Right to a fair trial in international criminal law

By Segun Jegede

THE international community's current drive to ensure that those who commit egregious crimes in all corners of the world are held accountable by the international criminal justice system has led to an unexpected upsurge in the number of international criminal trials.

This has consequently impacted the development of international criminal law. Hitherto, many of the crimes now punishable under international law and tried by existing international tribunals and the international criminal court were tried as ordinary crimes, with varying degrees of success, by the domestic courts of individual nations constituting the United Nations. Given that the measure of a state's commitment to the protection of an accused's rights is largely determined by the extent it respects individual human rights, trials held by most national courts conform to certain minimum fair trial guarantees.

The notion that persons accused of committing a crime are entitled to certain minimum basic fair trial guarantees was embraced by some nations several hundred years ago. Some of the early instruments enacted to guarantee the rights of the accused in countries such as England, France and the United States of America were genuine precursors to modern human rights documents. The early instruments clearly demonstrate that the concept of justice is based on respect for the basic rights of every individual in society. Some of these rights were spelt out in the Magna Charta of 1215, the Habeas Corpus passed by the English Parliament in 1879, the English Bill of Rights of 1689, the Virginia Bill of Rights of 1776, the Declaration of Independence of the United States of 1776, the Constitution of the United States of America of 1787 and its First Ten Amendments ratified in 1791, and the French Declaration of the Rights of Man and the Citizen of 1789.

Today, the individual rights guaranteed by these early instruments are expressed in the constitutions of most states and recognised as binding by all nations. These rights are founded on the Universal Declaration of Human Rights (UDHR) adopted in 1948 by the world's governments. Since its adoption in 1948, the UDHR has not only remained pivotal to the international human rights systems, but it has also served as a model for numerous international treaties and declarations.

Among the rights recognised in the UDHR is the right to a fair trial. This right has become legally binding on all states as part of customary international law. Subsequent to the enunciation of these rights in 1948, the right to fair trial and other basic human rights have been replicated and reaffirmed in legally binding treaties such as the International Covenant on Civil and Political Rights (ICCPR) adopted by the United Nations General Assembly in 1966. The right to fair trial, in particular, has found expression in numerous other international and regional treaties and non-treaty standards, adopted by the United Nations and by regional inter-governmental bodies. In order to ensure that member-nations comply with the rights guaranteed in the ICCPR, the United Nation's Human Rights Council (HRC) monitors the implementation of the Covenant and the Protocols to the Covenant in the territory of states parties. The HRC has power to entertain individual

complaints and its comments and decisions have provided a vital source of law for the international tribunals.

In recent history, considerable impetus has been given to the enforcement of fair trial rights in the international arena. This development is due mainly to the creation of international criminal tribunals and the setting up of the International Criminal Court. Following the massive violations of international humanitarian law in the former Yugoslavia and Rwanda in the early 90s, the United Nations created the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to prosecute the perpetrators of the crimes committed in the two countries. Similarly in 2002, after the brutal civil war in Sierra Leone was brought to an end, the United Nations and the government of Sierra Leone jointly set up the Special Court for Sierra Leone (SCSL) to prosecute perpetrators of the severely shocking violations of international humanitarian in that country.

Most recently a permanent court, the International Criminal Court (ICC), was established with more or less the same jurisdiction as the international tribunals. The ICC is responsible for ensuring that allegations of gross abuses of human rights committed within the territory of state parties to the Rome Statute are punished where the states are unwilling or unable to prosecute the perpetrators.

One important element common to the statutes of the tribunals and the International Criminal Court is that persons accused before them are guaranteed internationally-recognised rights, including the presumption of innocence and the right to be tried in person. In its report on the setting up of the ICTY, the UN Secretary General unequivocally stated: it is axiomatic that the International Tribunal must fully respect internationally-recognised standards regarding the rights of the accused at all stages of its proceedings. In the view of the Secretary-General, such internationally-recognised standards are, in particular, contained in Article 14 of the International Covenant on Civil and political Rights.

Indeed, the text of Article 21 of the ICTY Statute is taken from Article 14 of the ICCPR. The same is true of fair trial guarantees contained in the statutes of ICTR, SCSL and ICC.

While the stated provisions deal with the rights of the accused, the Rules of Procedure and Evidence of the Tribunals contain additional provisions designed to protect the rights of suspects during investigation. This is not surprising because the accused's fair trial rights can be effectively safeguarded only if measures are put in place to ensure that the accused's right to a fair trial is protected as soon as **s**he is suspected of having committed a crime. In the case of the ICC, possibly to further reinforce the accused's fair trial rights, some essential rules dealing with the rights of suspects during investigation are enacted in its Statute.

The main objective of this article is to provide an overview of the rights of suspects and the accused at pre-trial and trial stages, including a detailed analysis of the extent to which the rights have been protected by legal institutions in the international arena. As

some of the rights enjoyed at pre-trial and trial stages are intertwined, some overlapping in the analysis under the two headings is unavoidable, but this has been greatly minimised.

Rights of a suspect

In pursuance of the objective of the drafters tribunals' statutes to afford the individuals appearing before the tribunals enjoyment of the rights guaranteed in their statutes, the obligation not to disregard human rights violations that have occurred prior to trial is of critical importance. Article 20(1) of the ICTY Statute and Article 19(1) of the ICTR Statute explicitly oblige the trial chamber to ensure that a trial is fair and expeditious. This implies that pre-trial human rights violations must be addressed, since they can affect the overall fairness of the trial. Rule 95 of the Rules of the ICTR and ICTY Tribunals, which provides for the exclusion of evidence obtained by methods that cast substantial doubt on its reliability or whose admission would seriously damage the integrity of the proceedings must, therefore, be seen as a reminder to judges not to allow the erosion of the rights of the accused. Under the ICTR and ICTY rules, a suspect who is to be questioned must prior to questioning by the prosecutor be informed in a language he speaks and understands of his right to be assisted by counsel of his choice; the right to an interpreter and the right to remain silent.

Without any doubt, these rights are essential to preserving the suspect's physical and mental integrity not only during investigation, but also to enable the accused to benefit, to the fullest extent possible, from the fair trial rights guaranteed at the trial, if he is charged with the offence for which he is being investigated.

The right to remain silent, expressed in the maxim nemo tenetur se ipsum acusare, is arguably the most important of these rights. Silence and self-incrimination rights before trial are intimately bound up with the right to a fair trial and difficult to separate from the perspective of the accused at trial. For this and other reasons, the conceptual relationship between the right to silence, the right against self-incrimination and the presumption of innocence has been described as a jurisprudential enigma. The right to silence and specifically pre-trial silence is thus usually protected as part of the right to a fair trial. In Murray v. United Kingdom, the European Court of Human Rights referred to the right to silence as "a generally recognised international standard". The court stated further that while the right to silence is not an absolute right, it nevertheless lies at the heart of the notion of a fair trial.

Regarding whether it is permissible to make any adverse inference from pre-trial silence, the majority in Murray held that, in certain circumstances, the drawing of an adverse inference from silence during pre-trial investigations would not violate the right to remain silent.

In Murray, the court had to consider the question whether the provisions of in the Criminal Evidence Order 1988 (Northern Ireland) permitting an adverse inference to be drawn from an accused's silence during interrogation, infringe articles 6(1) and (2) of the

European Convention, which protect the right to a fair trial. While the majority reasoned that no right is absolute and that the right to silence may be limited in appropriate circumstances, Judge Bussittil, in the minority decision held:

in my view, the attachment of adverse inferences to the right to silence in the pre-trial stage is a means of compulsion, in that it can constitute a form of direct pressure exercised by the police to obtain evidence from a suspect. The cooperation of the detainee can be obtained during interrogation with the threat of adverse inferences being drawn against him for remaining silent. Thus the suspect is faced with Hobson's choice - he either testifies or, if he chooses to remain silent, he has to risk the consequences, thereby automatically losing his protection against self-incrimination.

Though the statutes of the tribunals and the ICC are silent on whether an adverse inference may be drawn from a suspect's silence during investigation, it is difficult to see how judges in these courts could take such a position in view of their demonstrated commitment to the protection of the accused's right to fair trial.

In addition to granting a suspect the right to remain silent during investigation, the rules of the ad hoc tribunals provide that the suspect be notified of the right to counsel. A combined reading of Articles 20(d) and 17(3) of the ICTR Statute and Rules 40 and 42 of ICTR Rules charge the prosecution with the onerous responsibility of ensuring that its investigators unequivocally advise suspects of their rights before they are questioned. It is safe to assume that the important requirement of prior notification by tribunal officials is necessary to ensure that the right to counsel during investigation is not rendered illusory. If the right to a fair trial is a fundamental safeguard to ensure that suspects and accused persons are not unjustly punished, it follows, therefore, that the right to counsel as a pivotal component of that right must be zealously fostered by the courts. Moreover, a denial of the right to counsel at the pre-trial stage may fundamentally impact the realisation of the other rights guaranteed the suspect.

Article 17 (3) of the ICTR Statute, "Investigation and Preparation of the Indictment", provides:

(3) If questioned, the suspect shall be entitled to be assisted by counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands.

As a key component of the right to fair trial, judges of the ICTR and ICTY have held that the right to counsel attaches when the suspect is interrogated by tribunal investigators or when the suspect is transferred to the jurisdiction of the tribunal. In Prosecutor v Kajelijeli, Trial Chamber II of the ICTR, ruling on a defence motion questioning the admissibility of a pre-trial statement made by the accused stated that "(t)he right to counsel attaches upon transfer to Arusha as provided in Rules 40 and 42." The same conclusion was arrived at in Prosecutor v Kabiligi. The trial chamber in that case held

that in situations where the suspect's questioning is to be undertaken by the prosecutor upon the suspect's transfer to the seat of the tribunal his questioning may not proceed without the presence of counsel.

In practical terms, the application of the right to counsel to different factual scenarios clearly warrants careful consideration and in doing so the courts have arrived at decisions commensurate with the degree of violation. The elebi i case represents the first scenario in which the suspect is completely deprived of the protection of the right to counsel at the pre-trial stage. The ICTY trial chamber in elebi i was confronted with the question of whether a statement obtained in the absence of the accused's counsel could be admitted into evidence. The accused, Zdravko Muci, was, prior to his transfer, interrogated by Austrian police, not at the request of the ICTY, but with a view to his transfer to the ICTY or even his extradition to a state.

Under Austrian law, there is no right for counsel to be present at these types of interrogations. The prosecutor essentially adopted the position that the tribunal itself, including its organs, had not violated the right to counsel, as protected by Rule 42 of the ICTY Rules and international human rights instruments, and, as a result, there was no reason to exclude the evidence.

The trial chamber, however, excluded the statement, stressing that the exclusion of evidence obtained in evidence in violation of internationally-protected human rights is mandatory under Rule 95. In this respect, it is irrelevant whether the tribunal in any way requested or was involved in the collection of evidence, although the involvement of the prosecutor in obtaining evidence in violation of human rights could result in remedies additional to the exclusion of evidence.

The second scenario concerns cases in which the suspect's waiver of the right to counsel is equivocal or the suspect's understanding of the right is doubtful. In Kabiligi, the prosecution sought to admit a recording and transcript of a custodial interview of the accused conducted by ICTR investigators. The accused had contested the admission on the basis that he was not sufficiently informed of his right to counsel.

Stressing the importance of the right to counsel, the trial chamber denied the motion and excluded the statement on grounds that the prosecution did not discharge its burden of showing that the accused voluntarily waived his right to the assistance of counsel. The chamber justified its exclusion on the reasoning that, at the beginning of his interview with the investigators, even though the accused was informed of his right to counsel, "he demonstrated that he did not understand that he had an immediate right to the assistance of counsel". The trial chamber cautioned that the rights and the practical mechanisms for their exercise be communicated in a manner that is reasonably understandable to the suspect, and not "simply by some incantation which a detainee may not understand". The importance of this right nonetheless, R.42 (B) of the ICTR, ICTY and SCSL Rules provides for the possibility of waiver of the right to counsel by the suspect, but makes clear, that not only must the waiver of right to counsel be voluntary, questioning of the suspect must cease if the suspect expressed a desire to have counsel. The exclusion of a

pre-trial statement in the Kabiligi case, therefore, clearly demonstrates that an attempt by the prosecutor to rely on a statement taken during investigation at the trial of the accused will be rebuffed by the tribunal unless the prosecutor is able to convince the tribunal that the waiver was both voluntary and informed.

On the other hand, where an accused opts for a waiver of his right to counsel and the decision is found by the court to be informed, based on the evidence before the court, the waiver will be upheld. In Prosecutor v Mugiraneza, the accused contested the admission of his custodial statements on the basis that the prosecution violated his right to counsel when he was questioned at the pre-trial stage. In essence, he argued that his consent to an interrogation by investigators in the absence of counsel was equivocally made and, therefore, illegal. The trial chamber, after a careful consideration of the transcripts of the interviews of the accused concluded that the accused's right to counsel had not been violated because the accused was "explicitly informed of his rights by the investigators and that he waived his right to counsel unequivocally".

The protection of the accused's right to fair trial during the proceedings

Article 20 of the ICTR Statute, which is in pari materiel to the provisions of art. 21 of ICTY, art. 20 SCSL, art 67 Rome Statute, provides as follows:

Article 20: Rights of the Accused

All persons shall be equal before the International Tribunal for Rwanda.

In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 21 of the statute.

The accused shall be presumed innocent until proven guilty according to the provisions of the present statute.

In the determination of any charge against the accused pursuant to the present statute, the accused shall be entitled to the following minimum guarantees, in full equality:

- To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;
- To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
- To be tried without undue delay;
- To be tried in his or her presence and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without

payment by him or her in any such case if he or she does not have sufficient means to pay for it;

- To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

- To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;

- Not to be compelled to testify against himself or herself or to confess guilt.

The right to equality

Tracking article 14 of the ICCPR, the statutes of all three international tribunals provide for the equality of persons before the tribunals. The Rome Statute on its part makes no such provision, but, it is safe to assume that there is a presumption of equality of persons appearing before the court given the comprehensive fair trial provisions enshrined in its statute. In consonance with the principle of non discrimination at the heart of the right to equality, there is no doubt that all accused persons charged before the international tribunals enjoy equal rights. Still, in addition to ensuring equality for all accused persons the right to equality has on occasion been viewed from a variety of other prisms. The right to equality has been explained in terms of the principle of "equality of arms" guaranteeing procedural equality to both the prosecution and the accused. The HRC and the European Court of Human Rights in the context of proceedings in domestic jurisdictions have interpreted the principle to entail procedural equality between the parties.

In Kaufman v Belgium, a civil case, the European Commission for Human Right found that equality of arms means that each party must have a reasonable opportunity to defend its interests "under conditions which do not place him at a substantial disadvantage vis-□-vis his opponent. A similar conclusion was arrived at in the criminal case of Delcourt v Belgium where the court held that the principle entitled both parties to full equality of treatment, adding that the conditions of trial must not "put the accused at a disadvantage".

The principle of equality of parties is reflected in Article 20(4) of the Statute of the ICTR, which affords the accused the right "to obtain the attendance and examination of the witnesses on his behalf under the same conditions as witnesses against him." The nexus between the wider concept of fair trial spelt out by the statutes of the tribunals and the notion of equality of arms has come up for discussion in cases before the ICTY and ICTR.

In Prosecutor v Tadic, the defence alleged that the appellant's right to fair trial was prejudiced by the circumstances in which the trial was conducted, arguing

that the principle of "equality of arms" "ought to embrace not only procedural equality or parity of both parties before the tribunal, but also substantive equality in the interests of ensuring a fair trial".

The prosecution, on its part, submitted that the scope of the principle is limited to procedural equality and that although it "entitles

both parties to equality before the courts, giving them the same access to the powers of the court and the same right to present their cases...the principle does not call for equalising the material and practical circumstances of the two parties". In the prosecution's view, the lack of cooperation with the Defence by the authorities of the Republika Srpska could not imperil the equality of arms enjoyed by the Defence at trial because the Trial Chamber had no control over the actions of those authorities. After careful consideration, particularly the appellant's acknowledgement that the Trial Chamber took all steps requested and necessary within its authority to assist the appellant in presenting witness testimony, the appeal's chamber held that, in the circumstances of the instant case, the appellant failed to show that the protection offered by the principle of equality of arms was not extended to him by the trial chamber. The trial chamber added:

Under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the prosecution and the Defence must be equal before the trial chamber. It follows that the chamber shall provide every practicable facility it is capable of granting under the rules and statute when faced with a request by a party for assistance in presenting its case.

The right to equality or principle of "equality of arms" has also been frequently invoked to redress an apparent disproportionate power and resources of the prosecuting authorities by persons charged before domestic and international tribunals and courts.

Considered against the background of the right to a fair trial, the need to achieve a balance between the parties in terms of provision of means and resources is of critical importance. Defence lawyers engaged by international courts and tribunals have often been confronted with major difficulties in obtaining proper facilities, trained investigators and sufficient payment to provide quality representation for their clients. It has, however, remained a difficult question whether 'equality of arms' involves equalising the resources and means of the parties or merely to ensure that the defence and the prosecution be equally organised, funded, and supported.

The approach of the ICTR Trial Chamber in Prosecutor v Kayishema and Ruzindana to the issue of substantive equality of resources is instructive. In that case, counsel for Kayishema contended that a fair trial in terms of the statute

required full equality between prosecution in terms of the means and resources at their disposal. The defence asked for a disclosure of the number of lawyers, consultants, assistants and investigators that had been put at the disposal of the prosecution since the beginning of the case.

It requested the trial chamber to restrict the number of assistants used by the prosecution to the same number authorised for the defence. The trial chamber considered that the defence had not availed itself of the facilities to which it was entitled under the applicable directive and that under the directive all of the necessary provisions for the preparation of a comprehensive defence were available and afforded to the defence.

With regard to the defence request for equal means and resources, the Chamber stated that "the rights of the accused and equality between the parties should not be confused with the equality of means and resources" and that "the rights of the accused as laid down in Article 20 and in particular (2) and (4) (b) of the statute shall in no way be interpreted to mean that the defence is entitled to the same means and resources as the prosecution."

More or less, the same decision was reached in the case of Prosecutor v. Milutinovic et al, where the Appeals Chamber declared that the "equality of arms" requirement is violated "only if either party is put at a disadvantage when presenting its case", stressing that in the circumstances of the case, the appellant could not rely on the alleged inadequacy of funds during the pre-trial stage to establish such a disadvantage, since he had "not shown how the Trial Chamber (had) failed to address the imbalance of resources between the prosecution and the Defence and in that way violated the principle of equality of arms".

It bears pointing out, however, that in order to enhance protection of the accused's right to adequate time and facilities for the preparation of his defence, the tribunals have continually sought to bridge the gap between prosecution and defence in terms of the resources available to them. For example, each indigent accused at the ICTR is defended during the main trial by a team composed of a lead counsel, a counsel, three legal assistants and/or investigators. The teams are also provided with office space, computers, photocopiers, telephone lines, and other office equipment. Assigned counsels also have unrestricted access to the libraries and the documentation centre used by the Tribunal judges

Procedural equality and preparation for trial

A guarantee of equality of parties before the tribunals, at a minimum, entails equal opportunity to prepare for trial. One of the essential elements of a fair trial enshrined in the statutes of the tribunals is that the defence must have adequate time and facilities for the preparation of his or her defence. To enable the accused effectively prepare his defence, the prosecutor must submit an indictment setting forth the name and particulars of the suspect and a concise statement of the facts

of the case and of the crime with which the suspect is charged. The legal standards in relation to perfecting an indictment in the ICTY and ICTR seems now settled. The charges against an accused and the material facts supporting the charges must be pleaded with sufficient precision in the indictment, so as to provide notice to the accused. In other words, "in pleading an indictment, the prosecution is required to specify the alleged legal prohibition infringed and

the acts or omissions of the accused that give rise to that allegation or infringement of a legal prohibition".

In this respect, the Appeals Chamber has opined that "the accumulation of a large number of material facts not pled in the indictment reduces the clarity and relevance of that indictment, which may have an impact on the ability of the accused to know the case he or she has to meet for purposes of preparing an adequate defence".

In regards to allowing the accused sufficient time to prepare for his defence, the tribunals have routinely acceded to defence requests where compelling reasons are advanced. Thus, in Prosecutor v. Ntakirutimana, the Trial Chamber granted a defence motion for an extension of time to procure reliable witnesses to testify on behalf of the accused at the trial on account of inadequate preparation occasioned by change of counsel. In Prosecutor v. Kovacevic, the prosecutor proposed an amendment of the indictment, increasing the charges against the accused from a single count to 15 counts. The Trial Chamber found that the accused would need substantial additional time to prepare his defence. Since the accused had been in custody for seven months before the additional charges were brought, the trial chamber was of the opinion that the additional period of seven months for the preparation sought by the defence was not unreasonable. However, based on the Chamber's opinion that such a delay would violate the accused's right to an expeditious trial, it rejected the amended indictment.

Concerning the critical issue of ensuring equality of parties on evidentiary matters, it bears noting that the tribunal's rules have been progressively structured to ensure that the prosecution and defence are on equal footing. One of the most important features of the rules of the tribunals is the prosecution's disclosure obligation to the defence. Rules 66 and 68 govern disclosures of evidence to the defence. Rule 66 obliges the prosecution to disclose to the defence within 30 days of the initial appearance of the accused copies of all material supporting the indictment and copies of the statements of all witnesses the prosecutor intends to call to testify at trial.

The prosecutor must also at the request of the defence permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence or are intended to be used by the prosecutor as evidence at trial or were obtained from or belonged to the accused.

By far, the most favourable rule in the tribunals' disclosure regime is Rule 68, which imposes a duty on the prosecution to disclose exculpatory material to the defence. Not only is the prosecution expected to act diligently in the performance of its functions, prosecution counsel are presumed to discharge this duty in good faith. Exculpatory evidence under Rule 68 comprises broad categories of materials. In Prosecutor v. Blaskic, the Chamber asserted that the broad scope of Rule 68 is intended to ensure that fairness is maintained between the parties and assist in the proper administration of international criminal justice by helping the trial chamber to ensure that proceedings are fair and expeditious. Rule 78 (A) encompasses evidence, which is in the actual knowledge of the prosecutor and which is favourable to the accused, in the sense that it may suggest his or her innocence or mitigate guilt, or may affect the credibility of prosecution evidence.

Material will affect the credibility of the prosecution evidence, if it undermines the case presented by the prosecution. The obligation to disclose under Rule 68 is a continuing one and continues throughout the trial process, during the proceedings before the Appeals Chamber, and even after the completion of the appeal.

The right to counsel

The statutes of the tribunals and the ICC, guarantee the accused the right to defend himself in person or through legal assistance of his or her own choosing. While some accused persons have exercised the option of self representation at the ICTY and SCSL with varying degrees of success, all accused persons charged before the ICTR have so far exercised the right to counsel. In order to ensure a full enjoyment of the right to counsel, it is guaranteed regardless of the financial status of the accused.

Ordinarily, there is no question that an accused who has sufficient means can obtain the services of any counsel of his choice at any point during the proceedings. Different considerations, however, apply with regard to indigent accused persons who must meet the criteria of indigence set out by the tribunal before he or she is assigned counsel by the registrar from a list of qualified counsel maintained by the Registry.

Although, there is no dispute regarding the accused's right to counsel at the pre-trial and trial stages, the issue of whether the right to free legal assistance by counsel implies the right to choose one's own counsel was on occasion hotly contested before the trial chambers of the ICTR. In Prosecutor v. Gerard Ntakirutimana, the Trial Chamber ruled that "Article 20(4) of the statute cannot be interpreted as giving the indigent accused the absolute right to be assigned the legal representation of his choice". In Kambanda v Prosecutor, the issue was laid to rest by the Appeals Chamber, where the chamber, making reference to the decision in Ntakirutimana concluded that "in the light of a textual and systematic interpretation of the provisions of the statute and the rules, read in conjunction

with relevant decisions from the Human Rights Committee and the organs of the European Convention for the Protection of Human Rights and Fundamental

Freedoms....the right to free legal assistance by counsel does not confer the right to choose one's counsel."

In regards to the issue of self-representation before the ad-hoc tribunals, it is noteworthy that when the right to counsel comes up for discussion or assertion they often turn on the right to access counsel, the choice of counsel and who pays for counsel if the defendant is indigent.

Recently, however, discussions on the right to self-representation and the power of the court to impose counsel have become topical in the jurisprudence of the tribunals. Clearly, the respective statutes of the tribunals do guarantee an accused person the right to self-representation, but the critical question is whether this guaranteed right is absolute or qualified having regard to the overall purport and intendment of the tribunal's statutes. The Trial Chambers of the ICTY and SCSL have unequivocally stated that the right to self-representation is not absolute. In Prosecutor v. Milosevic where the precarious health of the accused who had previously exercised his right to self-representation constrained the trial chamber to terminate the exercise of the right and assigned counsel to the accused over his objections, the trial chamber in doing so, stated:

The right to represent oneself must..... yield when it is necessary to ensure that the trial is fair. The primary duty of the trial chamber, as reflected in Article 20 of the statute, must always be to take such steps as are necessary and available to ensure that the trial of the accused is completed fairly and expeditiously.

Thus, the ordinary meaning of Article 21 (4)(d) of the statute, when read in light of the object and purpose of securing for an accused his right to a defence and to fair trial, is that an accused has a right to represent himself, but that right may be lost if the effect of its exercise is to obstruct the achievement of that object and purpose.

The trial chamber is therefore, entirely satisfied that, on the proper interpretation of Articles 20 and 21, it is competent, in appropriate circumstances, to insist upon an accused being represented by counsel in spite of his wish to represent himself. If the accused refuses to appoint his own counsel, then it is open to the trial chamber to assign counsel to conduct the defence case.

The ICTY Appeals Chamber concurred with the decision of the trial chamber emphasising that in as much as "the right to self-representation is indisputable; jurisdictions around the world recognise that it is not categorically inviolable".

The Appeals Chamber, however, cautioned that in cases where restrictions to the fundamental rights are contemplated, it is crucial to adhere to the principle of

proportionality - in the sense that any restriction must be in service of "a sufficiently important objective" and "must impair the right....no more than is necessary to accomplish the objective"

In Prosecutor v. Norman et al, a trial chamber of SCSL acknowledged the accused's right to self-representation, but held the view that the right is not absolute and in light of the circumstances of the case must yield in the interest of justice. In refusing the application of the accused for self-representation, the Special Court distinguished the facts in Norman from Milosevic noting, among other factors, that Milosevic asserted the right to self-representation from the outset as soon as his plea was taken, but, on the contrary, Norman sought to assert his right on the first day of his trial and after over a year in detention during which time he had been defended by a legal team.

The presumption of innocence

The legal principle that all persons are presumed innocent until proved guilty is an important feature of criminal law in virtually all modern legal jurisdictions. The principle forms part of the fair trials rights recognised in international law and is enshrined in the statutes of the tribunals and the ICC. The presumption of innocence not only governs the application of the burden of proof, it conditions the treatment to which an accused person is subjected throughout the period of criminal investigations and trial proceedings, up to and including the end of the final appeal.

The right to silence

The accused right to silence is derived from the provision in the statutes of the tribunals that the accused has a right "not to be compelled to testify against himself or herself or to confess guilt". The drafters of the ICC Statute were prepared to go a step further by explicitly stating that the accused has the right to remain silent without such silence being a consideration in the determination of guilt or innocence.

For persons accused before the ICC it is clear that that where they decide to exercise this right it may not be used against them at trial. In the case of the ICTR and ICTY, a number of decisions have addressed the scope of the right to silence. The Appeals Chamber of the ICTY has found that there is an absolute prohibition against consideration of silence in the determination of guilt or innocence; and that a trial chamber was in error in referring to the failure of the accused to testify.

The trial chamber in Delalic also had occasion to pronounce on the inviolability of the accused's right to silence. In the course of the Delali trial, it came to light that two of the accused were passing notes to each other in the tribunal's detention unit, in prohibition of an order of the Registrar that there be no contact between them.

The prosecution requested disclosure of the notes, which had been confiscated by the registrar, but she refused. The trial chamber decided that this was within the purview of the president of the tribunal.

The prosecution argued that they were entitled to the notes in order to decide whether to bring contempt proceedings for "interference with witnesses."

The president, however, held that there was a fundamental difference between witnesses, who may be compelled to testify and the accused who cannot be made to testify against him- or herself or to confess guilt and that such contempt could not arise unless the accused appeared as a witness.

In yet another application in the Delali case, the prosecution requested that a letter allegedly written by one of the accused to a witness be produced into evidence. The prosecution also argued that the trial chamber should direct the defendant to provide a sample of his handwriting for analysis and identification. The trial chamber admitted the letter into evidence but denied the prosecution's second request because "there is no duty in law... to fill a vacuum created by the investigative procedural gap of the prosecution... The precise meaning of the right to silence is that an accused person can stay mute without reacting to the allegation... The international community, due to the operation of the international and regional conventions protecting fair trial rights, has come a very long way from the unabashed and egregious violation of the dignity and personality of the individual in judicial proceedings. It is the sacred and solemn duty of every judicial institution to respect and give benevolent construction to the provisions guaranteeing such rights instead of giving such a construction as to whittle down their effects." The chamber therefore held that the accused could not be ordered to provide a handwriting sample as this would involve him testifying against himself.

Also, reference to the jurisprudence of the ICTY illustrates that the scope of the accused's right not to testify against himself is wider than is suggested in the Statute. In a majority decision in Tadic, the trial chamber upheld the argument of the accused that the right not to testify against himself meant that there was no obligation to disclose witness statements that might be used to impeach his witnesses. In the view of the majority the defence was under no obligation to disclose defence witness statements on the ground that "The accuse need not afford the prosecution any assistance in making out the prosecution case; he may, if so advised, simply remain mute and require the prosecution to prove its case".

On the question of whether there are consequences attached to an accused's making the choice not to testify in his own behalf, it is pertinent to point out that neither the statutes nor the rules of the tribunals specify whether an adverse inference can be drawn in determining guilt or innocence, or in sentencing, by a suspect's refusal to make a statement or testify on his own behalf.

At the same time, neither do they prohibit the judges from taking the accused's failure to give evidence into consideration in the determination of guilt or innocence as in the case of the ICC. The jurisprudence of the tribunals and the ICC Statute, however, strongly indicate that no adverse inference can be drawn by a suspect's silence in the determination of his guilt or innocence nor can it be viewed as an aggravating factor in the sentencing stage.

In the Delalic appeal where the appellant argued that the trial chamber erred in taking into account in aggravation of sentence the fact that he failed to give oral testimony, the Appeals Chamber agreed with the appellant that the trial chamber's reference to his failure to give evidence in that context indicates that it regarded the failure in an adverse light and considered that the trial chamber's remark leaves open the real possibility that it treated the appellant's failure to testify as an aggravating circumstance".

The position taken by the tribunals and the ICC is a significant improvement on the state of the law in national jurisdictions where there is no consensus as to whether an absolute right for an accused to remain silent at trial should be at no risk of adverse inferences being drawn. Of great concern is that certain jurisdictions have taken steps to limit such right and permit courts inferences from the accused's failure to testify. The attempt to limit the enjoyment of the right to a fair hearing has been considered by the European Court of Human Rights, which has found in principle that the fair hearing requirement in Article 6 of the European Convention implies that an accused has the right to remain silent and not contribute to incriminating himself or herself.

Pronouncements made on occasion by the court, however, could lead to the conclusion that the court subscribes to a regulatory whittling down of the right. In John Murray v The United Kingdom, the court recognised that this right is not absolute and that the drawing of an adverse inference from an accused's silence regulated by law is not contrary to Article 6 as long as there are other safeguards in place.

For a variety of reasons, including malice-induced silence or silence borne out of consciousness of guilt, one is tempted to agree with the 'regulatory control' exception, but, the strict approach of the tribunals and the ICC is preferred in order to avoid a systematic erosion of the right to silence by the courts..

The right to an expeditious trial and to be tried without undue delay

The right to an expeditious trial is guaranteed to accused persons by all international tribunals and the ICC with the objective of ensuring speedy determination of the charges against the accused and applies to all stages of the proceedings, including the appeal. Rule 62 of the ICTY and ICTR, which is founded on Article 20 of the statutes of the tribunals, provides that an accused shall be brought before the assigned trial chamber and formally charged without

delay upon his transfer to the seat of the tribunal. An important issue that has not been resolved by the tribunals is the period of delay that will constitute a violation of the provisions of the tribunals' statutes and the rules. Notably, the European Court of Human Rights and some judges active in the international criminal justice system have opined that it is not appropriate to use the standards in national courts as a guide on account of the peculiarities of the crimes adjudicated by international tribunals. X v. Federal Republic of Germany noted that certain war crimes proceedings as long as 11 years and stated:

The exceptional character of criminal proceedings involving war crimes committed during World war II renders, in the commission's opinion, inapplicable the principles developed in case-law of the commission and the Court of Human Rights in connection with cases involving other criminal offences.

However, taking a somewhat different view of the issue of time limits for the initial appearance of detainees before the ICTR the Appeals Chamber in Prosecutor v. Barayagwiza, held that a 96-day delay between the transfer of the appellant to the tribunal's detention unit and his initial appearance was a violation of his fundamental rights as expressed by Article 19 and 20, internationally-recognised human rights standards and Rule 62.

Invoking the abuse of process doctrine which ordinarily results in the dismissal of charges with prejudice where the court finds that to proceed on the charges in light of the egregious violations of the accused's right would cause serious harm to the integrity of the judicial process, the Appeals Chamber dismissed the indictment with prejudice to the prosecutor and released the appellant. Even though the decision to release the appellant was reviewed following a request filed by the prosecutor on the basis of new facts, the Appeals Chamber maintained in its review decision that the appellant's rights were violated but substituted a remedy of financial compensation to the appellant if acquitted or reduction of sentence to take account of the violation if convicted.

It is suggested that in extreme cases of violation of fair trial rights judges should impose stiff sanctions on prosecuting authorities even it results in the unconditional release of the accused.

The right to a public trial

The essence of the right to a public trial was succinctly captured by the European Court of Human Rights in Sutter v. Switzerland when it noted: "by rendering the administration of justice visible, publicity contributes to the achievement of the aim of ...a fair trial, the guarantee of which is one of the fundamental principles of any democratic society....".

In conformity with this goal, all proceedings before the international tribunals other than deliberations of the trial chamber must, in principle, be held in public.

As stated by the Trial Chamber in Prosecutor v. Kunarac "over and above the reasons that public proceedings facilitate public knowledge and understanding and may have a general deterrent effect, the public should have the opportunity to assess the fairness of the proceedings".

The right to public trial may, therefore, not be waived by the parties. In Kunarac, the accused asked for prosecution witnesses to be heard in closed session and that the press and public be excluded from the proceedings but the trial chamber denied the request stating that: "it is of great importance that proceedings before this tribunal should be as public as possible."

Nevertheless, on account of the serious post conflict problems in the places where the crimes prosecuted were committed, the statutes of the tribunals provide that the preference for public hearings must be balanced with other imperatives, such as the duty to protect victims and witnesses.

The rules of the tribunals make detailed provision for such measures, a number of which affect the right of the accused. Specifically, Rule 79 of the ICTY and ICTR provides that the press and public may be excluded from proceedings for various reasons, including public order or morality, the safety or non-disclosure of the identity of a victim or witness and the protection of the interests of justice. As such, in certain circumstances, the right to public hearing may be qualified to take into account these other interests.

As the tribunal's rules provide no guidelines as how the balancing act required of the judges is to be achieved, a lot is left to the discretion of the judges. In Prosecutor v. Tadic, the trial chamber had to deal with a prosecution request which related to non-disclosure of the identities of certain witnesses to the accused. The name, address, image, voice and other identifying data of the witnesses were to be kept from the accused effectively granting the witnesses anonymity.

Noting that only in exceptional circumstances can the court restrict the right of the accused to examine or have examined witnesses against him, a majority of the chamber decided it had to balance the right of the accused to a "fair and public" trial against the protection of victims and witnesses in view of the situation of armed conflict that existed and endures in the area where the alleged atrocities were committed.

The trial chamber therefore took a "contextual approach" and held that it was justified in accepting anonymous testimony if

- there was real fear for the safety of the witness or his or her family;
- the testimony of the witness was important to the prosecutor's case;

- there was no prima facie evidence that the witness is untrustworthy;
- the measures were strictly necessary.

In a separate opinion, Judge Stephen took a different view of the matter and anchored his opinion on the wording of Article 20 of the ICTY Statute, which provides that the proceedings should be conducted with "full respect" for the rights of the accused and "due regard" for the protection of victims and witnesses.

The judge, therefore, came to the conclusion that the statute does not authorise anonymity of witnesses where it would in a real sense affect the rights of the accused specified in Article 21 and in particular the "minimum guarantee" contained therein.

It is submitted that the approach in the minority decision is preferred given that the decision of the majority would have the effect of giving the accused certain minimum guarantees with one hand and taking it with the other - a grant of outright anonymity to prosecution witnesses has a real potential of denying the accused the right to examine, or have examined the witnesses against him.

Remedies for the infringement of rights

Article 20 of the Statutes ICTR, ICTY and SCSL, which spells out the minimum fair trial guarantees to accused persons does not expressly provide for remedies in situations where their rights are found to have been violated. Nonetheless, the trial chambers of the tribunals have called in aid the provision of rule 95 to exclude evidence where it falls short of the standards stipulated by the rule. This rule provides that no evidence shall be admissible if obtained by methods that cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.

Article 69 (7) of the ICC Statute, the equivalent of rule 95 of the ad-hoc tribunals expressly bars the admission of evidence obtained in violation of the accused human rights. This Article provides that evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if (a) the violation casts substantial doubt on the reliability of the evidence; or (b) the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings. It is submitted that the ICC Statute is, in this regard, a marked improvement on those of the ad-hoc Tribunals.

In spite of Article 20 on the Tribunals' Statutes silence on the remedies open to the accused upon a violation of fair trial rights, the trial chambers have often been resolute in granting appropriate remedies in proven cases. Thus, in Barayagwuza, the Appeals Chamber of the ICTR relied on the doctrine of "abuse of process" to terminate the proceedings initiated against the accused on account of the violations of the accused's rights. In the words of the Appeals Chamber, "we find

this conduct to be egregious and, in light of the numerous violations, conclude that the only remedy available for such prosecutorial inaction and the resultant denial of his rights is to release the Appellant and dismiss the charges against him".

In other circumstances, the judges of the tribunals have excluded evidence where its admission would deny the accused a fair trial. For example, in Kabiligi where the accused contested the admission of his custodial statements on the basis that the Prosecution violated his right to counsel when he was questioned at the pre-trial stage Trial Chamber I of the ICTR promptly excluded the statement on grounds that the suspect's pre-trial questioning may not proceed without the presence of counsel.

A similar decision was reached in elebi i. In that case a trial chamber of the ICTY had to decide whether a statement obtained in the absence of the accused's counsel could be admitted into evidence. Excluding the statement, the chamber noted that the exclusion of evidence obtained in evidence in violation of internationally-protected human rights is mandatory under Rule 95, and it is irrelevant whether the tribunal in any way requested or was involved in the

collection of the excluded evidence.

The jurisprudence of the tribunals also indicates that compensation may be adequate remedy where the right of the accused has been violated. In Barayagwiza, upon reviewing an earlier decision to dismiss the charges against the accused, the Appeals Chamber, on the basis of new evidence, found that the infringements on the rights of the accused were not as serious as originally thought. It, therefore, came to the conclusion that financial compensation was appropriate remedy if he is acquitted and a reduction of his sentence if he is convicted. Again, the ICC Statute has improved on the statutes of the tribunals by expressly providing for payment of compensation to persons who are wrongfully arrested or convicted or anyone who has suffered a grave and manifest miscarriage of justice.

Conclusion

The commitment to the fight against impunity by the international community has created an upsurge in the number of international criminal proceedings before the ad-hoc tribunals and ICC.

Correspondingly, in order to ensure that justice is done to persons suspected or accused of extremely serious crimes it is important to adhere to the highest standards of international criminal justice, particularly as it relates to the fair trial rights contained in major human rights treaties such as the ICCPR and ECHR. The statutes and rules of the tribunals and the ICC not only track the fair trial guarantees enshrined in these international human rights instruments, but also

enforce these rights through their trial chambers. A review of the jurisprudence of the ad-hoc tribunals shows that considerable impetus has been given to the enforcement of fair trial rights in the international arena

In the service of other imperatives such as the need to protect victims and witness, however, the tribunals and ICC are allowed by their statutes to restrict the accused's right to a public trial and right of the accused to examine or have examined witnesses against him.

The need to balance the right of the accused against the protection of victims and witnesses is justified by the extreme danger to which they are exposed in the situation of armed conflict that existed and endures in the communities where the alleged atrocities were committed. Because the tribunals' rules provide no guidelines as to how the balancing act required of the judges is to be performed, a lot is left to the discretion of judges. This and other matters will continue to challenge existing tribunals and other international courts.

Where there is a right, there must be a remedy. It is of critical importance that adequate and effective remedies are made available to accused persons whose fair trial rights have been violated. With the exception of rule 95, however, the statutes and rules of the tribunals do not provide specific remedies for a violation of the accused's fair trial rights, therefore, raising questions as to how the tribunals should arrive at the appropriate remedy in a given case.

For instance, it is difficult to understand how the ICTR Appeals Chamber arrived at the remedy of financial compensation prescribed in its second decision in Barayagwiza as against its earlier decision to dismiss the indictment with prejudice against the prosecutor.

In order to ensure certainty in this area of international jurisprudence, it is imperative that more needs to be done to create standard remedies in cases of infringements. It bears nothing in this regard, that the ICC Statute expressly provides for compensation for wrongfully arrested or convicted persons or anyone subject of a "grave and manifest miscarriage of justice."