial, issues relating to absent or anonymous witnesses and the attitude towards parties' role, particularly the accused, at the trial. Second, the common law evidentiary rules seem more stringent in comparison with those of the civil law. This reality is also not unconnected with the active involvement of judges in the process of investigation and examination. The presupposition is that the judges are equipped with the requisite skills to distinguish between evidentiary materials to support convictions or otherwise. As such, evidentiary rules in the Continental system are relaxed so much so that virtually all manner of materials intended for evidence can go into the records of the courts.

Unfortunately, the inquisitorial system appears overwhelmed by the desire to combat crimes at all cost and increase convictions, perhaps, to serve as deterrence to others. However, the inquisitorial system fails, refuses or neglects to see an accused from the very onset as innocent until proven guilty. Hence, an accused rarely and effectively expresses his RtC as should be. Conceded as earlier noted that the inquisitorial system practices some procedure which serves to notify an accused in details of allegations against him and affording the accused an opportunity to answer to them, it is humbly submitted that the expression of the RtC at common law which enables an accused to test the reliability of an accusing witness and cast doubt on his credibility cannot be equated to the mere opportunity to answer to allegations.

Essentially, the presentation of an accused defence only seeks to refute adverse claims against the accused and does not substantially tend to test the trustworthiness of a witness, discredit such witness on the bases of his personal and financial circumstances in life or, perhaps, cast doubts on his testimony on the basis of the witness's professional qualifications. Therefore, to insist on curtailing the RtC, as practiced under the inquisitorial system, presupposes a deliberate attempt to try such accused person unfairly. This is so because, a trial bereft of any of the ingredients of 'fairness' in the eyes of the law cannot, by any otherwise standard, be designated 'fair'.

It is not uncommon to find contrary argument to the above that the RtC serves as a tool for the distortion of facts through psychological, emotional and intellectual intimidation of witnesses rather than the end of truth-elicitation. Conceded that the RtC affords an accused the opportunity to challenge rather than suppress evidence against him, the RtC, however, offers the most valid legal defensive tool for testing the credibility of a witness, the reliability of his testimony as well as the discovery of truth with respect to matters to which the testimony relates.[47]

To this study, it defeats the logic of reasoning to justify the wanton restriction of the right to direct confrontation of witnesses with the fallacy that the accused has opportunity of examining his accusing witnesses through the judges. Moreover, what remain unresolved are the questions whether a judge in a given circumstance would question a witness beyond the superficial details of his testimony and, where the judge purports to put the accused person's questions to a witness, whether that process would ever equate to the stern confrontation

GA McClelland, 'A Non-Adversarial Approach to International Criminal Tribunal' (2002) 26 *Suffolk Transnational Law Review* 1; GV Kessel, 'Adversary Excesses in the American Criminal Trial', (1992) 67 *Notre Dame Law Review* 403; RS Frase and T Weigend, 'German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?' (1995) 18 *Boston College International And Comparative Law Review* 317; A Sherman, 'Sympathy for the Devil: Examining a Defendant's Right to Confront Before the International War Crimes Tribunal' (1996) 10 *Emory International Law Review* 833; RL Mack, 'It's Broke So Let's Fit It: Using Inquisitorial Approach to Limit the Impact of Bias in the American Criminal Justice System', (1996) 7 *Indiana International and Comparative Law Review* 63.

[47] See SJ Clark, 'An Accuser – Obligation Approach to the Confrontation Clause' *Nebraska Law Review* (2014) 81 (3) 1258 at p 1261.

required to elicit results from a witness. On this score, it is tempting to conclude that the practices of the inquisitorial system relating to fair trial is antithetical to and does not contemplate the true ideals of the RtC or 'right to examine' or 'have examined' accusing witnesses in criminal proceedings as enshrined under IHRL.[48] Dishearteningly, the ICTs' practices, evident in the unfettered judicial discretion on evidentiary matters, suggest an inclination towards the inquisitorial ideal. However, this study recommends that, in their bid to seeking guidance on how to balance the RtC against the interests of witnesses from general principles derived from major legal systems of the world, ICTs should customarily defer to the practices at common law as there lays a level playing ground for justice to be seen to have been done.

5. CONCLUSION

Undoubtedly, the philosophical undertone of every criminal justice system, irrespective of its designation and jurisdictional characteristics, as the phrase suggests is to administer 'justice'. It is axiomatic that the paths to justice are innumerable. It is also not to be disputed that procedural, including evidentiary, rules are strictly matters of national jurisdiction. However, it is imperative that in treading whichever path to justice, fundamentals of fair trials, particularly the RtC, are not treated with kid's glove. Whilst the inquisitorial system strives to dispense justice like the adversarial system, it appears that the RtC is oft-treated as a procedural matter, and, consequently, sacrificed on the altar of this purported end. It need be reiterated that the RtC doubles as procedural and substantive right, hence, cannot be undermined by procedural rules or unfettered judicial discretion.

Although, ICL develops in-between the gray-lines of common and civil law practices, the perception of ICL tilts more towards the unholy inquisitorial tradition, undermining the reality that the enabling statutes of ICTs, unlike the inquisitorial system in practice, ensure that an accused has a RtC at all times. To this extent, it is recommended that in their reliance on national law derived from legal systems of the world in this regard, ICTs should defer more to the common law stance on the RtC. As the bottom line for assessing whether justice has been done resonates to the overall fairness of the trial of the man presumed innocent at the time.

[48] This assertion is without prejudice to the position that the article 14 and 6 of the International Covenant on Civil and Political Rights and the ECHR contemplate various legal systems of the world.