

**Examining Prosecutor's Duty to Disclose Exculpatory Evidence and the Right to Fair  
Trial in Kenya**

**Mary Otulo**

**Submitted in Partial Fulfillment of the Requirements for the Degree of Masters of Laws  
at Strathmore University**

**Strathmore Law School  
Strathmore University  
Nairobi, Kenya**

**June, 2020**

This thesis is available for Library use on the understanding that it is copyright material and that no quotation from this thesis may be published without proper acknowledgment.

## DECLARATION

I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

©No part of this thesis may be reproduced without permission of the author and Strathmore University.

Mary Otulo

Signature: \_\_\_\_\_

Date:

## APPROVAL

The thesis of Mary Otulo was reviewed and approved by the following:

Dr. John Osogo Ambani,  
Senior Lecturer, Strathmore Law School,  
Strathmore University

Dr. Peter Kwenjera,  
Dean, Strathmore Law School,  
Strathmore University

Dr. Bernard Shibwabo,  
Director, Office of Graduate Studies,  
Strathmore University

## ABSTRACT

The right of an accused to a fair and just trial is as universal as it is absolute. Save for instances where there is a shift of evidential burden, an accused cannot be compelled to provide evidence in proof of their innocence. The sole bearer of the burden of proof is the prosecution which has to establish the guilt of an accused beyond a shadow of doubt. In fact, the prosecution is strictly obligated to not only facilitate the accused in their defence but to also make disclosures of all evidentiary discoveries irrespective of whether inculpatory or exculpatory. This strict obligation is aimed at remedying the undeniable imbalance of power between the state and the accused and while at face value may seem unfair, is functionally sound. Nonetheless, the application of the right of an accused to a fair trial including access to evidence and potential witnesses must be undertaken within the context of several supervening factors. These include, among others, safety of witnesses, confidentiality of materially proprietary information as well as national security.

Of concern to this study is safety of witnesses. Discovery must take into account the possible implications of disclosure of personal information of witnesses. This evaluation must be done on case by case basis. Effectiveness of a criminal trial process is thus determined on the basis of the balance of concerns of the state, victims and the accused. This study evaluates the application of these principles in Kenya. It evaluates the role of the prosecution on disclosure of exculpatory evidence, the right to fair trial by interrogating the interplay between the right of accused to discovery and the need to protect witnesses from potential harm on account of such disclosures. The research proceeds against a background that a majority of criminal cases in Kenya often overvalue the right of an accused to full evidentiary disclosure while increasingly paying little attention to the implications of the same, more so on the safety of witnesses. Domestic practice demonstrates that the only realm where witness protection seems to matter and reigns almost absolute is in sexual offences involving minors. The inconsistencies in the application of the principle of fairness brings to the fore the question as to the existing domestic legal instruments are sufficiently equipped at safeguarding the right of an accused to fair trial while at the same time guaranteeing safety of witnesses. To achieve this, the research conducts a qualitative systematic literature review in examining the role of the prosecutor and looking beyond the domestic practice to identify potential lessons Kenya can learn to streamline its approach. The study looks into the application of this interplay in major global legal platforms including the International Criminal Tribunal for Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC). The study is based on Aristotle's theory of justice specifically distributive justice with an aim of seeking a balance for all parties involved in the criminal justice system.

The findings indicate that, in Kenya, as in the international criminal trial platforms, application of evidentiary rules is rather loose, and the determination as to what amounts to witness safety concern or a violation of evidentiary disclosure obligations is purely discretionary. This implies the right of accused to disclosure may be violated without dire consequences to the prosecution while at the same time; the safety of witnesses may be compromised much to the disadvantage of the trial process.

## TABLE OF CONTENTS

<b>DECLARATION</b> .....	<b>ii</b>
<b>ABSTRACT</b> .....	<b>iii</b>
<b>LIST OF ABBREVIATIONS</b> .....	<b>vii</b>
<b>LIST OF CASES</b> .....	<b>viii</b>
<b>LIST OF STATUTES</b> .....	<b>x</b>
<b>LIST OF INTERNATIONAL LEGAL INSTRUMENTS</b> .....	<b>xi</b>
<b>ACKNOWLEDGMENTS</b> .....	<b>xii</b>
<b>DEDICATION</b> .....	<b>xiii</b>
<b>CHAPTER 1</b> .....	<b>1</b>
<b>BACKGROUND TO THE STUDY</b> .....	<b>1</b>
1.0 INTRODUCTION .....	1
1.1 STATEMENT OF PROBLEM .....	4
1.2 STATEMENT OF OBJECTIVE .....	6
1.3 RESEARCH QUESTIONS .....	6
1.4 THEORETICAL FRAMEWORK .....	6
1.5 RESEARCH METHODOLOGY .....	8
1.6 LITERATURE REVIEW .....	8
The Right to Fair Trial .....	8
Prosecution .....	10
Witness Protection .....	12
International Criminal tribunals .....	15
1.7 LIMITATIONS OF THE STUDY .....	16
1.8 HYPOTHESES .....	16
1.9 CHAPTER BREAKDOWN .....	16
<b>CHAPTER 2</b> .....	<b>18</b>
<b>DUTY TO DISCLOSE EXCULPATORY EVIDENCE</b> .....	<b>18</b>
2.0 INTRODUCTION .....	18
2.1 LEGAL FRAMEWORK .....	19
2.1.1 International Instruments .....	19
2.1.2 Domestic Instruments .....	23
2.2 PROSECUTION'S DISCLOSURE OBLIGATIONS .....	27
2.2.1 Inequity between the Prosecution and the Accused .....	27
2.2.2 Consequences of Violation of Prosecutorial Obligations .....	29
2.2.3. Legal and ethical dimensions of disclosure obligations .....	31

2.2.4 Reciprocity of Disclosure Obligations .....	34
2.3 WITNESS PROTECTION AND ITS RAMIFICATIONS ON FAIR TRIAL GUARANTEES .....	36
2.3.1 Witness Safety and Confidentiality .....	36
2.3.2 Challenges and Complexities .....	37
2.4 CONCLUSION .....	40
<b>CHAPTER 3 .....</b>	<b>42</b>
<b>INTERNATIONAL PRACTICE AND PERSPECTIVE .....</b>	<b>42</b>
3.0 INTRODUCTION .....	42
3.1 OVERVIEW OF THE INTERNATIONAL COURT AND TRIBUNALS .....	43
3.1.1 International Criminal Tribunal for the former Yugoslavia (ICTY) .....	43
3.1.2 International Criminal Tribunal for Rwanda (ICTR) .....	44
3.1.3 International Criminal Court (ICC) .....	45
3.2 PRINCIPLE OF EQUALITY OF ARMS AND ITS ROLE IN INTERNATIONAL DUE PROCESS.....	46
3.3 RIGHT TO FAIR TRIAL AND DISCLOSURE OF EXCULPATORY EVIDENCE IN INTERNATIONAL COURT AND TRIBUNALS .....	47
3.3.1 International Tribunal for the former Yugoslavia (ICTY) .....	47
3.3.2 International Criminal Tribunal for Rwanda (ICTR) .....	49
3.3.3 International Criminal Court (ICC) .....	50
3.4 IMPLICATIONS OF INTERNATIONAL CRIMINAL COURT AND TRIBUNALS STRUCTURES ON PROSECUTION’S DISCLOSURE OBLIGATIONS .....	51
3.5 CHALLENGES FACED BY INTERNATIONAL CRIMINAL TRIBUNALS AND THE INTERNATIONAL CRIMINAL COURT IN DEALING WITH EXCULPATORY EVIDENCE .....	52
3.5.1 Classification of Exculpatory Evidence .....	53
Materiality of Evidence .....	55
3.5.3 Ineffective Deterrence to Disclosure Violations .....	56
3.5.4 Burden of Disclosing Exculpatory Evidence .....	59
3.6 NON-DISCLOSURE ON ACCOUNT OF NATIONAL SECURITY AND WITNESS SAFETY .....	60
3.6.1 Confidentiality in ICTY .....	61
3.6.2 Confidentiality and privacy in ICC .....	62
3.7 CONCLUSION .....	64
<b>CHAPTER 4 .....</b>	<b>66</b>
<b>CONCLUSIONS AND RECOMMENDATIONS .....</b>	<b>66</b>
4.1 INTRODUCTION .....	66
4.2 ADEQUACY OF LEGAL FRAMEWORK.....	68
4.2.1 International instruments .....	68
4.2.2 Kenya’s legal framework .....	70
4.3 NON-DISCLOSURE AND THE RIGHT TO A FAIR TRIAL.....	72
International Criminal Court and Tribunals .....	74
4.4 CONCLUSIONS.....	75
4.5 RECOMMENDATIONS .....	77

<b>BIBLIOGRAPHY .....</b>	<b>80</b>
BOOKS.....	80
JOURNAL/ARTICLES .....	80
THESIS.....	84
INTERNET SOURCES.....	84
<b>APPENDICES .....</b>	<b>86</b>
APPENDIX 1: ETHICAL REVIEW .....	86
APPENDIX 2: PLAGIARISM REPORT .....	87

## LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ECHR	European Court of Human Rights
EU	European Union
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
JTI	Judiciary Training Institute
ODPP	Office of the Director of Public Prosecutions
OAU	Organization of Africa Unity
PTI	Prosecutors Training Institute
UDHR	Universal Declaration of Human Rights
U.K.	United Kingdom
UN	United Nations
SCSL	Special Court for Sierra Leone
U.S.	United States
WPA	Witness Protection Agency

## LIST OF CASES

### KENYAN CASES

*Ann Njogu and 5 others v. Republic* Misc. Crim. Application No.551 of 2007.

*Dennis Edmond Apaa and 2 others v. Ethics and Anti-corruption Commission and Another* [2012] eKLR.

*George Ngodhe Juma & two others v. The Attorney General* Miscellaneous Criminal Application No. 345 of 2001 (unreported).

*Gerald Macharia Githuku v. Republic* [2008] eKLR (Criminal Appeal No. 119 of 2007).

*Paul Mwangi Murunga v. R* Criminal Appeal No. 35 of 2006.

*R v. Kevin Ouma Omondi and 4 others* [2018] eKLR.

*R v. Raphael Muoki Kalungu* [2015] eKLR.

*Thomas Mboya Oluoch & Another v. Lucy Muthoni Stephen & Another* 2005 [eKLR].

*Thomas Patrick Gilbert Cholmondeley v. Republic* 2008 [eKLR].

*Thuita Mwangi and 2 others v. Ethics and Anti-corruption Commission and 3 others*, Petition No.153 of 2013 consolidated with Petition No.369 of 2013.

*Wycliffe Shakwila Mungo v. Republic* [2018] eKLR

### CANADIAN CASES

*R v. Stinchcombe* 1991) 3 S.C.R. 326.

*R v. Sussex Justices, ex parte McCarthy's* [1994] 1 KB 256.

*R v. Ward* [1998] QCA 329.

### EUROPEAN CASES

*R v. Meyers* [2008] EWCA Crim 2989.

### ICC CASES

*Prosecutor v. Ruto and Sang* ICC, Case No. ICC-01/09-01/11

*Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06-1020.

### ICTR CASES

*Prosecutor v. Bizimungu*, Case No. ICTR-99-50-T

*Prosecutor v. Karemera*, Case No. ICTR-98-44-T.

*Prosecutor v. Mpambara* ICTR-01-65-T, ICL 6 (ICTR 2006).

*Prosecutor v. Nyiramasuhuko*, ICTR, Case No. ICTR-97-21.

### **ICTY CASES**

*Prosecutor v. Karadzic* ICTY, Case No. IT-95-5/18-PT.

*Prosecutor v. Lukic* ICTY, Case No. IT-98-32/1-A.

*Prosecutor v. Slobodan Milosevic (Decision on Motion for Judgement of Acquittal)*, IT-02-54-T

*Prosecutor v. Stakic* ICTY, Case No. IT-97-24.

*Prosecutor v. Tihomir Blaskic*, No. IT-95-14-T.

### **INDIAN CASES**

*Rattiram v. State of M.P*(2012) 4 SCC 516.

### **SOUTH AFRICAN CASES**

*S v. Leepile* (5)1986(4) SA 187 (W)

### **UNITED KINGDOM CASES**

*People ex rel. Lemon v. Supreme Court* N.Y 24, 156 N.E 84(1927).

### **UNITED STATES CASES**

*Alford v. United States* 282 U.S 687 (1931).

*Barker v. Wingo* (1972) 407 U.S, 514-515.

*Berger v. United States* 295 U.S 78 (1935)

*Brady v. Maryland*, 373 U.S 83, 87 (1963).

*United States v. Olsen* 737 F.3d 625, 630 (9th Cir. 2013).

## **LIST OF STATUTES**

Criminal Procedure Code Cap 75.

Evidence Act Cap 80.

International Crimes Act No. 16 of 2008.

Sexual Offences Act No. 3 of 2006.

The Constitution of Kenya, 2010.

The Security Laws (Amendment) Act No. 19 of 2014

Witness Protection Act No. 16 of 2006.

## **LIST OF INTERNATIONAL LEGAL INSTRUMENTS**

African Charter on Human and Peoples' Rights 1981.

ICC Rules of Procedure and Evidence 2013.

ICTR Rules of Procedure and Evidence 1995.

ICTY Rules of Procedure and Evidence 1994.

International Covenant on Civil and Political Rights 1966.

International Covenant on Economic, Social and Cultural Rights 1966.

Rome Statute of the International Criminal Court 1998.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984.

The European Convention on Human Rights and Fundamental Freedoms 1950.

Charter of the United Nations 1945.

## **AKNOWLEDGMENTS**

I wish to express my gratitude to my supervisor Dr. John Osogo Ambani for the guidance and insight he made to this study.

I thank Strathmore University for giving me a chance to undertake my studies, making this journey a success by enriching it with brilliant faculty members and unrivalled academic resources.

## **DEDICATION**

This research is dedicated to my family for their continued support, encouragement and always believing in me.

## CHAPTER 1

### BACKGROUND TO THE STUDY

#### 1.0 Introduction

Exculpatory evidence refers to any relevant material that “creates a reasonable doubt that did not otherwise exist”.<sup>1</sup> It has also been defined to refer to evidence such as a pronouncement or a testimony, inclined to absolve, justify or excuse an alleged guilt or fault of an accused.<sup>2</sup> According to the International Association of Prosecutors (IAP), prosecutors have the duty to conduct themselves professionally. The IAP guidelines specifically outline that professional conduct includes the duty to “always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial.”<sup>3</sup>

When prosecuting a crime (and sometimes during investigation), the prosecution may at times come by evidence which favours the defence’s case. However, this potentially exculpatory evidence is rarely provided to the defence. More so, the accused would rarely have the ability to find out if any such exculpatory evidence has been unearthed and collated by the prosecution. It is therefore arguable that without a specific legal duty to disclose exculpatory evidence, the prosecution is left with unfettered discretion as to what evidence to disclose to the accused. Abuse of such unfettered discretion can and usually leads to grave violations of the rights of the accused to a fair trial, access to justice, and the right to fair administrative action.

In *Brady v. Maryland* the accused’s appeal arose from murder charges in the lower court where the accused John Brady and his accomplice Donald Boblit hatched a plan to steal a vehicle.<sup>4</sup> After identifying a victim and stealing his car his accomplice killed the victim. They were both arrested, thereafter charged with robbery and murder. They both recorded several statements

---

<sup>1</sup>*Brady v. Maryland*, 373 U.S. 83, 87 (1963).

<sup>2</sup>Cornel University Law, at [https://www.law.cornell.edu/wex/exculpatory\\_evidence](https://www.law.cornell.edu/wex/exculpatory_evidence).

<sup>3</sup>IAP (1999) “*Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*,” adopted by the International Association of Prosecutors on the twenty third day of April 1999, at [http://www.iap-association.org/getattachment/Resources-Documentation/IAP-Standards-\(1\)/English.pdf.aspx](http://www.iap-association.org/getattachment/Resources-Documentation/IAP-Standards-(1)/English.pdf.aspx).

<sup>4</sup>373 U.S. 83, 87 (1963).

at the police station. During their trial the prosecution failed to disclose evidence which exonerated Brady from the murder, as his accomplice had confessed in one of his statements to killing the victim. As a result they were both convicted of murder and sentenced to death. Brady appealed and the Supreme Court reversed the lower court's sentence and ordered a re-trial on the issue of the murder sentence. The court held that the suppression or withholding by the state of material evidence exculpatory to an accused is a violation of due process.

The prosecution usually has at its disposal the state resources including finances, support of the state machinery including security forces, and general state influence over matters. In this regard, there are certain established overarching principles aimed at guaranteeing, to the greatest extent possible, the protection of the rights of the accused and the equality of arms with the defence. These include the array of international human-rights conventions along with other international guidelines and principles outlining the conduct of prosecution.

The rules of disclosure in the international criminal tribunals: the rules of procedure since Nuremberg have their roots in the United States (U.S.) Model.<sup>5</sup> As far as disclosure is concerned, the rules deployed by the Rules of Procedure and Evidence to guide extempore tribunals are strikingly similar to the United States Federal Rules of Criminal Procedure, Rule 16.<sup>6</sup>

In their early stages of operations, the benches of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) have made extensive references to the U.S. Federal Criminal Procedure Rules. The U.S. discovery process comprises two major classifications: exculpatory and inculpatory materials. The prosecution's case hinges on inculpatory evidence. Statute and Court Rules stipulate materials which may be disclosed or are exempted from disclosure. Application of these requirements vary from one state to another but are ubiquitous in obligating the prosecution to avail all evidence to the defence to aid in their preparation for trial. On the other hand, exculpatory evidence is

---

<sup>5</sup>Gideon Boas and William Schabas, *International Criminal Law: Development in the Case Law of the ICTY*, Vol 6 Martinus Nijhoff Publishers, 2003, 227.

<sup>6</sup>*Prosecutor v. Tihomir Blaskic*, NO IT-95-14-T, Decision on the production of Discovery Material (27 January 1997) para 35-38.

underpinned by the constitutional law, as applied and interpreted by the Supreme Court. Through *Brady v. Maryland* and its progeny cases, the Supreme Court has consistently delivered on this mandate.<sup>7</sup>

Central to nearly all criminal rules and procedure across the globe, is the protection, promotion and advancement of the right of an accused to promptly obtain discovery of all materials in possession of the prosecution, and this includes any and all material necessary for preparation of defence as well as those outside the ambit of constitutional mandate.

In England in the 1920s pre-trial discovery was seldom allowed. At common law, the courts did not have authority to direct pre-trial discovery in criminal matters.<sup>8</sup> In the absence of a statute specifically directing such a mandate, a trial court could not arrogate itself the duty to compel a party to disclose evidence. Pre-trial disclosures were generally perceived to be subversive to justice. Discovery could only be aided by mutual exchange of information in the pre-trial process. This changed in the 1930s with the first statutory intervention. The legislative intervention institutionalized trial-court discretion in matters disclosure and directed that, where the statute is not specific as to whether an item is subject to disclosure, the intervention of the court as to such a determination would be final. This discretionary leeway resulted in varied outcomes in as far the compelling discovery in concerned.

In Kenya, the legal system has been transformed by the new Constitution the country's supreme law effectively binding all persons and state organs; it forms the basis of all laws of the country.<sup>9</sup> It promotes the spirit of democracy by protecting the human rights of all citizens. Change finally came to Kenya with the introduction of a Bill of Rights in chapter four of the said constitution which cemented citizens' rights coupled with an introduction of social-economic rights. Article 35 provides that every Kenyan has the right to access of information held by the government.<sup>10</sup> A similar view is portrayed in Article 50(2)(j) which provides that

---

<sup>7</sup>373 U.S. 83, 87 (1963).

<sup>8</sup>*People ex rel. Lemon v. Supreme Court* N.Y 24, 156 N.E 84(1927) at 28.

<sup>9</sup> *The Constitution of Kenya* (2010).

<sup>10</sup> *The Constitution*.

an alleged offender has the right to be promptly appraised of all the materials and information in possession of the prosecution.<sup>11</sup> Article 25 further espouses that the right to fair trial cannot be limited; it is listed as one of the non-derogable rights.<sup>12</sup>

The Criminal Procedure Code provides a step by step process from arrest of an accused to sentencing.<sup>13</sup> It is thus a set of rules and procedural guidelines aimed at an orderly facilitation of the criminal judicial process in a manner congruent not just with the Constitution but with other established principles of fairness and justice too. Section 42 of the Act was amended by inserting Section 42A(1) which provides that pursuant to Article 50(2) (j) of the Constitution, the prosecution shall inform the accused person in advance of all the evidence the prosecution intends to rely on and ensure the accused person has reasonable access to that evidence.<sup>14</sup>

The Evidence Act applies to all judicial proceedings before the court and regulates what facts are admissible and how the process of administration can be conducted.<sup>15</sup> It places the burden of proof on the person that alleges the facts. It deals with aspects of obtaining evidence before trial, adducing evidence at trial, applying and assessing evidence for proof or disproof of a fact. The Act provides that evidence to prove facts alleged must be adduced orally and must be direct.<sup>16</sup> However, the Act is silent on the issue of exculpatory evidence.

This study interrogates both case law and established legal framework to underscore the interchange between the right of the accused to fair trial including the right to full evidentiary disclosures and the need to ensure victims and witnesses of offences are protected.

### **1.1 Statement of Problem**

It is arguable that although the right of the accused to the entirety of exculpatory evidence (including mitigating evidence, potentially exculpatory evidence) has to be weighed against the safety of witnesses, victims and their families; the duty of the United Nations (UN) in

---

<sup>11</sup> *The Constitution.*

<sup>12</sup> *The Constitution.*

<sup>13</sup> Cap 75, Laws of Kenya.

<sup>14</sup> Section 16, The Security Laws (Amendment) Act No.19 of 2014.

<sup>15</sup> Cap 80, Laws of Kenya.

<sup>16</sup> Section 62.

upholding its mandate under the UN Charter and the national security interests of the states so involved, not much has been done, both jurisprudentially and legislatively, more so in Kenya, to achieve sustainable ideals.<sup>17</sup>

For starters, there is very little jurisprudential guidance on the delicate balance between the interests of all the other parties so involved in a trial and the rights of the accused. Courts have increasingly advanced the need for both the prosecution and the general public to disabuse themselves of the tendency to treat alleged offenders with disdain and loath even before material evidence is provided either in proof or disproof of their guilt. This conviction is premised primarily on presumption of innocence and while profoundly progressive and objective, remains significantly blind to the possibilities of surprise and unexpected interferences or threats from the accused directly or from his or her associates and sympathizers. There is therefore an inherent need for the judicial process to effectively appraise itself on the circumstances that circumscribe every case subjected to it with the view to establishing proper mechanisms and processes tailored to achieve an idyllic balance.

It necessarily follows therefore, that the duty of a prosecutor, acting on behalf of the Republic is not to achieve a conviction no matter what, but rather to be a minister of justice that is to help the court arrive at a just and fair decision in the circumstances of each case. Prosecutors must therefore avail all information relevant to the case, regardless of whether any of the disclosures supports or weakens their case. However, the right to a fair-trial is not entirely a monopoly of an accused person but rather a delicate balance of competing interests and liberties. Further, it is arguable that the absence of a reciprocally strict timely disclosure on the part of the defence following a shift of evidential burden, renders any such expectation or argument for such expectation moot at best effectively giving the defence undue leverage and creating an uneven playing field.

---

<sup>17</sup> United Nations, *Charter of the United Nations*, 1 UNTS XVI, 24 October 1945

## **1.2 Statement of Objective**

Overarching this study is the need to not only determine whether non-disclosure of exculpatory evidence amounts to a violation of the right of the accused to fair trial but also to interrogate the interplay of the competing rights of the accused persons and victims with respect to such evidence. Specifically, the study aims at:

- a) Examining the effectiveness of existing legal and policy framework on safeguarding the right of an accused to fair trial as well as guaranteeing the safety of witnesses.
- b) Assessing the practice at the international criminal tribunals and the ICC to highlight the lessons Kenya could learn in as far as witness protection and the right of an accused to fair trial is concerned.
- c) Underscoring the measures that can be sustainably put in place to ensure the rights of an accused to fair trial is guaranteed without impugning the need to protect witnesses from potentially harmful evidentiary disclosures.

## **1.3 Research Questions**

This study seeks to address the following pertinent concerns:

- a) Does the prosecutor have a duty to disclose exculpatory evidence in Kenya?
- b) What is the interplay of the rights of victims of offences to justice and the right of an accused to a fair trial?
- c) Does Kenya have domestic legal, policy and procedural framework as well as jurisprudence on exculpatory evidence?
- d) Are international rules and policy framework on exculpatory evidence sufficient enough for Kenya to adopt its best practices?

## **1.4 Theoretical Framework**

This study is premised on Aristotle's theory of justice and focuses on distributive justice. Aristotle derives two principles of justice. First, is corrective or commutative justice which is justice applied by courts to redress civil wrongs and restores a balance caused by criminal behaviour. Second, is distributive justice that states each person gets what is fair and what is

due to him. Together, the two principles espouse that society should be organized in a way that grants, protects and guarantees utmost liberties to its constituents, constrained only by the natural principle that guarantees of one constituent do not undermine those of another. Additionally, inequities can only be condoned in instances where the worst-off party is more advantaged than they would be under an equal distribution arrangement.<sup>18</sup>

Underpinning this study is the hypothesis that failure to disclose exculpatory evidence amounts to a fundamental infringement of an accused's entitlement to fair process. Furthermore the existing legal and regulatory framework as well as procedural guidelines on fair trial of criminal cases is inadequately equipped at effectively creating a parallelism between the competing rights of victims, witnesses and their families with that of the accused to exculpatory evidence. Accordingly, the study understands the premise upon which Aristotle's theory of justice draws inspiration-that whereas individuals have certain rights and liberties, the exercise of the same must not be to the disenfranchisement of others. An accused right to fair trial including the right to access, question witnesses and their testimonies must be effectively weighed against all the circumstances surrounding the case. This is not to say however, that the right to fair trial can be constrained. As a matter of fact, it is one of the inalienable rights guaranteed and safeguarded under the Constitution. Limiting access to identity of witnesses or information likely to lead to positive identification of a witness when there are real threats of harm inconsequence warrants operationalization of witness protection measures. These measures must however, not be as extreme as to prejudice or limit an accused's ability to mount effective defence.

Aristotle's theory of justice is thus foundational to this study which primarily revolves around disclosure of exculpatory evidence. However, evidentiary disclosure should be balanced so as not to infringe on the rights of victims and witnesses. To this end, justice can be summed up as adequate consideration of the rights, needs and exigencies of all parties to a trial process.

---

<sup>18</sup>Aristotle, *The Nicomachean Ethics of Aristotle (Book V)*, 10ed, Keagan Paul, Trench, Trubner and Company Limited, 1906, 136-149.

## **1.5 Research Methodology**

This study lays significant emphasis on an analysis of the relevant available literature on this subject. The research conducted a qualitative systematic review of various sources. In this regard it relies on primary sources for example judicial reports, bar publications, scholarly opinions, statutes, dissertations, decided cases from Kenya and international practice on non-disclosure of exculpatory evidence.

Secondary sources included newspapers, books, academic articles, law journals, encyclopedias, treatises and internet sources.

## **1.6 Literature Review**

In order to effectively test its hypothesis, answer its underpinning question and fulfil its overarching objective; this study relies heavily on the stellar scholarly, jurisprudential and statistical works of exemplary industry experts and professionals on the topic of criminology and criminal law. It not only looks to these extensive studies and authorities to underscore both local and international practice but also seeks to understand and highlight the intricate balance between the competing rights of the accused and the victims of his or her alleged aggression through the lenses of exculpatory evidence. The study however notes the rarity of detailed related studies as is indicative of the state of affairs. As such, it relies on a wide array of studies and literature, both old and new to test its principal hypothesis on the topical question.

### **The Right to Fair Trial**

In Kenya, the right to fair trial is as absolute as it is central to unprejudiced administration of justice. According to Scholastica Omondi, so crucial is this right that a trial body properly seized of such cases must be careful to not only act competently, independently and impartially but also guard against deliberate and calculated abuse by any persons or authority. She argues that the concept of fair trial and an accused's entitlement to it as a procedural requirement is foundationally underpinned by the doctrine of presumption of innocence and has historically gained global acknowledgment and affirmation to the point that numerous concerned

international human rights monitoring organs have been established specifically to ensure criminal process is fair and the rights of an accused are not violated.<sup>19</sup>

Omondi further asserts that the right to fair judicial process is statistically the most prevalently litigated human liberties globally with incredibly rich jurisprudence. She notes for instance, that in *Barker v. Wingo*, the United States Supreme Court determined that an accused's right to a fair and expedited trial is a due process entitlement that must be respected at times during the trial process.<sup>20</sup> According to her, the fundamental objective of the fair-trial liberties is to not only limit prosecutorial overreach but also ensure proper and unbiased dispensation of justice. It is notable however, that while Omondi acknowledges the fundamental functional role respect for an accused's right to fair judicial process plays in the dispensation of justice, it is lost on her the need to balance the same with the safety of witnesses to achieve a similar end.

Like Omondi, Joseph Kipkoech Biomdo analyses that as a norm of the international human rights practice and ordinance, the right to a fair judicial process is specifically intentioned at protecting people from arbitrary and unlawful deprivation or curtailment of other fundamental liberties and primarily encompasses various domestic and international shields aimed at protecting and promoting fair and public hearing before an impartial and dispassionate judicial trial process.<sup>21</sup> Biomdo argues that as a fundamental pillar of any self-respecting democratic state, the right to fair trial including the right to full disclosure of both exculpatory and inculpatory evidence, is not merely a legal and ethical concept used to give meaning to or describe procedural rules of a criminal judicial process as well as treatment of the accused, but rather a basic concept of the rule of law aimed at facilitating fair judicial process. He notes that whereas the scope of fair trial varies from one criminal jurisdiction to another, there is a general consensus that associated guarantees must be observed, respected and protected from the

---

<sup>19</sup> Omondi S, 'The Right to a Fair Trial and the Need to Protect Child Victims of Sexual Abuse: Challenges of Prosecuting Child Sexual Abuse under the Adversarial Legal System in Kenya' 2 *Quest Journals Journal of Research in Humanities and Social Science* 3, 2014, 38-60.

<sup>20</sup> (1972) 407 U S, 514-515

<sup>21</sup> Biomdo J, 'Judicial Enforcement of the Right to a Fair Trial without Unreasonable Delay under Article 50 of the Constitution of Kenya' Unpublished LL.M Thesis, University of Nairobi, 2015, 35.

commencement of investigations against the accused to the trial and any appeals and reviews thereafter. In Kenya, the right of the accused to fair trial is enshrined in the Constitution and is an absolute, non-derogable right.<sup>22</sup>

He makes reference to an attempt at interpretation by Justice Shahabuddin in *Prosecution v Slobodan Milosevic* where the court asserted that “the fairness of a trial need not require perfection in every detail.”<sup>23</sup> The essential question is whether the accused has had a fair chance of dealing with the allegations against him”. There is no single standard test or template for fairness upon which local courts can draw inference.

Unlike Omondi however, Biomdo fails to acknowledge the possibility of overlap or competition between the liberties of an accused including access to evidence and witnesses and the possible adverse limiting consequences such unlimited or uncensored access may have on witnesses and victims and thus the trial itself. This oversight is possibly excusable to his focus primarily on the right to expeditious disposal of criminal cases. Nonetheless, there is an undeniably compelling consensus among Omondi, Biomdo and this study, that Kenya lacks an explicit mechanism or benchmark critical to effective uniform determination as to what amounts to a fair judicial process.

## **Prosecution**

This research also reviewed a study by Rimpay Bhardwaj on the duty and obligations of a prosecutor as a custodian of the state criminal policy.<sup>24</sup> Bhardwaj’s study not only examines the critical interrogation of the historical roles of a prosecutor but also looks into the legislative history of the powers and obligations of the prosecution. He argues that on a fundamentally

---

<sup>22</sup>Article 25, *Constitution of Kenya* (2010).

<sup>23</sup> *Prosecutor v. Slobodan Milosevic (Decision on Motion for Judgement of Acquittal)*, IT-02-54-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 June 2004, available at: <https://www.refworld.org/cases,ICTY,47fdb590.html> [accessed 21 March 2019].

<sup>24</sup> Bhardwaj R, 'A Critical Study of the Role of Prosecutor in Criminal Law' 3 *International Journal of Law* 4, 2017, 1-7.

basic level, a public prosecutor's primary duty is to prosecute cases at the behest of the state. As a protector of public policy therefore, a prosecutor's primary focus is effective administration of criminal justice. He must therefore disabuse himself of the natural inclination to deviate from this focus to ferociously advance the interests of victims at the expense of fairness and justice. His study gives a rather important glimpse into the centrality of the doctrine of presumption of innocence and the principle of fair trial on impartial and effective dispensation of justice. Of importance to this study too is Bhardwaj's conclusion that success of prosecution in the future will be determined and weighed primarily on the basis of its response to emerging prosecutorial realities. One such emerging issue is the safety of victims and witnesses of crime and the balance of the inherent needs of these parties with the trial liberties of an accused more so access to witnesses and evidence. Many countries are increasingly acknowledging the threat of failure to protect witnesses and victims on the course of justice. For instance, Kenya just recently made amendments to the Witness Protection Act<sup>25</sup>. The law not only makes important distinctive definitions but also outlines circumstances under which individuals can be enlisted for state protection.

According to Lisa Kurcias, the duty of a prosecutor and particularly the duty to make full disclosures to an accused with respect to particulars of crime including both inculpatory and exculpatory evidence as well as list of witnesses is one that has its root both in law and professional ethics.<sup>26</sup> Her argument is primarily anchored in *Brady v. Maryland* a U.S. Supreme Court trial that held that a prosecutor perpetrates a due process infringement, justifying annulment of a conviction, if it is proven in evidence, that they suppressed evidence.<sup>27</sup> Kurcias admits that the U.S. Model Rules and Codes do not offer sufficient definitions and explanations of important foundation principles.

Kurcias argues, for instance, that the term "justice" is very ambiguous, both legal and ethics rules provide very little guidance to prosecutors on its meaning yet the same is central to effective dispensation of justice. Kurcias relied on *Berger v. United States* where the Supreme

---

<sup>25</sup>Cap 79, Laws of Kenya.

<sup>26</sup> Kurcias L, 'Prosecutor's Duty To Disclose Exculpatory Evidence', 69 *Fordham Law Review* 3, 2000, 1206-1229.

<sup>27</sup> 373 U.S. 83, 87 (1963).

Court held that, in his role, the prosecutor is not merely a representative of a typical party to a dispute, but rather a hegemony whose primary duty to superintend fairly is as efficacious as its responsibility to hegemonize all; and whose involvement, thus in criminal trial is not to win a case and achieve a conviction no matter what, but rather to ensure justice is not only done but also seen to be done.<sup>28</sup> This study agrees with Kurcias that while a prosecutor, in pursuit of justice, is allowed to exhibit fair aggression and earnestness, such vigour should be properly directed and must focus primarily on effective trial aimed not at conviction of the accused at all costs but rather on provision of evidence to court to provide a full picture on occurrence of events leading to the crime under trial.

This study notes however, that attaining that Zen-like balance is incredibly burdensome and calls for effective safeguards and guidance. These can only be operationalized by legislation and trial courts themselves.

### **Witness Protection**

According to Wilson Kiprono, Kibet Ngetich and Wokabi Mwangi not all crimes are equal.<sup>29</sup> Some criminal activities exhibit immeasurably profound impact both on human development and security effectively necessitating equally effective profound control and prosecutorial measures. Crimes such as human and drug trafficking, organized crime, murder, rape, terrorism, human rights abuses and systemic corruption all have far reaching consequences that, if unaddressed, pose serious existential threats to the society. By their very nature these crimes invoke a lot of emotions and oftentimes involve many parties linked to the accused effectively posing dangers to both victims and witnesses. A study conducted by the trio established that one of the key limitations encountered by prosecution in dealing with such crimes is the reluctance of victims and witnesses to volunteer critical information for fear of revenge and recrimination either from the accused themselves or their affiliates. Even where witnesses cooperate, there is always difficulty in guaranteeing their safety. In the study, they

---

<sup>28</sup> 295 U.S. 78 (1935).

<sup>29</sup> Kiprono W, Ngetich K and Mwangi W, 'Challenges Facing Criminal Justice System in Relation to Witness Protection in Kenya' 20 *IOSR Journal Of Humanities And Social Science (IOSR-JHSS)*, 2015, 93-97.

not only examine legal and socio-cultural challenges to witness protection in Kenya but also interrogate the existing legal and institutional measures of witness support, assistance and security.

This study concurs with the trio that whereas tremendous developments have been made towards appreciation of witness protection as a fundamental component of fair and just trial, a lot still remains to be done to foster legislation, training and research to direct and facilitate witnesses' protection. A witness protection scheme that is fool-proof, immune to external infiltration and influence could potentially inspire tremendous confidence leading to successful prosecution of cases previously unimaginable including trial of high-profile persons.

Allan George Ward takes a completely different look into the fair trial and witness protection debate.<sup>30</sup> He argues that whereas adoption of witness protection measures is paramount to effective administration of justice, care must be taken though to ensure certain measures such as total concealment of identity of witnesses, do not unfairly handicap the accused persons, who themselves, it must not be forgotten, are innocent too, until proven guilty beyond a shadow of doubt. An activist approach to witness protection runs a complete and potentially crippling risk of creating an unintended notion that the accused is guilty ab initio. To test his hypothesis, Ward looks at the witness protection schemes, mechanisms and measures adopted and operationalized in the U.S, European Union, the U.K, and South Africa. The Supreme Court in *Alford v. United States* held that "The witnesses name and address open countless avenues of in-court examination and out-of-court investigation."<sup>31</sup> To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross examination itself." Ward notes further that the principle upon which this determination of the court is anchored is timeless. An accused must have the right to defend himself by testing the evidence against him. He adds that the same principle is enshrined in Article 6 (3) (d).<sup>32</sup>

---

<sup>30</sup> Ward A, 'The Evidence of Anonymous Witness in Criminal Courts: Now and Into the Future' 21 *The Denning Law Journal* 1, 2009, 67-97.

<sup>31</sup> 282 US 687 (1931).

<sup>32</sup>The European Convention on Human Rights and Fundamental Freedoms 1950.

Ward states that, like the United States, South Africa is very indifferent to concealment of witness identity on account that it places unlawful limits on an otherwise inalienable right of the accused to challenge the evidence against them. This debate was effectively put to rest in *S v. Leepile*.<sup>33</sup> So strong and compelling is the need to safeguard the right to fair trial even in light of emerging realities that even the European Union admits that whereas protection of witnesses is paramount to effective administration of justice, care should be taken to ensure established witness protection measures are not misdirected and misapplied to the disadvantage of the alleged offender. The Court of Appeal in *R v. Meyers*, while commenting on the degree of diligence that must be exercised by the prosecution to be allowed to provide anonymous testimony stated that the duty of the prosecution in the context of a witness anonymity application must go beyond the ordinary disclosure obligations. Accordingly, extensive interrogation of the background of any and all potential anonymous witnesses must always be required.<sup>34</sup>

Ward's study offers incredible insights into the delicate issue that is a trial faced with the challenge of safeguarding an accused's entitlement to fair process while at the same time confronted by potential threats on the safety of key witnesses. Even local jurisprudence acknowledges these intricacies. In fact, the trial bench in *Thomas Patrick Gilbert Cholmondeley v. Republic* observed that whereas the prosecution is at all costs under a strict obligation to make full evidentiary disclosures to an accused as a matter of right, care must however be taken to safeguard the safety of witnesses and victims.<sup>35</sup> It is noteworthy that the domestic jurisprudence on matters witness safety is not as developed as other jurisdictions like the United States, the United Kingdom, and the European Union; several steps have been taken to not only recognize its relevance but also explore various sustainable options as captured in numerous debates. Still, there is no comprehensive guideline on the application of

---

<sup>33</sup> (5)1986(4) SA187 (W).

<sup>34</sup> [2008] EWCA Crim 2989

<sup>35</sup> 2008[eKLR].

the same with various principles and postulations scattered across statutes including the Witness protection Act<sup>36</sup>, Criminal Procedure Code<sup>37</sup> and the Constitution.<sup>38</sup>

### **International Criminal tribunals**

After the Second World War the world vowed that the atrocities of such magnitude would never happen again. International criminal law has progressed in the last 50 years especially with regard to the setting up of international criminal court and tribunals. The Nuremberg Trial and judgment left a legacy particularly the formulation of the Nuremberg principles, which influenced the development of international criminal law and practice that resulted in the creation of a permanent international criminal court.

Dr. Misa Zgonec-Rowzey examines the international criminal tribunals stating that; two ad hoc tribunals established by the UN Security Council to provide a quick and effective response to conflicts of an international and domestic nature, respectively, proved to be relatively successful experiments, producing valuable jurisprudence of substance and procedure.<sup>39</sup> The ICTY's Statute was used as a model for the ICTR's Statute which in turn provided the basis for the Statute of the SCSL. The Statutes of the ad hoc tribunals, and later of the ICC, together with general principles of international criminal law, were copied by other mixed and internationalised courts and tribunals. The establishment of mixed tribunals in post-conflict situations is an effective means to bring to trial those responsible for serious crimes, especially where there is a non-functional, corrupt or biased judiciary and lack of political will or funding to establish an international tribunal.<sup>40</sup>

The analysis of the international criminal tribunals in this manual leaves out the important aspect of discovery, specifically exculpatory evidence. This study therefore seeks to fill that

---

<sup>36</sup>Cap 79, Laws of Kenya.

<sup>37</sup>Cap 75, Laws of Kenya.

<sup>38</sup>*The Constitution of Kenya* (2010).

<sup>39</sup>Rowzey M 'International Criminal Law Manual' *International Bar of Association Report*, 2010, 47-78.

<sup>40</sup>Rowzey M.

gap by extensively addressing the issue of exculpatory evidence in these tribunals and the vast case transcripts which has enriched jurisprudence in international criminal law.

### **1.7 Limitations of the Study**

The study is premised on archival research; as such it faced various limitations including:

- a) There is limited jurisprudential guidance on the delicate balance between the interests of all parties involved in a trial and the accused's rights.
- b) A lot of inconsistencies especially in African jurisprudence in as far as interpretation and application of the right of accused to fair trial and protection of witnesses are concerned.
- c) Most of the resources the study relied on were catalogued, exhaustively covered repositories and publications making the sourcing process time-consuming.
- d) Difficulties in gaining full access to important information from key primary sources such as government records.

### **1.8 Hypotheses**

- a) The existing legal and regulatory framework as well as procedural guidelines on fair trial of criminal cases is inadequately equipped at effectively creating a balance between the competing rights of victims, witnesses and their families with that of the accused.
- b) Non-disclosure of exculpatory evidence amounts to a fundamental breach of the right to a fair trial of the accused.

### **1.9 Chapter Breakdown**

This study is broken down into the following four chapters:-

Chapter one outlines the background to the study, statement of the problem, statement of objective, questions that guided the entire research, theoretical framework relied upon, the research methodology, literature review, the study limitation, hypotheses and the conclusions that were arrived at.

Chapter two not only discusses whether a prosecutor is duty-bound to disclose exculpatory evidence in Kenya but also discusses the interplay of the accused's right to fair process with the right of victims and the state to justice. Further, the chapter examines domestic legal, policy and procedural framework as well as jurisprudence on exculpatory evidence. It overlays key foundational components of international practice as identified in chapter three and the best practices Kenya can emulate.

Chapter three deals with international rules and policy framework on exculpatory evidence and with close reference to the rules of procedure and case law emanating from the international criminal tribunals and the International Criminal Court (ICC).

Chapter four not only provides a summary overview of the entire study but also outlines the conclusions of the study and makes recommendations.

## CHAPTER 2

### DUTY TO DISCLOSE EXCULPATORY EVIDENCE

#### 2.0 Introduction

As explained in Chapter 1, a crime is an offence not just against the victims but also against the state generally. As such, it behoves both the investigation and prosecution as a matter of public interest and policy, to impartially and without a scintilla of malice (no matter how tempting) ensure justice is not only done but also seen to have been done. A prosecutor's duty is thus not to secure a guilty verdict at all costs but rather to see to it that facts material to a crime, inclusive of those favourable to the alleged offender, are adduced in court and in a manner that is not only dispassionate, ethical and fair, but also clear and firm. Any perceived departure from this benevolent obligation brings to question whether the prosecution is guided by secondary aspirations other than authentic vindication of the trial process. One such prevalent departure is suppression or failure, deliberate or otherwise, of the prosecution to supply evidence material either to the guilt or punishment of an offender.

This Chapter tests this study's hypothesis that non-disclosure of exculpatory evidence amounts to a fundamental breach of the right to a fair trial of the accused. It not only analyses the role of the prosecution in Kenya particularly with respect to the obligation to reveal exculpatory evidence but also discusses the interplay between the entitlement of an accused to fair process and safety of witnesses on account of such disclosures. Part 2.1 examines the domestic and international legal frameworks on the right to fair trial. Part 2.2 discusses the power dynamics between the state as represented by the prosecution and the accused with the view to understanding the implications of the same on evidentiary disclosure obligations. Part 2.3 on the other hand introduces the concept of witness safety and confidentiality and interrogates the nuance of the same with prosecution's evidentiary disclosure obligations and the eventual impact of such nuance on the right of an accused to fair trial.

## 2.1 Legal Framework

### 2.1.1 International Instruments

Article 2(5) provides that "...general rules of international law shall form part of the law of Kenya."<sup>41</sup> Article 2 (6) further provides that "...any treaty or convention ratified by Kenya shall form part of the law of Kenya."<sup>42</sup> Effectively, international conventions, treaties and agreements on human rights and fundamental freedom and specifically those touching on the right to fair trial and protection of witness confidentiality and safety ratified by Kenya are enforceable per the laid down legislation. However, in the post-2010 Constitution a lot has changed regarding Kenya being a dualist state. In the previous dispensation, international law did not have significant influence. Consequently, it would only be relied upon where there were no statutory interventions on a matter, or for purposes of eliminating ambiguities from domestic legislation.<sup>43</sup> However, determining the correct position of international law in Kenya has not been easy; courts have reached different positions regarding the same. Harmonization of municipal and international laws would be the best way forward; furthermore, Kenya could seek guidance from the International Law Commission.<sup>44</sup> The international instruments are: the African Charter on Human and People's Rights (ACHPR) also known as the Banjul Charter, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (also known as 'The Torture Convention'), the International Covenant for Civil and Political Rights (ICCPR), and the Universal Declaration on Human Rights (UDHR).

### Universal Declaration on Human Rights (UDHR) 1948

Simply known as the Universal Declaration, the UDHR is an international document that not only outlines but also defines the basic rights and fundamental freedoms to which every individual is entitled. From the transgressions perpetrated by states against particular leanings

---

<sup>41</sup> *The Constitution.*

<sup>42</sup> *The Constitution.*

<sup>43</sup> Ambani J, 'Navigating Past the "Dualist Doctrine": The Case for Progressive Jurisprudence on the Application of International Human Rights Norms in Kenya' in M Killander (ed), *International Law and Domestic Human Rights Litigation in Africa*, Pretoria University Law Press, 2010, 25-30.

<sup>44</sup> Kabau T and Ambani J, 'The 2010 Constitution and the Application of International Law in Kenya: A Case of Migration to Monism or Regression to Dualism?' 1 *Africa Nazarene University Law Journal* 1, 2013, 36-55.

and tribes of their society, it was undeniably clear that even governments could not be trusted to protect their own. There emerged a need to shield citizens from the atrocious acts of their governments. Domestic interventions were no longer sufficient at safeguarding the rule of law and protecting the innocent. The consistent and persistent application and invocation of the UDHR for nearly two thirds of a century has arguably made it binding as an integral component of customary international law.<sup>45</sup>

Articles 8, 9, 10 and 11<sup>46</sup> are very specific to the rights of the accused. Article 10 guarantees an accused's right to fair trial and specifically states "...that everyone is entitled in full equality to a fair and public trial by an independent and impartial tribunal, in the determination of their rights and obligations and of any criminal charge against them". Article 11 doubtlessly forms the foundation of this study. It provides a succinct summary into the rights and liberties of an accused.<sup>47</sup> It states in Clause 1 that individuals accused of crimes have a right to be adjudged innocent until proven culpable by a court of competent jurisdiction and vide a process that safeguards their defence. Clause 2 adds that criminal law cannot apply retroactively and an accused has to be treated with dignity, respect and fairness as if they had not committed the crime for which they are charged.<sup>48</sup>

### **International Covenant for Civil and Political Rights (ICPPR) 1966**

Following the operationalization of the UDHR, it became apparent that effective wholistic impact on the lives and livelihoods of individuals across the globe demanded more than political pronouncement of what needed to be achieved. Accordingly, it became necessary to convert the basic tenets of the declaration into tangible instruments with legal force. The General Assembly asserted that it was important to complement this framework with an

---

<sup>45</sup>Bilder R and others, 'The Universal Declaration of Human Rights: A Commentary', 88 *The American Journal of International Law* 3, 1994, 557-559.

<sup>46</sup>Universal Declaration on Human Rights (UDHR) 1945.

<sup>47</sup>Weissbrodt D and Hallendorff M, 'Travaux Preparatoires of the Fair Trial Provisions -- Articles 8 To 11 -- Of The Universal Declaration Of Human Rights', 21 *Human Rights Quarterly*, 1999, 1061-1096.

<sup>48</sup>Hughes G, 'The Concept of Dignity in the Universal Declaration of Human Rights', 39 *Journal of Religious Ethics* 1, 2011, 1-24.

instrument that captured the interdependence and interconnectedness of cultural, social and economic liberties.<sup>49</sup> In 1966, ICPPR and International Covenant on Economic, Social and Cultural Rights (ICESCR) instruments were adopted by the Assembly by way of consensus.<sup>50</sup>

The right to fair trial, including the right of an accused to cross-examine prosecution witnesses, challenge prosecution evidence as well as access to potentially exculpatory evidence is provided for in Articles 14 and 15 of the ICCPR.<sup>51</sup> The ICCPR has had tremendous global policy influence. It continues to inform the drafting of human liberties in regional and domestic legal instruments and constitutions.

### **The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984**

Known simply as the Torture Convention and adopted by the General Assembly of the United Nations.<sup>52</sup> The Torture Convention was basically meant to buttress the universal right to fair trial and particularly the right of an accused to be presumed innocent until proven otherwise by an independent and competent judicial process.<sup>53</sup> The fact that Kenya not only ratified the ICCPR but also affirmed and validated the Torture Convention when the ICCPR was in and of itself a sufficient guarantee of trial rights, is a demonstration of the country's willingness to pursue justice and in particular, respect, promotion and preservation of the right to fair trial.

### **The African Charter on Human and Peoples' Rights 1981**

Unlike the ICCPR and the UDHR that are universal in nature and application, the African Charter on Human Rights (ACHPR) also known as the Banjul Charter, is a regional instrument whose application and reach is limited to the African nations that have ratified it. The ACHPR

---

<sup>49</sup>Kearney M, 'The Prohibition of Propaganda for War in the International Covenant on Civil and Political Rights', 23 *Netherlands Quarterly of Human Rights* 4, 2005, 551-570.

<sup>50</sup>UN A/Res/ 2200 (XXI) 16 December 1966.

<sup>51</sup> Jixi Zhang, 'Fair Trial Rights in ICCPR', 2 *Journal of Politics and Law* 4, 2009, 39-43.

<sup>52</sup> UN A/Res/ 39/46 (10 December, 1984).

<sup>53</sup>Silwal R, 'Right against Torture and Case of Maina Sunuwar: An Analysis In The Light of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment Or Punishment (CAT)' *SSRN Electronic Journal*, 2011.

borrows heavily from the UDHR and the ICCPR with respect to the right to fair criminal process. It has helped guide Africa from the era of flagrant human rights violations to compliance.<sup>54</sup> The instrument improved accountability across the continent. It establishes the groundwork and standards for the protection and promotion of human liberties in the continent. Since its operationalization nearly three decades ago, the ACPHR has consistently acted as a platform from which people could make human rights violation claims at the international stage effectively watering down sovereignty defence which countries generally involved in human rights violations invoke.<sup>55</sup>

The ACHPR Charter acknowledges that the right to a fair trial is essential for the protection of fundamental human rights and freedoms and whose violation entitles the affected persons to an effective remedy. This right is provided for under the ACPHR Charter.<sup>56</sup> It is noteworthy that despite the best of intentions of the discussed regional and international instruments in as far as protection, advancement and promotion of human rights and fundamental freedoms including the right to fair trial are concerned; effective implementation is fundamentally dependent on the good will of the individual member states.

Kenya has for instance, endeavoured to domesticate these instruments through domestic legal mechanisms. Our Constitution recognizes international law as a source of the laws of Kenya.<sup>57</sup> With no specified hierarchy of norms courts are left to make differing decisions. However, these instruments ratified by Kenya should be enforced and there should be no reluctance of will on the part of the leadership to establish domestication mechanisms and framework.

---

<sup>54</sup>Barnidge R, 'Anti-Zionism, Jus Cogens, and International Law: The Case of the Banjul Charter and Arab Charter', 9 *The Journal of the Middle East and Africa* 1, 2018, 77-92.

<sup>55</sup>Barnidge R.

<sup>56</sup>Article 7, ACHPR.

<sup>57</sup> Article 2(6), *Constitution of Kenya* (2010).

### **2.1.2 Domestic Instruments**

It is noteworthy that operationalization of global and regional principles of human rights, and especially in their wide-sweeping form would be arduous if not outright impossible without home-grown domestic frameworks. In the absence of local instruments, the otherwise progressive provisions would remain merely advisory at best. Kenya, aware of this disconnect, has been on the forefront at establishing domestic legal frameworks for the implementation of these otherwise progressive global and regional instruments. Some of the domestic instruments that anchor the right to fair trial in Kenya include the Constitution,<sup>58</sup> the Criminal Procedure Code,<sup>59</sup> the Witness Protection Act<sup>60</sup> and the Sexual Offences Act.<sup>61</sup> This section interrogates each with the view to understanding the implications of each on protection, promotion and fulfilment of the right to fair trial.

#### **The Constitution of Kenya, 2010**

It obligates the state to not only observe, respect, protect, promote and fulfil the rights and fundamental freedoms of the citizenry but also directs it to proactively enact and implement legislation to fulfil the country's international obligations in respect of human rights and fundamental freedoms. This also includes adoption and operationalization of numerous legislative, policy and regulatory measures, among others, including setting of standards, to facilitate progressive realization of the said rights and fundamental liberties. One such right is the right to fair trial.

The Constitution restates and affirms the salient provisions of the UDHR, the ICCPR and the ACHPR on the right to fair trial.<sup>62</sup> It provides that every individual has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before

---

<sup>58</sup>*The Constitution.*

<sup>59</sup> Cap 75, Laws of Kenya.

<sup>60</sup> Act No.16 of 2006.

<sup>61</sup> Act No.3 of 2006.

<sup>62</sup>Article 50, *Constitution of Kenya.*

a court or, if appropriate, another independent and impartial tribunal or body and that all accused persons have a right to fair trial including the rights: to be presumed innocent; to be sufficiently appraised of the charges against them in sufficient detail, in a manner and language they understand; to be afforded adequate time and facilities to properly and adequately prepare for their case including possible access to legal representation; to be tried expeditiously; to be present during their trial unless otherwise reasonably held; to refuse to adduce self-incriminating evidence; to remain silent during the trial; to adduce and challenge evidence as well as to be notified beforehand of the evidence the prosecution intends to place reliance on, and the same to be made accessible.

Like freedom from torture and degrading, inhuman and cruel punishment or treatment, freedom from slavery or servitude and the right to habeas corpus, the right to fair trial is absolute and cannot be in any way, form or manner, limited or restrained. Accordingly, an accused cannot be denied an opportunity to not only access but also challenge evidence adduced by witnesses against them. In instances where such confrontation is likely to jeopardize witness safety, it is incredibly paramount for courts to determine what amounts to justice or fair trial. Exposing witnesses to possible intimidation and imminent danger merely on account of openness does not in any way serve justice if doing so prevents them from disclosing the truth or giving accurate unadulterated testimonies. Secondly, if concealment of witness identity for fear of reprisal or any other negative consequences has little to no impact on the core or materiality of the case then it can be presumed that such a move is in the interest of justice and does not in any way violate, restrict or limit the right of an accused to fair trial. These determinations and interpretations are however not explicit in the Constitution but rather left to the discretion of courts effectively exposing the weakest link in the chain of the trial process.

### **The Criminal Procedure Code (Cap 73)**

Unlike the other legal, regulatory and policy frameworks on the right to fair trial, the Criminal Procedure Code (CPC) does not reinstate these liberties but provides a chronological order from arrest to passing of sentence. It is the link between the ideals prescribed in the supreme

law and the net outcome that is the Penal Code. Its primary purpose is to steer the judicial process clear of interferences and make it as dependable, reliable, consistent and replicable as possible. In other words, it serves to reduce to the utmost minimum, discretion and judgment in criminal judicial process. The Security Laws (Amendment) Act amended the CPC by inserting Section 42A which provides inter alia that the prosecution may, with leave of court, not disclose certain evidence which it intends to rely on until immediately before the hearing, if the evidence may facilitate the commission of other offences or if it is not in the public interest to disclose such evidence.<sup>63</sup>

Like their counterparts at the international criminal tribunals, local judicial officers struggle to enforce accountability on the part of the state in as far as the right of an accused to fair trial is concerned. Several studies that have ventured into this phenomenon have identified weaknesses both in law and procedure that have pushed judicial officers to provide guidance. Kipkoech Biomdo for instance, interrogated the judicial interpretation of the right to fair trial without unreasonable delay.<sup>64</sup> His contestation rested on the existing variegated understanding of what constitutes unreasonable delay. He intertwined the interpretation with other similarly unclear elements of fair trial including the right of an accused to interrogate evidence and witnesses against them. Like many scholars before him, Biomdo examines that, in the absence of clarity in law as to how the accused's right to cross-examine witnesses and challenge evidence not in his favour can be weighed against witness safety, violation of the liberties of the accused will persist. Judges have been categorical on the need to adequately safeguard these rights. In *Ann Njogu and 5 others v. Republic*, the late Justice Onesmus Mutungi, held that any violation of the right of an accused to fair trial in whatever manner is illegal and an affront to the rules of procedure.<sup>65</sup> It matters not the form the violation takes, whether a delay of a procedural requirement or withholding of evidence. In *Gerald Macharia Githuku v. Republic*, the Court of Appeal asserted that it does not matter that failure to fully disclose evidence does

---

<sup>63</sup> Section 16, Act No.19 of 2014.

<sup>64</sup> Biomdo J, 'Judicial Enforcement of the Right to a Fair Trial without Unreasonable Delay under Article 50 of the Constitution of Kenya' Unpublished LLM Thesis, University of Nairobi, 2013, 36.

<sup>65</sup> Misc. Crim. Application No.551 of 2007.

not cause the accused any prejudice, the failure by the prosecution to abide by the rules of procedure cannot be downplayed.<sup>66</sup>

### **The Witness Protection Act No.16 of 2006**

As already discussed, the right to fair trial is absolute and not subject to limitation, judicial or otherwise. An accused therefore has the right to institute court proceedings claiming that his right to a fair trial has been denied, violated or infringed, or threatened. There are however exceptional circumstances that while not in any way directly a threat to this right or limiting or violating it at all, require due consideration in the interest of justice and fairness. Such circumstances are oftentimes characterized by competing or overlapping liberties effectively requiring a court's discretionary intervention. One such circumstance is protection of witnesses from apprehensible harm or threat of harm as a consequence of their testimony. It is against this background that the Witness protection Act (WPA) finds its footing. The WPA is doubtlessly foundational to the facilitation of witness safety in Kenya and by extension, fair criminal judicial process. The WPA not only makes important distinctive definitions but also outlines circumstances under which individuals can be enlisted for state protection.<sup>67</sup> It empowers the court, on application by the prosecution, to issue orders effectively limiting full disclosure to the defence in instances where apprehension of threat or risk is real.<sup>68</sup> Without an elaborate and effective witness protection mechanism, some investigations are impossible to carry out, frustrating the administration of justice.

It is notable however, that like other laws, legal and policy frameworks already discussed, the WPA, however progressive, is not without institutional and operational limitations. One fundamental challenge and concern commonly expressed in doubt of its efficiency is the inclusion of security agencies in its advisory board effectively hampering independence in cases involving state officials. Secondly there is insufficient counselling of victims of crimes

---

<sup>66</sup> [2008] eKLR (Criminal Appeal No. 119 of 2007).

<sup>67</sup>Section 3, Witness Protection Act.

<sup>68</sup>Section 14, WPA.

who are extremely traumatized psychologically and mentally. Thirdly emerging issues facing the witness protection programs have not been adequately addressed for example cyber stalking which affects witness safety management.

### **The Sexual Offences Act No. 3 of 2006**

This Act provides for wider definition of sexual offences, the protective measures taken in cases of sexual assault and other connected purposes. The right to fair trial is visible by how courts can declare a witness as vulnerable and protect them by the witness testifying under the cover of a witness protection box. This conceals the witness from the glare of the perpetrator and prevents further trauma. Secondly the court can direct that evidence be given through an intermediary. Thirdly the court in most instances allows testimony in camera.

## **2.2 Prosecution's Disclosure Obligations**

It is noteworthy that whereas all lawyers and advocates are superintended by strict legal and ethical rules of conduct, prosecutors are subject to even more stringent obligations. Unlike a private practitioner whose primary obligation is to be a zealous advocate and defender of the interest of his client, prosecutors are strictly obligated to impartially and passionately pursue justice in addition to their role as advocates.<sup>69</sup> After all, they are defenders, not of a single individual, but of the state and the society generally. With this responsibility comes immense powers that far outstrip those enjoyed by other advocates and their clients.

### **2.2.1 Inequity between the Prosecution and the Accused**

In addition to unlimited access to state machinery including police investigators, a prosecutor has unrestrained discretion to decide whom to prosecute and on what charges.<sup>70</sup> This imbalance of power and privilege undeniably leads to a dangerous inequity between the defence and prosecution. Fundamentally therefore, the heightened obligation of the prosecution beyond

---

<sup>69</sup>Kurcias M, 'The Duty of the Prosecutor to Disclose Exculpatory Evidence' 69 *Fordham Law Review* 3, 2000, 1209.

<sup>70</sup>Fisher S, 'The Prosecutor's Ethical Duty To Seek Exculpatory Evidence In Police Hands: Lessons From England' *SSRN Electronic Journal* [2000].

mere advocacy is to not only reduce this disparity of resources but to also ensure fair judicial process as well as stem any potential abuse of power. A prosecutor's obligation is thus to pursue justice and no less. In furtherance of this obligation, and in an obvious attempt to effectively alleviate the inherent variance between the prosecution and the defence, the prosecution is expected to provide defendants with certain assistance.

Ethically, the limitations and obligations placed on the prosecution are meant to not only limit potential prosecutorial overreach but to also safeguard the uprightness of the judicial process.<sup>71</sup> The prosecution is strictly required to ensure that all evidence, including those favourable to the accused, are fairly, ethically and dispassionately presented before a court of law. Accordingly, a prosecutor is strictly directed to refrain from acts or omission likely to result in conviction of innocent individuals. This obligation must however not blind a prosecutor to their first and foremost obligation- that of advocacy on behalf the state. Just as distasteful, is the erroneous acquittal of individuals guilty of crime.<sup>72</sup> Nonetheless, the detachment required of the prosecutor to display does not preclude him from passionately and vigorously pursuing a case. In fact, every prosecutor is required to work their case to the best of their abilities.

The obligation of the prosecution to effectively immerse itself to the pursuit of justice rather than conviction was reiterated and explained in *Thomas Mboya Oluoch & Another v. Lucy Muthoni Stephen & Another*.<sup>73</sup> The court held that both the police and the prosecution must exercise their discretion to charge a person on the evidence of sound legal principles. High Court Justice Ojwang' (as he then was) reasoned that prosecutors and police who are led by malice, chicanery, or who fail to act in good faith, in pursuing conviction of an accused cannot be allowed to hide under prosecutorial immunities should the victims of their conceited conduct rightfully pursue reparation. On this basis alone, it is foolhardy to expect that any reasonable prosecutor would prefer charges against an individual, on the premise of material and

---

<sup>71</sup>Fordham M, 'Disclosure Principles' 12 *Judicial Review* 4, 2007, 266-268.

<sup>72</sup>Nofer P, 'Specific Requests and the Prosecutorial Duty to Disclose Evidence: The Impact of *United States v. Bagley*' 1986:892 *Duke Law Journal*, 1986, 892-914.

<sup>73</sup>2005 [eKLR] (Justice Ojwang') (emphasis added).

information so contentious and so manifestly directed to be malicious. To take advantage of the state's prosecutorial machinery, and to leverage the judicial process with this type of trial, is to appropriate the public legal services for self-serving endeavours and is tantamount to misapplication of power.

### **2.2.2 Consequences of Violation of Prosecutorial Obligations**

It necessarily follows those prosecutors unfaithful to their obligation to not only disclose material evidence to the defence but also discharge their duties faithfully and dispassionately in the interest of justice, open themselves and the state to numerous legal liabilities. In *Wycliffe Shakwila Mungo v. Republic*, the High Court held that a prosecutor perpetrates a grave due process violation, necessitating countermanding of a conviction, if it is demonstrated that the prosecutor suppressed evidence.<sup>74</sup> Justice Odunga addressed the need for the police and prosecution to endeavour to always operate above board to protect the integrity of the prosecutorial process. He observed that the police and the prosecution must exercise integrity and professionalism in undertaking investigations and should not be directed by spite other considerations collateral to fair process.

It is however notable, that malice can be either express or implied from the conduct of the prosecution. A prosecution can either be lodged by a complaint or protestation of unlawful conduct to the police or on the premise of an illegality perpetrated in the presence of the police. Nonetheless, a mere lodging of a protestation does not warrant initiation of a prosecution. It is incumbent on the police to sufficiently investigate the accusation before instituting any charges against the alleged offender. Thus, the prosecution and the police are not merely conduits for complainants. They must exercise their obligations autonomously and impartially without duress, direction or control of any party.

In instances where exonerating material or information is given to the police in the course of investigation, and they intentionally or unknowingly exclude them, it would be rational for one

---

<sup>74</sup> [2018] eKLR.

to surmise that they are guided by considerations malicious and collateral to a fair judicial process. Failure to effectively investigate a claim or include all evidence material to an offence prior to mounting a prosecution may therefore be deemed as abuse of power and process.<sup>75</sup>

The Kenyan criminal justice system hedges possible abuse of power by the police and the prosecution by placing the accused in a somewhat advantageous position. The country's criminal administrative system places the accused's guarantee of fair trial on a pedestal and demands the accused be presumed innocent until proven guilty beyond a shadow of doubt.<sup>76</sup> As such the accused is entitled to fairness and impartial investigation with the court specifically charged with the onerous responsibility to ensure these constitutional safeguards and guarantees are jealously protected and upheld at all times. The trial process should be speedy, judicious, transparent, fair and most importantly, be in full compliance with both the law and due process. The right to fair trial is one of the most important hallmarks of a fair society. In *Rattiram v. State of M.P.*, the Supreme Court of India held that "...fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favouritism."<sup>77</sup>

This is in consonance with *R v. Sussex Justices, ex parte McCarthy's* famous holding that "...justice should not only be done but should manifestly and undoubtedly be seen to be done".<sup>78</sup>

It is arguable based on the foregoing, that deliberate and wilful suppression of evidence or withholding of facts and information material to a case by the prosecution amounts to subterfuge effectively opening the judicial process to ridicule and interferes with fair and impartial administration of justice. Indeed, Justice Odunga admitted in *Wycliffe Shakwila*

---

<sup>75</sup>*Wycliffe Shakwila Mungo v. Republic.*

<sup>76</sup>Biomdo J, 'Judicial Enforcement of the Right to a Fair Trial without Unreasonable Delay under Article 50 of the Constitution of Kenya' Unpublished LL.M Thesis, University of Nairobi, 2013, 29.

<sup>77</sup> (2012) 4 SCC 516.

<sup>78</sup> [1994] 1 KB 256.

*Mungo v. Republic* that impartial, disingenuous and malicious investigation aimed purely at building a case against the accused rather than portraying to the court the true occurrence of events based on facts and evidence and leaving to it to decide, is not only manipulative and reprehensible but also diverts the cause of justice from the established fundamental ideals.<sup>79</sup> He explained that where a report of a crime is made to the police, thorough investigations ought to be undertaken not just with a view to eliciting evidence favourable to the complainant but also evidence, if any, favourable to the suspect. In other words, investigations ought to be independently and impartially conducted and any evidence unearthed, whether favourable to the prosecution or not must be disclosed.

### **2.2.3. Legal and ethical dimensions of disclosure obligations**

In view of the foregoing, it undeniably accurate to surmise that a prosecutor's disclosure obligation has both ethical and legal dimensions. The ethical dimension is functionally informed by the desire to not only ensure fair play but also protect the integrity of the judicial process. This effectively creates a higher standard of behaviour for the prosecution. Suppression of evidence or unjustifiably making secret of witnesses material to a case and capable of establishing the innocence of an accused is borderline unethical and thus highly reprehensible.<sup>80</sup> Such conduct negates the intentionality of fair process and goes parallel to a prosecutor's general directive to pursue justice within specific operating guardrails. One such guardrail is the rule prohibiting withholding, deliberate or otherwise, of witnesses or facts favourable to the defence.

On the other hand, the legal dimension of a prosecutor's disclosure obligation is buttressed by both the need to alleviate the inherent inequity or imbalance of power between the parties as well as the desire to protect and safeguard an accused's constitutional right to fair trial. These legal directives and restrictions stem from several authorities including: The Constitution,<sup>81</sup> the Criminal Procedure Code<sup>82</sup> and judicial case law. For instance, both the Criminal Procedure

---

<sup>79</sup>(2018] eKLR.

<sup>80</sup> Dressler J, *Encyclopaedia of Crime & Justice*, Macmillan Reference USA, 2ed, 2002.

<sup>81</sup> *The Constitution of Kenya* (2010).

<sup>82</sup> Cap 75, Laws of Kenya.

Code and the Constitution obligate the state (prosecution), upon request, to make available to the accused, documents or any other evidentiary facts and information, material to the case, likelihood of disfavour to the prosecution's case notwithstanding. Similarly, judicial opinions formulate restrictions and obligations for prosecutors in their holdings. In *R v. Raphael Muoki Kalungu* for instance, the High Court asserted that a prosecutor's primary role is to pursue justice.<sup>83</sup> Lady Justice Mutuku held that trial by ambush is not just unfair but also legally unprocedural. The prosecution and the court, have a legal obligation to aid the accused persons by providing them with adequate facilities and time to prepare their defence. She defined facilities to include full disclosure of all facts and information material to a case regardless of the potential disadvantage the same may occasion the prosecution.

Lady Justice Mutuku's decision was largely informed by *R v. Stinchcombe*, on the question of discovery and disclosure of material.<sup>84</sup> The Canadian Supreme Court held that the prosecution has a constitutional duty to ensure the accused is provided access to the evidence they intend to adduce in proof of the charges against him. This duty extends to disclosure of material and information the prosecution is in possession of but may not necessarily adduce in court in proof of the said charges. This duty is especially compelling if the material and information the prosecution do not intend to rely on are favourable to the accused. And it matters not that the prosecution came across the evidence during investigations, at pre-trial or during the trial, they are still duty-bound to disclose it.

It is notable however, that the requirement for disclosure is not reciprocal. Unlike the prosecution, the defence is not under a strict legal obligation to make evidentiary disclosures. The Canadian Supreme in *R v. Stinchcombe* further held that in criminal matters, the Crown has an obligation, both in law and procedure rules, to reveal any and all information material to the case to an accused. The outcome of investigation by the state is not to be merely exploited to pursue conviction at all costs, but rather to ensure justice is done. Nonetheless, the defence has not such strict obligation to make reciprocal evidentiary disclosures, and is qualified to

---

<sup>83</sup> [2015] eKLR.

<sup>84</sup> (1991) 3 S.C.R. 326.

take-up a purely adversarial role towards the prosecution. Failure by the prosecution to make requisite evidentiary disclosures would impede the ability of the defence to effectively respond, effectively stifling the right of an alleged offender to a fair judicial process—a common law right which is one of the key pillars of the criminal justice system and which ensures that the innocent is not convicted.

The duty to make evidentiary disclosures is a continuing one and is to be updated when further, auxiliary or supplemental material or information is received.<sup>85</sup> The material to be disclosed includes not only that which the prosecution intends to introduce but also that which it does not. All statements obtained by the prosecution from individuals who have supplied pertinent information are to be revealed to the defence regardless of whether or not the prosecution intends to call such persons as witnesses.<sup>86</sup> Where statements do not exist, other material, such as notes, are to be disclosed or, where there are no such notes, the occupation, address, name, and all information prosecution has in relation pertinent evidence that individual may provide, are to be passed to the accused.<sup>87</sup> Such a strict mandate of the prosecution leaves to question the role of defence in evidentiary disclosure.

It would therefore suffice that the Kenya legal system has undergone tremendous revolution with the new Constitution.<sup>88</sup> The former Constitution had no single provision for disclosure of evidence but this can be now seen in Articles 50(2) (j) and Article 35.<sup>89</sup> Similarly the former Constitution incorporated fundamental rights but there was no precise remedial provision or procedure of protecting the rights of citizens whose rights had been infringed. However, currently in Article 23 the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.<sup>90</sup>

---

<sup>85</sup> *R v. Stinchcombe*.

<sup>86</sup> *Wycliffe Shakwila Mungo v. Republic* [2018] eKLR.

<sup>87</sup> *Wycliffe Shakwila Mungo v. Republic*.

<sup>88</sup> *The Constitution of Kenya* (2010).

<sup>89</sup> *The Constitution*.

<sup>90</sup> *The Constitution*.

#### 2.2.4 Reciprocity of Disclosure Obligations

The question of reciprocity with respect to evidentiary disclosure obligation was first dealt with in *George Ngodhe Juma and Two Others v. The Attorney General*.<sup>91</sup> While the trial judges did not give definitive or definite responses in respect of the same, their statements could be construed to imply non-reciprocity. Justice Muga Apondi for instance noted that whereas opponents of the disclosure obligations often times argue that such duty should be reciprocal, so that the accused too should make adequate disclosures before trial, it is not legally or functionally easy to justify such a position merely for the purposes of trying to absolve the prosecution of its legal obligation to divulge all material information.

The explanations on disclosure obligations in both *George Ngodhe Juma and Two Others v. The Attorney General* and *R v Stinchcombe* were adopted and further expounded by the Court of Appeal in *Thomas Patrick Gilbert Cholmondeley v. R*.<sup>92</sup> The Bench argued that central to Kenya's criminal trial procedure is the presumption of innocence of the accused as well as the constitutional deterrence of compulsion of the accused to provide evidence in proof of their innocence. The court held that the burden of proof invariably rests with prosecution and at no time does it shift. Arguing for reciprocity would effectively imply a shift of this burden and thus a demand that an accused, otherwise presumed innocent, adduce evidence as to their innocence or in counter of their presumed guilt. The courts emphasized that since nobody can under the law arrest the Republic of Kenya and charge it with a criminal offence so that it would require it to be informed of the nature of the offence against it, the question of reciprocity of disclosure obligations or level playing field, are as unthinkable as they are misplaced.

Further, the absence of a law specifically conferring powers on a tribunal to compel an accused person to make evidentiary disclosures, no such order may issue.<sup>93</sup> The appellate court added

---

<sup>91</sup>[2003] eKLR.

<sup>92</sup>[2008] eKLR.

<sup>93</sup>*Thomas Patrick Gilbert Cholmondeley v R*.

that such approach creates a dangerous precedent and establishes a rather false and misguided theory that what is convenient and would expedite the disposal of a matter is lawful. Such an attempt amounts to blatant abuse, disregard and limitation of the right of the accused to fair trial as espoused in Article 50 a right that is not subject any limitation, constitutional or otherwise.<sup>94</sup> The state is definitively the obvious and usual offender against whom protection is constitutionally sanctioned and thus it cannot be allowed to demand similar privileges. The Appellate Court affirmed that there is not and there can never be a level playing field, or a question of reciprocal rights, or any such concept as between the state and an accused person.

The Bench in *Cholmondeley* case while making reference to *Paul Mwangi Murunga v. R*, held that it would effectively be incongruous with both the letter and the spirit of the Constitution and well established legal principles, procedures and practice to establish a misguided jurisprudential principle that the prosecution, like the accused, and in the spirit of misconceived fairness, is entitled to demand and receive advance disclosure of evidence from the defence and especially, if the accused happens to be wealthy.<sup>95</sup> The right of an accused to a fair judicial process, like other fundamental human liberties, can only be guarded against those who have the unlimited capacity and resources to deprive individuals of their freedom of expression, of assembly and of association, freedom of conscience, security of the person, liberty, and right to life. That is doubtlessly the state.

It follows that the duty of the prosecution to disclose all evidence material to a case is absolute and under no circumstances whatsoever, is the defence under a similar legal duty either in the spirit of reciprocity or perceived levelness of the playing field. It is indeed established in Kenyan law and illustriously explained in case law that a prosecutor is legally and ethically required to submit to court all evidence for consideration irrespective of whether the same works against their cause. The duty of the prosecutor, as an agent of the state and the society as a whole, is thus not to pander to the individual whims and demands of the victims and

---

<sup>94</sup> *The Constitution of Kenya*.

<sup>95</sup> Criminal Appeal No. 35 of 2006

complainants not matter how empathically compelling, but rather to impartially and dispassionately pursue justice both for the victims as well as the accused. There are however situations and circumstances where the duty to make full disclosure may be restricted or strategically restrained, albeit with the authorization of the trial court.

### **2.3 Witness Protection and Its Ramifications on Fair Trial Guarantees**

Whereas the right to a fair trial is absolute as espoused by Article 25(c), there are certain exceptional mitigating circumstances that while not in any way directly a threat to this right or limiting at all, require due consideration.<sup>96</sup> Such circumstances are oftentimes characterized by competing or overlapping liberties effectively requiring a court's discretionary intervention. One such circumstance is protection of witnesses from apprehensible harm or threat of harm.

#### **2.3.1 Witness Safety and Confidentiality**

Foundational to the facilitation of witness safety in Kenya is the Witness Protection Act.<sup>97</sup> This law not only makes important distinctive definitions but also outlines circumstances under which individuals can be enlisted for state protection. It defines a 'witness' to include any individual involved in a criminal proceeding, within or outside Kenya, by virtue of having given or has agreed to provide evidence, or made a statement in relation a criminal violation and requires protection due to a perceived risk or threat.

As illustrated before, openness and fairness of the criminal judicial process is a fundamental principle enshrined not just in the Constitution but also redlined in several international conventions and treaties ratified by Kenya. Central to this principle is the requirement that prosecution evidence and witnesses be made unconditionally available and identifiable not just to the accused but the general public as well. It reinforces the ability of the accused to effectively present their case and test the prosecution's case through cross-examination of prosecution witnesses. In many instances, the open justice system has been found to encourage witness involvement. However, in some instances, the principle has been found to be extremely

---

<sup>96</sup> *The Constitution of Kenya.*

<sup>97</sup> Act No.16 of 2006, Laws of Kenya.

constraining to justice. Organized crime, rape, robbery with violence, terrorism and murder are just but a few examples of crimes known to generally have successful prosecutions. For rather obvious reasons, witnesses tend to shy away for fear of reprisal. They fear the revelation of their identity thanks to the open trial process, which opens them and their families to the risk of harm or backlash either from the associates of the offender or the public generally. The primary purpose of witness protection is thus to allay the perceived threats through provision of requisite protection.

### **2.3.2 Challenges and Complexities**

The interplay between the right to open, fair trial and protection of witnesses from apprehensible harm or risk of harm is as delicate as it is complex. On one hand is the compulsion to strictly adhere to the *McCarthy's case* principle that justice must not only be done but must also be seen to have been done effectively requiring full disclosure of prosecution evidence including revelation of who exactly are the witnesses to the accused and general public. On the other hand, is the need to ensure justice is properly and effectively served by encouraging involvement of otherwise scared witnesses through witness protection assurance effectively limiting access by the accused and without which protection, the case against the accused, however legitimate, would flop leading to an undeserved miscarriage of justice.

These pressures and complexities have generated somewhat instructive and insightful judicial interpretations and interventions. One such intervention is the interpretation of the prosecution's disclosure obligations to allow for intermittent disclosures which while affording the defence time to effectively respond, limits them from pursuing retaliatory tactics on prosecution witnesses. While referencing the judgment in *Cholmondeley* case, the learned Judges in *Dennis Edmond Apaa and 2 others v. Ethics and Anti-corruption Commission and Another*, held that the disclosure obligation does not in any way support the supposition that all witnesses and evidence must be disclosed in advance of a trial.<sup>98</sup> It argued that Article 50

---

<sup>98</sup> [2012] eKLR.

(2) (j) guaranteeing the right of the accused to be informed in advance must not be restrictively read and construed to imply in advance of trial.<sup>99</sup> The court cited *R v. Ward*, which held that disclosure obligation is a continuing one through the trial and that the duty levied on the court is to facilitate a fair and just trial including safeguarding the right of the accused to reasonable access to evidence and witnesses.<sup>100</sup> The court explained further, that the right of an accused to reasonable access to evidence and witnesses must thus be read and construed together with other liberties that collectively make up the right to a fair judicial process.

Further, in *Thuita Mwangi and 2 Others v. Ethics and Anti-corruption Commission and 3 Others*, High Court Justice Majanja intimated that an accused's right to be duly furnished and familiarized with information the prosecution is keen to relying on at trial is not a one-time occurrence but rather a functional requirement that persists through the trial process from the commencement of the case to when the accused takes a plea.<sup>101</sup> The Judge addressed himself to the realities that generally circumscribe any typical trial process. Oftentimes, all the material relating to investigation may not be available at the time of charging the suspect or plea taking. As such, disclosure of evidence, both exculpatory and inculpatory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the trial court is empowered to give such orders and directions as may be necessary to effect the right. The court held that whenever a fresh material or piece of evidence is provided, the accused is entitled to have adequate time, opportunity and facilities to effectively prepare their defence.

The courts are instinctively aware of the possible implications of threat of witnesses to fair and impartial dispensation of justice. It is on the premise of this appreciation that they constantly and consistently seek to establish a balance between the right to disclosure and the need for protection of witnesses from any potential harm. Court of Appeal Justices Omolo, Otieno and O'Kubasu in the *Cholmondeley* case demonstrated awareness of such possibility and the potential difficulties and observed that whereas an accused has an absolute entitlement to a just

---

<sup>99</sup> *The Constitution of Kenya*

<sup>100</sup> [1998] QCA 329

<sup>101</sup> Petition No.153 of 2013 consolidated with Petition No.369 of 2013.

process including the right to access evidence and witnesses, certain circumstances, in public interest and in the interest of justice, require non-disclosure or redacted disclosure of names, addresses and occupations of a particular witness or witnesses. However, such reductions and non-disclosure must not be deliberately done to blindside the defence or in a manner that makes it nearly impossible for an accused to effectively respond. The reductions must not be so significantly material as to occasion injustice to the accused and at the same time not so loose as to compromise the identity of witnesses.

The question as to whether protection of witnesses in consonance with the Witness Protection Act infringes on the right of an alleged offender to open and fair judicial process as enshrined in the Constitution was definitively dealt with in *R v. Kevin Ouma Omondi and 4 others*.<sup>102</sup> The High Court in Homabay held that the right to open public trial can be restricted to safeguard the safety of witnesses. The prosecution sought an order for witness protection allowing a witness to testify in camera but also seeking reduction of witness statements before service on the accused ostensibly to hide witness's identity. In support of the prosecution's application was a risk assessment report on a witness prepared by a protection officer from the Witness Protection Agency (WPA). The assessment observed that the witness was invariably at danger on account of the evidence he had agreed to provide against the accused. Additionally, the protection officer noted that the fact that the crime involved a politically instigated murder, apprehension of danger and risk of a similarly politically instigated reprisal was undeniable. The accused vehemently opposed the application pleading that the intended use of pseudonyms to conceal the identity of the witness as well as redact witness statement would be prejudicial and heavily constrain his ability to adequately respond effectively infringing on his right to a fair trial. The prosecution pegged its application on Section 4 which provides that: "The witness protection agency may request the court to hold proceedings in camera or closed sessions, use pseudonymous on the witness, reduction of identity information of witness use of video link or distort the identity of a witness."<sup>103</sup>

---

<sup>102</sup>[2018] eKLR.

<sup>103</sup> Witness Protection Act.

The court held that while the Constitution provided for the right to a fair trial including a right to public hearing, that provision cannot be read in isolation but alongside other constitutional human liberties provisions.<sup>104</sup> In particular, Article 50 (8) requiring shielding of witnesses and persons at risk.<sup>105</sup> Satisfied that the apprehension of danger was undeniably real and that no question had been asked in at the trial which would have provided information leading to the divulgence of the safeguarded identity of the witness or his residence, Lady Justice Omondi allowed the application and directed that the witness statements be redacted and the witness not only be placed under witness protection but also testify in camera.

## **2.4 Conclusion**

As demonstrated in this chapter, the right to fair trial has its foundation on well-established universal principles of human rights and fundamental liberties. Core to its protection, promotion and realization is the doctrine of presumption of innocence that demands that the trial process be conducted rather dispassionately and in an inquisitive manner as opposed to a unidirectional way aimed only at finding evidence to prove the guilt of an accused. Ideally, the prosecution in furtherance of this right is required to assume an accused innocence and consequently endeavour to find and adduce any all and evidence material to the case irrespective of whether same favours or disfavors the accused.

Despite the best of wills and intentions however, implementation of these global principles is contingent on strong and dependable local institutions and frameworks. Even then, independence must be guaranteed and clarity of the legal texts emphasized as ambiguities and generalities often incentivize mediocrity and non-compliance. On this premise alone, it is arguably accurate to surmise that the domestic legal framework is pretty clear on the

---

<sup>104</sup> Article 50 (2) (d).

<sup>105</sup> *The Constitution of Kenya*.

absoluteness of the right to fair trial. However, failure of specificity as to what that means and especially if it is nuanced with other competing interests and contingencies such as witness safety and confidentiality, leaves room for errors and misguidance. It is common knowledge that judicial interpretations on important legal concepts and principles can be as varied as the persons giving them sometimes even negating the very spirit of the law. To this end, it is safe to say that while the domestic legal and policy framework is adequately equipped at guaranteeing an accused right to fair trial, it is still weak at ensuring justice thanks to weak witness protection mechanisms. In text, the WPA is incredibly progressive and foul-proof. In application however, it remains weak and ineffective.

The foregoing undeniably demonstrates that the right of an accused to a fair and open judicial process is absolute and the prosecution is strictly obligated, both legally and ethically, to provide facilities and make adequate evidentiary disclosures to allow the accused prepare their case. This disclosure obligation is not a one-off exercise but rather a functional requirement that persists throughout the trial process. Such disclosure must be made non-selectively and must include both inculpatory and exculpatory evidence. Suppression of evidence therefore amounts to infringement on the right to fair trial, and if established, may lead to an acquittal and subsequent pursuit of a malicious prosecution case against the state.

The right to fair trial must however be balanced with the competing need to protect witnesses as a matter of public policy and just judicial process. Evidence and testimonies may thus be redacted in instances where full disclosure would otherwise expose witnesses to potential threats or risk of harm. Such reductions must however be made in a way that do not make it extremely difficult for the accused to respond. Having looked into the interplay between the right to fair trial and the need to protect witnesses from potential harm, the next chapter analyses international rules and policy framework on exculpatory evidence with close reference to the rules of procedure as well as case law emanating from the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Court (ICC).

## CHAPTER 3

### INTERNATIONAL PRACTICE AND PERSPECTIVE

#### 3.0 Introduction

As discussed in Chapter 2, the interplay between witness protection and the right to fair trial is as delicate as it is complex. The trial process must be shielded from any potential abuse from either of parties. On one side is to safeguard the defence's need to challenge prosecution evidence and question witnesses. The other is the need to protect the identity and confidentiality of some witnesses if exposure to the accused is likely to endanger their lives. The difficulty lies in the determination of the existence of danger as well as ascertainment of disclosures likely to render witnesses vulnerable. Even then, the duty to prevent prosecutorial overreach through insistence that the right to fair trial is absolute and incontrovertible is ironclad. Any attempt at shielding witnesses from direct cross-examination by the accused on account of perceived harm or threat of harm must be sufficiently substantiated. Conversely, a trial court has to acknowledge and give credence to all matters ancillary to a trial including the possibility of retaliation on the victims and witnesses by the accused or their sympathizers on account of their testimonies.

This Chapter endeavours to build a deeper understanding into these nuances as well as further the necessary discourse on the subject matter. It specifically turns the spotlight to international criminal judicial processes where the nuances are even more pronounced. It tests further the study's hypothesis that non-disclosure of evidence amounts to a violation of accused's right to fair trial. However, unlike the previous chapter, it tests this through examination of related rules of procedure and evidence governing the right to fair trial at major international criminal tribunals and international court specifically the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC). The choice of these international criminal tribunals as opposed to any others for example the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Court of Senegal is that jurisprudence is informed by the fact that generally, tribunals

tend not to reflect a single inherent borrowed practice that often times vary, but rather are representative of an amalgamation of practices that provide a more nuanced and averaged collective consideration. Thus, they are likely too rich and dense in insightful amalgamation of jurisprudential principles and practices. Furthermore these two African tribunals have little to offer in relation to the thesis. Part 3.1 of the chapter provides an overview of the international court and tribunals. Parts 3.2 and 3.3 not only examines the equality of arms principle and its role in international due process but also discusses the interplay between the right to fair trial and disclosure of exculpatory evidence at the international arena. Part 3.4 analyses the implications of international court structures on prosecutorial evidentiary disclosure obligations. Lastly, Parts 3.5 and 3.6 look into the challenges faced by the tribunals and international in dealing with exculpatory evidence and implications of witness safety and confidentiality on disclosure obligations respectively.

### **3.1 Overview of the International Court and Tribunals**

Interrogation of operationalization of rules of evidence and procedure targeted primarily at promoting and protecting the right of an accused to fair trial is incomplete without a critical foundational understanding of the mandate of institutions established to apply them. The functions, objectives of the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) are addressed here. It explains the principle of equality of arms and its incorporation into both the tribunals and ICC.

#### **3.1.1 International Criminal Tribunal for the former Yugoslavia (ICTY)**

Before the ICC and the ICTR was the ICTY. Established in 1993 following numerous reports and outcries to the UN on widespread human rights violations and mass murders in Bosnia-Herzegovina and Croatia, the ICTY was mandated with the onerous task of prosecuting the responsible political leaders.<sup>106</sup> It faced a huge challenge. Being the first international tribunal

---

<sup>106</sup> 'About The ICTY | International Criminal Tribunal for the Former Yugoslavia' (*Icty.org*, 2019) <<http://www.icty.org/en/about>> accessed 15 April, 2019.

to be established in nearly fifty years, the ICTY did not have access to precedents on how to effectively handle procedural and evidentiary issues.<sup>107</sup> The judges had to carefully, and in the most prudent way possible, determine the most appropriate way to include evidence. Further, they were mandated with the seemingly impossible task of reining in powerful and dangerous government and military operatives previously deemed untouchable.<sup>108</sup> In response, the ICTY created rather elaborate principle-based rules that centred on the critical aspects of proceedings as well as the rights of the accused. These rules not only established a level of predictable result and efficient trial process but also entrenched respect for the right of the accused to fair trial.<sup>109</sup>

### **3.1.2 International Criminal Tribunal for Rwanda (ICTR)**

The International Criminal Tribunal for Rwanda (ICTR) was set up by the Security Council in 1995, three years before the ICC, in response to crimes of genocide and human rights infringements in Rwanda.<sup>110</sup> In comparison to the ICTY, the durations of the transgressions the ICTR dealt with was much briefer. Its precedents, along with those of ICTY have been significantly instrumental in the development of credibility and reliability of international criminal justice system and jurisprudence.<sup>111</sup> Whereas many of the evidentiary and procedure rules applied by the ICTR were modelled along those of ICTY, the ICTR became the first to provide in-depth and insightful interpretation of case-law and especially, those concerned with genocide. The ICTR not only prosecuted high-ranking military officials and politicians but also tried influential religious leaders and rogue journalists responsible for the distribution and broadcasting of material that fuelled the atrocities in Rwanda.<sup>112</sup> The tribunal left an indelible mark on international criminal practice, pioneered safety measures that empowered witnesses to unreservedly testify, and demonstrated that individual bearing the most responsibility for

---

<sup>107</sup>Carter L and Pocar F, *International Criminal Procedure*, Edward Elgar Publishing, 2013, 73.

<sup>108</sup>Sznajder R, 'Provisional Release at the ICTY: Rights of The Accused and the Debate That Amended a Rule' 11 *Northwestern Journal of International Human Rights* 3, 2013, 114-122.

<sup>109</sup>Carter L and Pocar F.

<sup>110</sup>'The ICTR In Brief | United Nations International Criminal Tribunal for Rwanda' (*Unict.irmct.org*, 2019) <<http://unict.irmct.org/en/tribunal>> accessed 15 April, 2019.

<sup>111</sup>Malekian F, *Jurisprudence of International Criminal Justice*, 1ed, Cambridge Scholars Publishing, 2014, 27-33.

<sup>112</sup>Sadat L, 'The Legacy of the International Criminal Tribunal for Rwanda' *SSRN Electronic Journal*, 2012.

transgressions could be apprehended, their position and status in life and society notwithstanding.<sup>113</sup>

### 3.1.3 International Criminal Court (ICC)

Established in 1998 under the aegis of the Rome Statute of International Criminal Court (the Rome Statute) as a reaction to the need of the international community to establish permanent international court to handle crimes national legal systems are either incapable or reluctant of handling, more so crimes against humanity<sup>114</sup>, the ICC functions as a an autonomous legal entity but oftentimes collaborates with global organizations like the United Nations (UN).<sup>115</sup> The court comprises three branches namely: appeals, trial, and pre-trial. Collectively, these divisions are served by 18 members of the bench.<sup>116</sup> The Rome Statute not only confers jurisdiction on the court, but it also allows it to actively carry out investigations of offences on referral by the UN, a party state and upon receipt of related communication on a state's unwillingness or inability to investigate and prosecute alleged international crimes.<sup>117</sup> The courts rapidly rising caseload has seen it rely heavily on precedents of the ICTR and the ICTY. Kenya domesticated the Rome Statute through the enactment of the International Crimes Act in 2008.<sup>118</sup> The crimes that can be prosecuted under the Act are genocide, war crimes and crimes against humanity.<sup>119</sup> The High Court shall have jurisdiction to try a person who is alleged to have committed any of the mentioned offences and punished in Kenya for that offence.<sup>120</sup>

---

<sup>113</sup>The Legacy of the International Criminal Tribunal for Rwanda'.

<sup>114</sup>Klamberg M, 'What Are The Objectives Of International Criminal Procedure? - Reflections on the Fragmentation of a Legal Regime' 79 *Nordic Journal of International Law* 2, 2010, 279-302.

<sup>115</sup>'About The International Criminal Court' (*Icc-cpi.int*, 2019) <<https://www.icc-cpi.int/about>> accessed 15 April 2019.

<sup>116</sup>'About The International Criminal Court'.

<sup>117</sup>'About The International Criminal Court'.

<sup>118</sup> Act No.16 of 2008.

<sup>119</sup> Section 6, International Crimes Act.

<sup>120</sup> Section 8, International Crimes Act.

### 3.2 Principle of Equality of Arms and its role in international due process

Common and central to the evidentiary rules and procedure across ICTY, ICTR and ICC, is the principle of equality of arms. The principle was first formulated and operationalized by the European Court of Human Rights (ECHR) - a court established under the Convention for Human Rights and Fundamental Freedoms (The Convention) to protect fundamental liberties in Europe.<sup>121</sup> The principle espouses that parties to a dispute, criminal or otherwise, have and must provide a “reasonable opportunity” to put on their case.<sup>122</sup> It thus not only encompasses an accused’s right to a fair trial but also includes an accused right of access to exculpatory evidence. Unsurprisingly, the principle was adopted by the UN and is a common thread that runs through the terms of reference of major international UN-sanctioned tribunals including ICTR and ICTY.<sup>123</sup> It is a fundamental component of the International Covenant on Civil and Political Rights (ICCPR), and the Rome Statute which established and superintends the ICC.<sup>124</sup>

Whereas the ECHR is only applicable to European countries that subscribe to it, the United Nations appropriated its principle of equality of arms in the ICCPR.<sup>125</sup> The International Covenant on Civil and Political Rights postulations adopt equality of arms, quite similar to liberties circumscribed in the Kenyan Constitution’s Bill of Rights.<sup>126</sup> No ICCPR provision definitely and clearly identifies the evidence that is necessary to facilitate defence preparations, but unquestionably, exculpatory material establishing the innocence of an accused would be, if available, and necessary. This principle was also co-opted by the Rome Statute.<sup>127</sup>

---

<sup>121</sup>Fedorova M, *The Principle of Equality of Arms in International Criminal Proceedings*, Intersentia, 1ed, 2012, 81.

<sup>122</sup>Sanan-Ogly G, 'Adversarial Principle and Principle of Equality of Arms as a Subject of Adversarial type of Criminal Proceeding' 7 *Journal of Advanced Research in Law and Economics* 4, 2016, 920-925.

<sup>123</sup>Negri S, 'The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure' 5 *International Criminal Law Review*, 2005, 513-571.

<sup>124</sup>Negri S.

<sup>125</sup>Article 14, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171.

<sup>126</sup>Part 3, *Constitution of Kenya* (2010).

<sup>127</sup>Article 67(2), *Rome Statute*.

### **3.3 Right to fair Trial and Disclosure of Exculpatory Evidence in International Court and Tribunals**

As discussed before, operations of international justice systems and the judicial processes established thereupon are hinged primarily on the principle of equality of arms demanding that the right of an alleged offender to fair judicial process be protected and promoted at all times. This part not only describes the rules of divulgence of exculpatory evidence in ICTY, ICTR and ICC but also underscores the implications of the structures of these judicial bodies on the application of the same.

#### **3.3.1 International Tribunal for the former Yugoslavia (ICTY)**

Disclosure of exculpatory evidence in the ICTY was governed by its Rules of Procedure and Evidence. The first rule specifically obligated the prosecutor to make full evidentiary disclosure irrespective of whether the same was inculpatory or exculpatory.<sup>128</sup> It however, allowed for an exception for disclosure in the circumstances where it could be demonstrated that such disclosures had a higher likelihood of affecting public or security interest of any state or were likely to prejudice on-going or further investigations into the alleged crime.

The second rule on the other hand, belaboured the significance of the role of the prosecution and the immediacy of the need for evidentiary disclosures.<sup>129</sup> It mandated the prosecution to disclose, soonest possible, as to any material evidence were likely to suggest innocence of the accused or mitigated an accused's guilt or impacted the reliability of prosecution evidence. The prosecution was however shielded from having to provide sufficient proof that it adequately satisfied its disclosure obligations. Comparatively, an accused was expected to rely on the evidence disclosed by the prosecution as a good-faith gesture. If dissatisfied, he was to make a request for disclosure and demonstrate to court failure of disclosure on the part of the

---

<sup>128</sup> Rule 66.

<sup>129</sup> Rule 68.

prosecution. To a larger extent therefore, the determination as to the materiality of evidence, exculpatory or otherwise, was purely a prosecutor's exercise of good-faith discretion.

The ICTY's disclosure rules were interpreted and refined in *Prosecutor v. Karadzic*.<sup>130</sup> The trial court held that, in proof of an alleged non-compliance of the prosecution with the established evidentiary disclosure obligations, an accused was to not only identify the evidence or materials entreated from the prosecution but also prove a prima facie case that the sought out items were not just material to their defence but were also in the custody or control of the prosecution. The tribunal went ahead to define "material evidence" to mean items upon whose reliance, the defendant had some prospect of success. It did not however define what constituted "prospects of success".

The court reaffirmed the importance of Rule 66 in not only reinforcing the equality of arms principle but also in ensuring fairness of the trial process. It held that in instances where otherwise exculpatory evidence was known and immediately and easily accessible to the accused, the prosecution could not be compelled to make such otherwise obvious disclosures. This is within the local legal parlance, known as the due diligence rule. Additionally, the prosecution's evidentiary disclosure obligations did not arise automatically even instances where it could be shown that the prosecution failed to disclose exculpatory information. The trial chamber clarified that withdrawal of witnesses and any and all evidence associated with and thus reliant on their testimony was, in and of itself, sufficient non-disclosure remedy.<sup>131</sup>

Even in instances where the office of the prosecution was found to have violated its disclosure obligations, the associated sanctions in the form of warnings or punishments were directed not to individual prosecutors in breach but rather the office of the prosecutor as a collective unit. Such a determination was made in *Prosecutor v. Lukic* following the accused's application for

---

<sup>130</sup> ICTY, Case No. IT-95-5/18-PT.

<sup>131</sup> Rydberg A, 'Case Analysis: The Protection of the Interests of Witnesses – The ICTY In Comparison To the Future ICC' 12 *Leiden Journal of International Law* 2, 1999, 455-478.

redress emanating from infringement of disclosure requirements by the prosecution.<sup>132</sup> The Appeals Chamber reminded the prosecution of the significance of its duty to disclose evidence and reiterated its expectation of the prosecution to take measures to ameliorate any future occurrences of such violations.

### **3.3.2 International Criminal Tribunal for Rwanda (ICTR)**

Disclosure requirements of the ICTR were governed by Rule 66 (B).<sup>133</sup> The requirements were very similar to those of ICTY and obligated the prosecutor to make disclosures notwithstanding the possibility of the accused not relying on the same to advance their case. Nonetheless, the rules demanded that an accused advance claims of infringement for the Trial Chamber to issue a compliance directive under Rule 66(B), notwithstanding the fact that it is the duty of prosecutors to make disclosures. The rules called on the accused to not only know but to also reveal the specific evidence not divulged by the prosecution. The defence faced a reduced standard if it made demands for an inquest into whether the prosecution contravened Rule 66(B), instead of a directive from the Trial Chamber requiring the prosecution to redress a claimed infringement.<sup>134</sup>

It is notable however, that like the ICTY, the ICTR lacked a general rule on what amounted to exculpatory evidence, effectively requiring the tribunal to make case-by-case decisions. Generally, witness testimonies that were hitherto contradictory to prosecution's claims or impugned the authenticity of the prosecution witnesses themselves were deemed exculpatory.<sup>135</sup> Similarly evidence of information relevant to an accused's case including but not limited to alibis or failure to link the accused to the alleged crime was also exculpatory. Accordingly, the remedy for failure of the prosecution to make disclosures varied

---

<sup>132</sup> ICTY, Case No. IT-98-32/1-A.

<sup>133</sup> ICTR Rules of Procedure and Evidence, 1995.

<sup>134</sup> *Prosecutor v. Nyiramasuhuko* ICTR, Case No. ICTR-97-21-T.

<sup>135</sup> Harmon M and Karagiannakis M, *The Disclosure of Exculpatory Material by the Prosecution to the Defence under Rule 68 of the ICTY Rules*, 2001, 315.

inconsistently across cases and hinged heavily on how favourably the tribunal viewed an accused's case.<sup>136</sup>

### 3.3.3 International Criminal Court (ICC)

The rules of evidence and procedure that underpin ICC's effective discharge of mandate are governed by the Rome Statute. The Statute expressly grants an accused person the right to access evidence that mitigates their guilt and which may impugn the authenticity and soundness of prosecution evidence.<sup>137</sup> Oftentimes, and particularly in incidences where exculpatory evidence is undetermined, Statute's applicability unsettled, circumspection is left to the court to assess the applicability of the specific Article of the Statute<sup>138</sup>.

Additionally, and in the strongest language possible the Statute, in describing the prosecutor's investigative authority, states that the prosecutor has strict legal obligation to investigate any and all claims, including those likely to discharge an accused.<sup>139</sup> This language is arguably stronger than those of the ICTY and ICTR as well as the postulations of the Constitution or any other domestic Kenyan laws. Nonetheless, the court (ICC) still lacks clear guidelines on specific applicability of this provision. Scholars and experts have argued that its case laws are replete with rulings on broad procedural questions but, unlike the tribunals, very lean on specificity.<sup>140</sup> It however, takes a stricter approach on providing of exculpatory evidence in redacted format as witnessed in some recent cases.<sup>141</sup>

---

<sup>136</sup>Zappala S, 'The Prosecutor's Duty to Disclose Exculpatory Materials and the Recent Amendment to Rule 68 ICTY RPE' 2 *Journal of International Criminal Justice* 2, 2004, 620-630.

<sup>137</sup>*Rome Statute*.

<sup>138</sup>Smith L and Olivier M, 'How the International Criminal Court is balancing the Right of Victims to Participate with the Right of the Accused to a Fair Trial', T.M.C. Asser Institute, 2008, 1-18.

<sup>139</sup> Article 54 (1) (a), *Rome Statute*.

<sup>140</sup>Catani L, 'Victims at the International Criminal Court: Some Lessons Learned from the Lubanga Case' 10 *Journal of International Criminal Justice* 4, 2012, 905-922.

<sup>141</sup>Grey R, 'Interpreting International Crimes from A 'Female Perspective': Opportunities and Challenges for the International Criminal Court' 17 *International Criminal Law Review* 2, 2017, 325.

In *Prosecutor v. Ruto and Sang* for example, the court determined that the prosecutor's election to suppress documents containing potentially exculpatory material and information from both the accused and the Trial Chamber amounted to a serious and wholesale misapplication and infraction of a major proviso which was intentioned at allowing the prosecution to obtain evidence privately, and in very restrictive conditions.<sup>142</sup> The accused persons were charged with crimes against humanity committed in Kenya. The prosecution withheld nearly two hundred and twelve documents containing exculpatory evidence on the basis of confidentiality. As the ICC proceeds to try cases, it needs to address itself to the determinations of other international tribunals in ascertaining the material and information that should be divulged.

### **3.4 Implications of International Criminal Court and Tribunals Structures on Prosecution's Disclosure Obligations**

The case for a robustly effective methodology in providing defence lawyers unrestrained access to prosecution evidence, including possibly exculpatory ones, is doubtlessly self-evident. On the premise of equality of arms principle alone, an accused has all the rights to a fair trial as well as a fair opportunity to effectively advance his case. Without access to exculpatory evidence, an accused has an incredibly onerous and arduous task to mount a defence than if he had it. The strains defence lawyers face in international criminal justice system to procure favourable evidence is thus fairly similar to the due diligence rule predominantly applied in adversarial systems such as Kenya and the United States (U.S).

As highlighted before, the due diligence rule provides that where an accused can locate evidence with the least amount of effort, then non-divulgence of the same by the prosecution cannot be construed as a violation of disclosure obligations. The challenge with the application of this rule is that the adversarial nature of trials generally incentivizes the prosecution and the defence to openly take part in what can only be described as a "hide and seek" game instead of a constructive and beneficial discovery measures and to the disadvantage of fair process.

---

<sup>142</sup> ICC, Case No. ICC-01/09-01/11.

It is noteworthy that neither the ICTY, ICTR nor ICC conform to specific national system of criminal judicial practice to best reflect the variety of nations and legal systems they try.<sup>143</sup> Rather, they mash-up elements of common law's adversarial legal framework with civil law system's inquisitorial framework to create a more balanced and widely-accepted set of principles of criminal justice, procedure and rules. Critics however, accused ICTY prosecutors of leaning more towards adversarial approach in their trial of war crimes effectively implying the prosecutors worked less to uncover the truth of what happened and more to merely prove cases against the defence. This scenario was fuelled by vagueness of the language adopted for the tribunal's Standard of Professional Conduct.<sup>144</sup> Like the ICC, the ICTY's Standard of Professional Conduct comprises multiple postulations on a prosecutor's obligation to protect and guarantee privacy of any witnesses who testify, effectively providing justification for any prosecutorial action that could otherwise be construed as failure to make evidentiary disclosures to the accused.<sup>145</sup>

### **3.5 Challenges faced by International Criminal Tribunals and the International Criminal Court in Dealing with Exculpatory Evidence**

As already established, the rules governing classification and determination of evidentiary items that qualify as exculpatory in ICTY, ICTR and ICC are helplessly vague oftentimes requiring interpretation for application by the respective trial chambers. This calls for a deeper evaluation to establish the causes of these misgivings. This part not only looks into the salient features of exculpatory evidence including categorization and materiality and how the same can hinder disclosure but also lays out ways through which the international courts and tribunals can best improve prosecutorial disclosure obligations.

---

<sup>143</sup>Klamberg M, 'What are the objectives of International Criminal Procedure? - Reflections on the Fragmentation of a Legal Regime' 79 *Nordic Journal of International Law* 2, 2010, 279-302.

<sup>144</sup> Adele J, 'Comparative Analysis between Adversarial and Inquisitorial Legal Systems' *SSRN Electronic Journal*, 2017.

<sup>145</sup>Zappala S.

The question of materiality of evidence has been found to generally stifle disclosure due to the perceived limited effect in changing the potential results.<sup>146</sup> In effect, rather than deter prosecutors from perpetuating non-disclosure, it incentivizes them due to the absence of real consequences. This section concludes by explaining the challenge faced by the accused in learning about the existence of exculpatory evidence and how such limitation directly affects their ability to prove non-disclosure.

### **3.5.1 Classification of Exculpatory Evidence**

Within the realms of international criminal justice system, providing clarity to existing rules of evidence and procedure is doubtlessly the first step towards remedying systemic ineffectual prosecutorial evidentiary disclosure. In as much as inadequate and ineffectual prosecutorial deterrence remains critical an issue, it is imperative that rules on disclosure of exculpatory evidence be clear enough to any reasonable persons including prosecutors to eliminate excuses for non-compliance.

In the ICTY for instance, rules of discovery demanded classification of evidence into three distinct categories with equally distinct disclosure requirements. These included: tangible materials that were “material” to an accused’s preparation, exculpatory information, and basic threshold information.<sup>147</sup> Despite the existence of these classifications in the rules of evidence, case-by-case judicial determination as to what amounted to exculpatory evidence was still a necessity.<sup>148</sup> The rules should however classify the scope of exculpatory evidence before explaining what it would exactly mean for evidence to be deemed as exculpatory; similar to the way ICTY determined that evidence required within the meaning of Rule 68 did not have to be exculpatory at face value, but that material and information that may seem exculpatory should be divulged.<sup>149</sup> It would thus be nearly impracticable if not impossible to effectively

---

<sup>146</sup> Ford S, 'Measuring, Understanding, and Predicting Trial Complexity at the ICTY' *SSRN Electronic Journal*, 2012.

<sup>147</sup> ICTY Rules of Procedure and Evidence Rule 66(A).

<sup>148</sup> Moranchek L, 'Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY' 31 *Yale Journal of International Law* 2, 2006, 480.

<sup>149</sup> Moranchek L.

determine when exculpatory evidence must be disclosed. Nonetheless, categorization of such evidence helps expedite court's determinations. Even then, case-by-case determinations roots out the element of predictability of outcome effectively requiring significant time for review and decision.

Generally, due to unforeseeable limitations, the tribunals and the trial chamber prefer specific evidentiary requests over broad ones. However, broad pre-determined evidentiary categorization of exculpatory material is likely to assist the ICC make preliminary decisions when an accused seeks specific orders. It is doubtlessly easier for the Trial Chamber to ascertain whether the prosecution deliberately suppressed evidence key to an accused's case once exculpatory and materiality of evidence has been determined.<sup>150</sup> This would not only save time and costs but also ameliorate the difficulties often faced by the defence in determining the exact categories within which their requests and applications fall. Additionally, it makes it less arduous for the trial chamber to make preliminary determinations as to whether or not the rationales for withholding evidence qualify as exceptions to the general rule. Accordingly, the prosecution can successfully obtain evidence in instances where safety of witness or confidentiality of sources is paramount.<sup>151</sup>

Some of the prosecutorial evidentiary categorizations likely to require confidentiality and protection and thus redactions include: evidence that contradicts or impeaches prosecution witnesses or evidence of alternative explanations or justifications, evidence related to defences raised, evidence of alternative explanations or justifications, and witness statements, including any questioning by the prosecution or subsequent testimonies. Due to the availability of precedents touching on each of the categories, an accused would be able to accurately place their case between cases where the court held the evidence demanded divulgence or not,

---

<sup>150</sup>Klamberg M, *Evidence in International Criminal Trials*, 1ed, Martinus Nijhoff Publishers, 2013, 35.

<sup>151</sup> Irving E, 'Protecting Witnesses at the International Criminal Court from Refoulement' 12 *Journal of International Criminal Justice* 5, 2014, 1141-1160.

effectively establishing some degree of predictability minimizing the need for further review by the Trial Chamber.<sup>152</sup>

### **Materiality of Evidence**

In addition to exculpation, international criminal tribunals and courts consider materiality of evidence adduced before them. In ICTY for instance, evidence was considered material if it exhibited what the rules described as “some prospect of success”.<sup>153</sup> The tribunal did not however provide a sufficiently clear description or interpretation of this phrase. Rather, it merely explained it to mean evidence “supporting a colourable argument” causing further confusion and uncertainty in rules of procedure and evidence.<sup>154</sup> In *Prosecutor v. Karadzic*, the trial-chamber asserted that merely arguing that there was evidence of an alleged agreement between the U.S. and the accused was inadequate, but indicated that had the accused explained what the nature of the arrangement was and the form it took, that may have been adequate to meet the threshold.<sup>155</sup>

In ICTR, materiality of evidence was judged on the premise of its relevance to an accused’s preparation. Still, the concept of preparation is admittedly wide-sweeping requiring further refinement notwithstanding the fact that materiality is generally superseded by the demand that the evidence would influence the final decision.<sup>156</sup> As this is barely the case, it is unnecessary to conduct further investigations. Materiality question generally reduces evidentiary analysis to a numbers game.<sup>157</sup> The ICC in the *Ruto and Sang* Case for instance determined that despite the glaring failure on the part of the prosecution to make sufficient evidentiary disclosures in nearly nine instances, that failure was not so tragic or procedurally dire as to warrant appointment of a disclosure officer to conduct further investigations.<sup>158</sup> The court directed itself

---

<sup>152</sup> Irving E.

<sup>153</sup> Ambos K, *Treatise on International Criminal Law*, 1<sup>st</sup> Edition, Oxford University Press, 2013, page 76.

<sup>154</sup> Ambos K.

<sup>155</sup> ICTY, Case No. IT-95-5/18-PT.

<sup>156</sup> *Prosecutor v. Karemera*, Case No. ICTR-98-44-T.

<sup>157</sup> *Prosecutor v. Bizimungu*, Case No. ICTR-99-50-T.

<sup>158</sup> ICC-01/09-01/11.

to the fact that the nine disclosure failings, if juxtaposed with the numerous evidentiary pages and items already disclosed by the prosecution, had limited influence on the final decision.

The trial court's determination on materiality in *Ruto and Sang Case* was, in this study's opinion, as dangerous as it was naïve. Its import is that the prosecution can make several disclosures only to hold on to a few crucial potentially exculpatory evidence from an accused merely on account of relativity; that the undisclosed evidence is not numerically substantial enough to meet disclosure violation threshold. Ideally, the focus should be more on the value or quality of the withheld or undisclosed evidence and less on the ratio of the disclosed to undisclosed evidence.

### **3.5.3 Ineffective Deterrence to Disclosure Violations**

The biggest limitation to effective implementation of evidentiary disclosure rules in international criminal justice system is lack of elaborate and enforceable deterrent penalties for violations. This is arguably due to the overlap of a variety of factors and circumstances that generally circumscribe such violations. Sufficiency of remedy let alone enforceability remains another big challenge. The ICTY for instance focuses primarily on the harm such non-disclosures are likely to occasion an accused in determining sufficiency of remedy. In *Prosecutor v. Stakic*<sup>159</sup> for instance, the prosecution withheld material evidence contrary to Rule 68<sup>160</sup> despite numerous appeals and requests from the accused. The accused was eventually able to access the withheld information and items of evidence and used them to not only recall witnesses but also interrogated them on the premise of the discovery. The tribunal asserted that the eventual access to the otherwise unavailable evidence by the accused was sufficient to render mute and repugnant any claims of violations on the part of the prosecution.<sup>161</sup>

---

<sup>159</sup>ICTY, Case No. IT-97-24.

<sup>160</sup>ICTY Rules of Procedure and Evidence, 1994.

<sup>161</sup>*Prosecutor v. Stakic*.

Likewise, the ICTR in *Prosecutor v. Mpambara* allowed the prosecution to proceed with an application for a delayed motion to redact evidence on account of confidentiality and witness safety.<sup>162</sup> The prosecution had heavily redacted important and starkly material portions of evidence before making disclosures to the accused or seeking authority from the court to make redactions. Their primary concern, and thus failure to adhere to strict procedural requirements, was the safety of witnesses which they feared would have been jeopardized as the witnesses were easily identifiable from the un-redacted documents. This violation clearly went unsanctioned. When faced with questions of disclosure violations and the associated possible punishments, the trial chamber chose to focus instead on the effect of the disclosure on the accused's case. This approach is arguably counterproductive and negates the real intention of the evidentiary rules since it reviews a prosecutor's otherwise unlawful conduct on a fortuitous basis-regardless of its influence on the outcome, rather than assessing the transgression separate from the result.

Such approach to enforcement of rules wrongly and misguidedly affirms the notion that the prosecutor was amenable to punishment only if the outcome had been different or if there was no way to offer the defence a remedy. It encourages and incentivizes the prosecution to continue withholding crucial evidence safe in the knowledge that the accused would not be advance their cause in the absence such exculpatory evidence; and that a recourse exists for the accused should they discover that evidence was suppressed; or, that the accused may be oblivious of the fact that evidence was suppressed.<sup>163</sup>

Effective and sustainable deterrence of violation of disclosure obligations, even in circumstances where the same may not have a significant impact on an accused's case, is only possible if harsher penalties are meted. This begins with the ICC and other international criminal tribunals making sure their evidentiary rules are free of ambiguity and are as clear, concise and straightforward as possible. Notably, unlike the ICC, the ICTR and ICTY had

---

<sup>162</sup> ICTR-01-65-T, ICL 6 (ICTR 2006).

<sup>163</sup> *Prosecutor v. Karadzic*, ICTR, Case No. IT-95-5/18-T.

fairly clearer rules and procedures for general disclosures as well as for divulgence of exculpatory evidence, effectively acknowledging the importance of evidence for both parties, more so the accused.<sup>164</sup> Even then, as things stand, the trial chamber is precluded from punishing individual prosecutors for disclosure violations. Unless the error is irredeemably egregious, only the office of the prosecutor can be sanctioned as a collective unit. Given the trial chambers' common disinclination to recognize infringements justifying some sort of sanctions, the prosecutor remains undeterred from any other or further violations.

Unlike in the ICC, ICTY and ICTR, a robust and progressive system of deterrence of disclosure violations can be found in Kenya and other adversarial systems such as the U.S. Courts in these jurisdictions demonstrably display little to no patience for non-disclosures. In the U.S. for instance, the prosecutor is amenable to individualized ethical violations on their record with the same being publicly accessible to everyone.<sup>165</sup> It is thus a careless professional risk for a prosecutor in such a country to flagrantly commit non-disclosure violation. Justice Kozinski in *United States v. Olsen*<sup>166</sup> observed that in the unusual case that non-disclosed evidence becomes known, the implications generally leaves the prosecution no not any better than if it had abided by *Brady* ab initio.<sup>167</sup> In the event that violation is found to be material, the prosecution gets a do-over; making it no worse off than if it had disclosed the evidence in the first place. Comparatively, non-disclosure in Kenya, if established, is sufficient grounds for acquittal especially on appeal.

Disclosure violations at the international criminal justice system persist due to failure of the courts emphasize the importance of full evidentiary disclosure to the prosecution as well as explain the consequences of non-compliance. To this end, introduction of ethical standards directly hinged on prosecutor's faithfulness to disclosure obligations as seen in the U.S, has a

---

<sup>164</sup> Wilson R, 'Expert Evidence on Trial: Social Researchers in the International Criminal Courtroom' 43 *American Ethnologist* 4, 2016), 1130-744.

<sup>165</sup> Green B, 'Prosecutors and Professional Regulation' 25 *Fordham Law Review* 28, 2012, 873.

<sup>166</sup> 737 F.3d 625, 630 (9th Cir. 2013).

<sup>167</sup> A Rule established in *Brady v. Maryland* 373 U.S. 83 (1963).

higher likelihood of making the rule more effective in the international arena. In comparison to state or national cases where individual prosecutors are barely known to the general public and cases are just between the state and equally unknown individuals, the attention international criminal cases command puts pressure on individual prosecutors to act above board. Introduction of sanctions for non-disclosure with personal liability as opposed to collective liability would see a higher rate of compliance among prosecutors. To ensure justice is done to victims of crime, prosecutors have to achieve convictions without violating rules of procedure as that would only cast aspersions as to the validity of the verdict.

Caution however must be taken, to make certain that such pressure does not mislead the prosecutor into securing conviction at all costs at the expense of justice and due process or to merely fulfil a populist agenda. Transgression of due process takes place when suppression happens, notwithstanding the existence of regressive measures for the same.<sup>168</sup> Failure to operationalize any significant consequences creates a bad procedural example and, while the same may be nearly immaterial in an isolated case, there is very little to show that a similar misapplication would not result in far more significant implications in the future.

#### **3.5.4 Burden of Disclosing Exculpatory Evidence**

The rules of procedure and evidence of ICC, ICTY and ICTR all rest the burden on disclosure of exculpatory evidence on the prosecution.<sup>169</sup> The prosecutor is strictly obligated to not only notify the accused but also share where with them any and all evidence the prosecution has found, exculpatory or not. Thus, the responsibility of notifying the trial court of any disclosure-violations rests solely with the accused, possibly due to the fact that it is doubtlessly the party most disenfranchised by non-disclosure. Accordingly, the burden of proof shifts to the defence to establish a prima facie case that the prosecution withheld information, items or evidentiary materials material to their case. This they must achieve by having evidence to prove that the

---

<sup>168</sup>ICTY Statute, Article 21(4) (b).

<sup>169</sup>ICC, R. P. & E 76; ICTY, R. P. & E 68(i); ICTR R. P. & E 68(A).

prosecution is in custody of material otherwise unavailable to both themselves and the trial court.

The right to exculpatory evidence was however first diluted by the ICTY in *Prosecutor v. Blaškić* where the court described the exact phrasing of application for release of exculpatory evidence failing to acknowledge the fact that oftentimes the accused lacks specific knowledge of the content of such evidence and can only speak in generalities and make broad requests in respect thereof.<sup>170</sup> Even in instances where an accused establishes a prima facie case for the existence of such evidence, the other numerous previously discussed limitations and protections offered to the prosecution reduces any chances of eventual success. This implicitly burdens the defence to work harder than is ordinarily necessary just to access information and material it has a right to from the outset.

### **3.6 Non-disclosure On Account of National Security and Witness Safety**

As already established, the prosecution at the international criminal court and tribunals are obligated to make evidentiary disclosures as a general rule. There are however, exceptional circumstances that necessitate non-disclosures. The burden placed on the prosecution and the high-profile nature of their work oftentimes call for exercise of utmost restraint, patience and confidence as the most crucial and game-changing evidence are not always available unless promises are made to protect the sources.

Presently, implementation of exceptions to the disclosure rules in the ICC is made on case-by-case basis. Experts are unanimous that this approach is particularly as strategic as it is important since without it, the redress for non-disclosure would be inadequate especially in the face of competition between confidentiality and full evidentiary divulgence.<sup>171</sup> Care must however be

---

<sup>170</sup> ICTY, Case No. IT-95-14-T.

<sup>171</sup> Ambos K, 'Confidential Investigations (Article 54(3) (e) ICC Statute) v. Disclosure Obligations: The Lubanga Case and National Law' 12 *New Criminal Law Review* 4, 2009, 544.

taken to avert any misuse of these exceptions. Confidentiality on account of national safety or witness protection should only be used by the prosecutor to gather information that is partly crucial to a trial but must not in and of itself be the premise of the case in its entirety.<sup>172</sup>

### 3.6.1 Confidentiality in ICTY

As a matter of practice, the ICTY generally allowed the prosecution to withhold evidence on the premise that the materials were provided by either witnesses whose safety on account of such disclosure was likely to be compromised or states to whom such releases were a matter of national security.<sup>173</sup> These exceptions however applied only to items material to the concerned cases.<sup>174</sup> Rule 67(A) (ii) stipulates that disclosure was only required if the defence consented to reciprocity.<sup>175</sup> An accused was thus required to supply the prosecution with testimonies of their prospective witnesses. These encompassed statements taken by third parties in the custody of the defence. As a reaction to prosecution's request for confidentiality, the defence generally argued that evidence fell within the larger classification of basic-threshold information, effectively requiring unilateral unreserved divulgence from the prosecution.<sup>176</sup>

The tribunal in the *Blaškić* case broadened the definition what constituted "prior statements of the accused" beyond what was textually permissible in the evidentiary rules. This was later followed by actual amendment of Rule 66 in 1999 to accommodate the holding.<sup>177</sup> The phrase was now broadened to include testimonies of the accused obtained in the course of interrogation during any type of judicial process. The effect of this change was quite prominent in the immediately following case law. The tribunal leaned more towards a stricter

---

<sup>172</sup> Ambos K.

<sup>173</sup> Sangkul K, 'ICC Prosecutor's Duty to Disclose Exculpatory Evidence' *Korean Lawyers Association Journal*, 2009, 58.

<sup>174</sup> Sangkul K.

<sup>175</sup> ICTY Rules of Procedure and Evidence.

<sup>176</sup> Swoboda S, 'Confidentiality for the Protection of National Security Interests' 81 *Revue internationale de droit pénal* 2, 2010, 209-229.

<sup>177</sup> ICTY Rules of Procedure and Evidence.

interpretation of what constituted prior statements. Effectively, more communications, items and documentations could be withheld under the guise of confidentiality.

One instance that justifiably warranted invocation of the disclosure exception in the ICTY was the use of evidence of mass graves in Bosnia to prove the atrocities alleged to have been committed.<sup>178</sup> The U.S. government had satellite imagery of the actual graves it was inclined to provide to the prosecution but only on condition of confidentiality and anonymity. At the time, the satellite technology was so crucial to the U.S. government that disclosures on the international stage in respect of the same were as unthinkable as it was dangerous. It was certainly a matter of national security. The insistence of the U.S. on confidentiality and privacy as a precursor and a prerequisite for the disclosure sparked future amendment of the disclosure rules to incorporate even more narrower rules against disclosure.

The tribunal's attempt to protect confidentiality, guarantee safety of witnesses and thus maintain good relations with the sources severely constrained the fundamental rights and liberties of an accused.<sup>179</sup> An accused was in effect given little to no notice or opportunity to rebut evidence clearly material to their defence. This in addition to other already discussed procedural limitations and bottlenecks only helped to further suppress an accused already-limited right.

### **3.6.2 Confidentiality and privacy in ICC**

It is noteworthy that the decisions of ICTY on the question of non-disclosure on account of confidentiality both for national security and witness safety concerns set the stage for the ICC. This was conspicuously evident in *Prosecutor v. Thomas Lubanga Dyilo* where the prosecutors leveraged the uncertainty of the wording of the rules of disclosure to their build their case against the accused, and to the disenfranchisement of the accused.<sup>180</sup> Article 54(3)(e) confers

---

<sup>178</sup>Bax M, 'Mass Graves, Stagnating Identification, and Violence: A Case Study in the Local Sources of "The War" In Bosnia Herzegovina' 70 *Anthropological Quarterly* 1, 1997, 11-19.

<sup>179</sup>Rohde D, 'Graves Found That Confirm Bosnia Massacre' *The Christian Science Monitor*, 1995.

<<https://www.csmonitor.com/1995/1116/16012.html>> accessed 12 April, 2019.

<sup>180</sup> ICC-01/04-01/06.

on the prosecutor the freedom to elect not to disclose documents and items he/she intends to rely on for the purposes of generating leads for new evidence.<sup>181</sup> This implies that non-disclosure of evidence on account of national security and confidentiality or for the purposes of protecting the source is generally allowed in instances where such source is used by the prosecutor to uncover new evidence that would otherwise be subject to evidentiary disclosure.

Concerns and reservations about the *Lubanga case* among defence lawyers have centred on the fact that the prosecutor invoked Article (54(3) (e) to not only obtain new evidence but to also shield itself against the request to disclose the same. Vagueness and lack of clarity of this rule as well as the already established lack of strict stiffer penalties or accountability measures for disclosure violations have exacerbated problems and concerns of procedure orchestrated by the tension between disclosure and confidentiality. Perhaps the biggest motivation for non-compliance with disclosure obligations under the guise of confidentiality is arguably the global burden placed on the prosecutor to try crimes and atrocities abhorred on a global scale. The prosecutor is not only duty bound to prosecute persons most responsible for crimes and atrocities, but is also expected to uphold and cherish justice and try cases fairly. This pressure is highly likely to incentivize them to take shelter on or hide behind these expectations under the pretext of sustaining the legitimacy and voracity of their indictments.

As illustrated before, the structure of international courts and tribunals and particularly the ICC, opens it up to external interference. The horrifying and high-profile nature of the crimes handled by the court creates a palpably strong pressure for the prosecution to look for ways to secure convictions at all costs. It is notable however, that just as the pressure on the prosecution is high and on a global-scale, so is the need for the accused to defend themselves, plead their innocence and save their globally-damaged reputation. Allowing the prosecution to unfairly hide under the pressure of global scrutiny to deny an accused access to otherwise material information is arguably unjustified and procedurally twisted. If the evidence is favourable to the prosecution with a significantly higher chance of resulting in a conviction, then there would

---

<sup>181</sup> Rome Statute.

be little incentive to suppress information favourable to an accused. Contrary to the popular rule that an offender is presumably innocent until and unless an opposite determination is made by a trial court; suppression of evidence is tantamount to an assumption of an accused's guilt, and somehow unfairly pressures the accused to prove their innocence.

### **3.7 Conclusion**

As alluded to earlier, the establishment of the ICTY, ICTR, ICC and other international tribunals is driven primarily by the global need to reign in on international crimes. They are aimed at giving assurance to the otherwise helpless victims that the powerful individuals most responsible for such crimes are never immune to justice. The Rome Statute that established the ICC for instance acknowledges the need to punish crimes. At the same time, the Statute cautiously acknowledges the importance of the individual due process rights of the accused, the doctrine of presumption of innocence as well as the right to fair trial. Unfortunately, the international pressure oftentimes misguides the prosecution into feeling like they owe it to the victims to secure convictions at all costs.

These prosecutorial pressures, coupled by the general vagueness and ambiguity of rules of procedure and evidence as well as lack of sufficient accountability mechanisms and punishment for non-disclosure of evidence have emboldened the prosecution to overlook the innocence of the accused to drive what can only be described as activist prosecution agenda. Moreover, interpretations by the tribunals and trial chambers as to what constitutes exculpatory evidence have not made the situation any easier. Even in matters of confidentiality on account of safety and national security, very little clear, dependable, repeatable and replicable guidance have been made. As a consequence, applications for exceptions have to be presented on case-by-case basis effectively dragging cases over long periods.

The *Lubanga* and *Ruto* cases brought to the fore concerns about prosecutorial disclosure violations and advanced pertinent questions as to the application of rules both on confidentiality and disclosure. The argument has been that if the likelihood of securing conviction on account

of information otherwise held by the prosecution as confidential is so high, then there would be no harm in disclosing such evidence to an accused. Non-disclosure would thus be unnecessary given the inevitability of conviction.

This Chapter has established that the struggle to balance the need for fair process and thus protection of an accused's liberties with the need to protect witnesses and sources of information material to a case is not uniquely Kenyan and is one that is not only faced by the ICC but also confronted ICTY, ICTR and other criminal tribunals before them. That most of these institutions handle this otherwise delicate balance on a global scale, and with global scrutiny and with much pressure to impress and remedy atrocities with wide-sweeping consequences further compounds the associated challenges as already demonstrated. The next chapter discusses the findings of the study, outlines the conclusions of the research and covers the recommendations the study deems would best help create a determinable balance between the right of an accused to exculpatory evidence and the need to shield witnesses from potential harm from such disclosures, both as important components of the fair trial liberties.

## CHAPTER 4

### CONCLUSIONS AND RECOMMENDATIONS

#### **4.1 Introduction**

Anchored by a situational appraisal of Kenya's criminal justice system that depicted a country grappling with a palpable imbalance between an accused's absolute right to a fair trial and the need to protect witnesses from any apprehensible harm, this study set out to fulfil three objectives. First, it sought to establish the extent to which the existing legal, policy and regulatory framework on fair trial not only guarantees and protects the rights of an accused but also balances the same with the competing interests and rights of victims and witnesses. Secondly, the study endeavoured to determine whether there are relevant domestic and international jurisprudential guidelines on the right of an accused to exculpatory evidence that Kenya can adopt and standardize to effectively balance the competing rights of an accused, witnesses and victims. Thirdly the study underscored the measures that can be sustainably put in place to ensure the rights of an accused to fair trial is guaranteed without impugning the need to protect witnesses from potentially harmful evidentiary disclosures.

The study operated under the hypothesis that: the existing legal and regulatory framework in Kenya as well as procedural guidelines on fair trial of criminal cases are inadequately equipped to effectively create a balance between the competing rights of victims, witnesses and their families with that of the accused to exculpatory evidence; and that non-disclosure of exculpatory evidence amounts to a fundamental violation of the right of the accused to fair trial.

In a bid to effectively and comprehensively answer its research questions, meet its anchoring objectives and thoroughly test its foundational hypotheses, the study adopted a multipronged approach. First, it looked into the role of the prosecution in Kenya particularly with respect to the obligation to disclose exculpatory evidence and also analysed the potential implications of

the same on the safety of victims and witnesses. This called for an interrogation of the foundational principles governing the right to fair trial and prosecution generally. The study thus probed the power dynamics between the state as represented by the prosecution and the accused with the view to understanding the implications of the same on evidentiary disclosure obligations. It also introduced and examined the concept of witness safety and confidentiality and explored the nuance of the same with prosecution's evidentiary disclosure obligations and the eventual impact of such nuance on the right of an accused to a fair trial.

Secondly, the study ventured beyond Kenya and explored global and universal principles on fair trial, witness safety and confidentiality and the role of the prosecution and the courts in guaranteeing both. It interrogated select rules of procedure of international tribunals, international court particularly the ICTY, ICTR and the ICC. It examined the role of the prosecutor in those tribunals to establish the extent to which the rules on disclosure of exculpatory evidence, protection of witness safety, confidentiality impacted the right to fair trial and justice generally.

Lastly, the study, content in the understanding of the application of the right to fair trial in the said international courts and tribunals, shifted to seek an understanding of the legal, policy and regulatory framework governing witness safety and the right to fair trial. This was undertaken with the view to not only determining the applicability of the same but also gauging their adequacy in safeguarding and guaranteeing the said rights. Accordingly, it looked at the international legal instruments ratified by Kenya that have not only become part of the local laws by virtue of Article 2 (6) of the Constitution but have also had tremendous influence on domestic legislation and policies on fair trial and witness safety. The study also underscored important fundamental global principles that nuance both the domestic and international instruments with the view to highlighting areas of strengths and weaknesses.

This Chapter is therefore a culmination of the research into; an accused's right to disclosure of exculpatory evidence the implication of witness safety and confidentiality on the right to fair

trial. It condenses the findings into simple coherent statements of finality reflective of the established norms. Accordingly, it not only summarily restates the findings of the study in respect of each of the tested research hypotheses but also expounds on the respective lessons and insights, and recommends adjustments, policy or otherwise, necessary to effectively address the shortcomings identified in the course of the study. It also proposes areas in need of further research or scholarly engagement.

## **4.2 Adequacy of Legal Framework**

### **4.2.1 International instruments**

The study established that the right to fair trial as a concept is championed by both international and domestic legal and policy instruments. On the international front, the concept is advocated by the African Charter on Human and Peoples' Rights (ACHPR); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Torture Convention); the International Covenant on Civil and Political Rights (ICCPR), Universal Declaration on Human Rights (UDHR).

The conventions and charters are unanimous on the general principles and specifics of the right to fair trial. All postulate that everyone has a right to an effective and expeditious remedy by competent courts and tribunals for acts violating the fundamental rights and liberties granted to them by the law and the constitutions of the respective member states. They prohibit subjection of individuals to arbitrary arrests, detention or exile and guarantee an accused's right to fair trial. The instruments uniformly espouse that every individual is guaranteed a right to public, fair and impartial trial by an impartial and independent court, in the ascertainment of their obligations and rights as well as of charges against them. All persons against whom criminal accusations have been made and charges preferred, is entitled to be presumed innocent. Further, no one can be held or found guilty on account of any act or omission which did not constitute a crime, under international or national law, at the time when it was committed. Nor can a heavier penalty be imposed than the one that was applicable at the time

of the offending. In other words, no criminal law can apply retroactively and an accused has to be treated with dignity, respect and fairness as if they had not committed the crime for which they are charged, until it is established beyond a shadow of doubt that they indeed committed the alleged offence.

Whereas these international and regional instruments on human rights and fundamental liberties are incredibly critical at establishing the fundamental principles upon which respective member states draw inspiration for their domestic legal frameworks, their enforcement and operationalization is primarily contingent on the political will and legal maturity of the respective member state. In essence, the otherwise noble intentions are reduced to mere guidelines applicable only at the whims of prevailing political leadership. Even in instances where enforcement mechanisms have been put in place at the international arena, such as the Rome Statue, the threshold is generally so high that they fail to capture the majority of prevalent violations. As demonstrated in cases from Rwanda, the former Yugoslavia, Kenya, Sudan and Congo, the involvement of international enforcement mechanism is extremely slow and focuses primarily on prosecution of individuals bearing the greatest responsibility for crimes leaving out many offenders otherwise deserving trials.

Secondly, while the international instruments are fairly elaborate on what constitutes the right to fair trial and justice, they fail to provide specific and dependable definition of what amounts to justice. They also do not take into account considerations generally ancillary to any criminal trial processes. These include witness safety and confidentiality. Strict non-contextual implementation of the right to fair trial as per the postulations of these instruments demands full disclosure of evidence, both potentially inculpatory and exculpatory, in advance of trial. This inordinately ignores the possibility of reprisal of an accused and their sympathizers on any potential witnesses and victims, leaving entirely to the court, and without any guidance whatsoever, the discretion to determine the extent of disclosure. It is on this premise alone that this study concludes that the international and regional instruments governing the right to fair trial and justice are inadequately equipped at sufficiently providing guidance on the balance

between an accused's right to full evidentiary disclosure and the need to guarantee witness safety and confidentiality in instances where full disclosure has a higher likelihood of reprisal.

It is noteworthy however, that while changes in international instruments are advisable in light of the prevailing realities (increasing threat to witness safety), the process involved would make them excruciatingly slow. Even then, it would be incredibly arduous if not outrightly impossible for the instruments to be exhaustive enough in capturing the balance between the right to fair trial and witness safety or confidentiality. This is fundamentally the purpose of domestic laws.

#### **4.2.2 Kenya's legal framework**

The study also established that the domestic legal framework draws many parallels with the international framework in as far as the right to fair trial is concerned. In fact, the Constitution almost adopts the phrasing of the Universal Declaration of Human Rights (UDHR) verbatim. This is no surprise as the same is universally the originator and foundation of all human rights and fundamental freedoms.

The study determined that, besides the Constitution, the right to fair trial is promoted and safeguarded by the Criminal Procedure Code, Witness Protection Act and the Sexual Offences Act. Whereas the Criminal Procedure Code does not reinstate the fundamental liberties regarding the trial process and only provides a step by step process towards their realization from arrest of an accused to sentencing, the Witness Protection Act and Sexual Offences Act seek to promote justice by placing a limit on evidentiary disclosures in instances where the same is likely to occasion or threaten harm to a witness. Oftentimes, the harm or threats of harm are made primarily with the intention of intimidating witnesses into suppressing or changing their testimony.

As already established, the Witness Protection Act not only makes important distinctive definitions but also outlines circumstances under which individuals can be enlisted for state

protection. It defines a witness to include any individual involved in a criminal proceeding, within or outside Kenya, by virtue of having made a statement or given or has agreed to provide evidence in relation to an offence and requires protection due to a perceived risk or threat. It empowers the court, on application by the prosecution, to issue orders effectively limiting full disclosure to the defence in instances where apprehension of threat or risk is real.

Without adequate resources governing witness protection in Kenya, it would be difficult to guarantee justice and by extension, the right to fair trial. Only through credible, uninhibited or uninfluenced and truthful witness' testimonies can offenders be booked and punished for criminal wrongdoing. Lack of adequate elaborate witness protection mechanisms would see many otherwise dependable and credible witnesses shy away from the criminal judicial process effectively subverting the course of justice and perpetuating the culture of impunity. Kenya has enacted the Witness Protection Act (WPA), but with limited resources its adequacy is still wanting.

The study established that the legal framework is insufficient at guaranteeing the right to fair trial as well as witness protection. This is largely due to the fact that operationalization of the law is fundamentally dependent on political will. The study found out that since the government has not prioritized witness protection, an acute lack of funds has rendered the Witness Protection Agency incapable of handling the outpouring demands and references. Further, many otherwise deserving witnesses have shied away from the Agency and even failed to cooperate with the courts and the prosecution on account of apparent lack of independence of the Agency. This is especially due to the fact that the Agency's leadership comprises the offices of the Attorney General, the Inspector General of Police and the Director of National Intelligence Service making it seem rather impartial and thus porous in criminal matters involving state officials and dangerous influential persons. Even then, these still points to an inadequacy of the law and the institutions established.

### **4.3 Non-disclosure and the right to a fair trial**

The study also set out to explore the extent non-disclosure violates an accused's right to a fair trial. It operated on the hypothesis that non-disclosure of evidence, exculpatory or otherwise, infringes on the right to a fair trial. To test this hypothesis, the study not only looked into the evidentiary disclosure obligations of the prosecution in domestic, international court and tribunals but it also examined potential mitigating circumstances and intricacies and in particular, safety and confidentiality of witnesses.

The research established that whereas all lawyers are superintended by strict legal and ethical rules of conduct, prosecutors are subject to even more stringent obligations. Unlike a private practitioners whose primary obligation is to be a zealous advocates and defender of the interest of their clients, prosecutors are strictly obligated to impartially and dispassionately pursue justice in addition to his/her role as advocates. After all, they are defenders, not of a single individual, but of the state and the society generally. With this responsibility come immense powers that far outstrip those enjoyed by other advocates and their clients. This creates a power imbalance between two adversaries that can only be mitigated by a strict set of rules and responsibilities. One such duty is to make full evidentiary disclosures.

So strong and punitive are the evidentiary disclosure rules that a violation, as demonstrated by both domestic and international jurisprudence, entitles the defence to a relief and sometimes even a discharge. The study established that these rules have their foundation in ethics and law. Ethically, the limitations and obligations placed on the prosecution are meant to not only limit potential prosecutorial overreach but to also protect the integrity of the judicial process. The prosecution is strictly required to ensure that all the relevant facts, including those favourable to an accused, are fairly, ethically and dispassionately presented before a court of law. Accordingly, a prosecutor is strictly directed to refrain from acts or omission that could lead to the trial and conviction of innocent persons. In law on the other hand, the heightened obligations of the prosecution beyond mere advocacy is to not only reduce the disparity of resources between the prosecution and the defence but to also ensure fair judicial process as

well as stem any potential abuse of power. A prosecutor's duty is thus to seek justice and no less. In furtherance of this obligation, and in an obvious attempt to effectively alleviate the inherent inequities between the defence and the prosecution, the prosecution is expected to provide the defence with certain assistance.

It was established however, that while the prosecution is strictly obligated to make full evidentiary disclosures in advance of trial, no such requirement is expected of the defence. At no time can the prosecution claim reciprocity of disclosure obligations. Domestic courts have in fact been particular that central to Kenya's criminal trial procedure is the presumption of innocence of the accused as well as the constitutional deterrence of compulsion of the accused to provide evidence in proof of their innocence. The courts have held that the burden of proof invariably lies with prosecution and at no time does it shift. Arguing for reciprocity would effectively imply a shift of this burden and thus a demand that an accused, otherwise presumed innocent, adduce evidence as to their innocence or in counter of their presumed guilt. Furthermore, since nobody can under the laws arrest the Republic of Kenya and charge it with a criminal offence so that it would require it to be informed of the nature of the offence against it, the question of reciprocity of disclosure obligations or level playing field, are as unthinkable as they are misplaced.

The study also found out that in the absence of a law specifically conferring powers on a court to compel an accused person to make evidentiary disclosures, no such order can be issued. Such approach would create a dangerous precedent and establish a rather false and misguided theory that what is convenient and would expedite the disposal of a matter is lawful. Such an attempt would amount to blatant abuse, disregard and limitation of the right of the accused to fair trial as espoused in Article 50 of the Constitution. The state is definitively the usual and obvious violator against whom protection is constitutionally sanctioned and it ought not to be allowed to claim the same privileges. Affirmatively therefore, there is not and there can be no question of reciprocal rights, or a level playing field or any such theory as between an accused person and the state.

There is however circumstances where the prosecution can with the leave of court fail to make full disclosures. The research established that one such circumstance is where full disclosure bears a higher likelihood of exposing witnesses to harm or threat of harm either from the accused or their associates and sympathizers. To seek further understanding on the applicability of this exception, the study looked at the practice in ICTY, ICTR and ICC. It established that the prosecution can be allowed to conceal the identity and confidentiality of witnesses. Domestically, the same is provided for under the Sexual Offence Act especially where minors are involved. The study found out that often the prosecution at the international tribunals hide behind the exceptions to not only frustrate the defence but to also create the impression that they have a water-tight case, even when that is not the case. Such incidences are abated by the fact the trial rules and procedures of the courts do not provide strict sanctions for failure of the prosecution to disclose evidence. Even in instances where such failure is established, the penalties are so weak to deter officers and the office of the prosecution is sanctioned collectively as opposed to individual prosecutors.

### **International Criminal Court and Tribunals**

The study found out there is an ambiguity in the rules of procedure and evidence in the international criminal tribunals and the ICC. The accountability mechanism for punishment of non-disclosure is not sufficient therefore the likelihood of prosecutors overlooking rules of disclosure is very high. What entails exculpatory evidence is also rather unclear and determinations have been made on a case to case basis.

Even in matters of confidentiality on account of safety of witnesses and witness security, very little guidance has been made; exceptions are decided on the merits of a case. This has caused the cases to go on for a longer period than anticipated. However in some of the decided cases prosecutors have been allowed to conceal the identities of these witnesses.

With the magnitude and global scrutiny of the cases handled at this level coupled with the large number of victims usually involved prosecutors are driven to try as much as possible to secure a conviction at the expense of the accused.

#### **4.4 Conclusions**

On the premise of the findings of the study, it is conclusive to surmise the following:

First, whereas the international legal instruments and principles on the right to fair trial upon which the domestic legal framework draw inspiration are, at face value, adequate at promoting, protecting and upholding the right to fair trial and other fundamental human liberties, they are predominantly silent on matters and concerns antecedent or ancillary to fair trial and in particular, safety and confidentiality of witnesses. This inadequacy is by extension reflected on the domestic legislation and the Constitution. Furthermore, in leaving it to the courts to determine what amounts to justice or fair trial introduces the element of variance further affecting the dependability and replicability of the anchoring law. Parliament has sought to address this void through the enactment of the Witness Protection Act. Even then, the failure of the government to properly equip and fund programmes run by the Agency established under the Act (Witness Protection Agency) to not only implement it but also give meaning to witness protection are still indicative of weakness. On this premise alone, it is justifiable to conclude that the existing legal, regulatory, policy and institutional framework governing the right to fair trial is inadequately equipped at creating a balance between the right of accused with the safety and confidentiality of witnesses and victims of crime.

Secondly, failure on the part of the prosecution to make evidentiary disclosures amounts to violation of an accused's right to fair trial. Even worse is failure to disclose potentially exculpatory evidence. Violation of this obligation is evidently rife in the country and in the absence of clear and concise punitive legal and ethical sanctions for abuse, is likely to continue unabated. Strict adherence to this duty can only be feasible if the prosecution is held accountable. While the consequences of such non-disclosures are obvious, including vacation

of conviction and other remedies, the same are demonstrably not deterrent enough to prosecutors. Non-disclosure or partial disclosure is only allowable if the same is sanctioned by the trial court and only for the purposes of protecting witness safety and confidentiality. Care must however be taken not to allow the prosecution hide behind this exception to punish the defence or drive private malicious agenda.

Thirdly, there is a consensus among scholars that the adversarial nature of criminal trial process oftentimes sparks emotions creating a wedge between the prosecution and the defence making it incredibly difficult for otherwise credible witnesses to confidently and coherently provide testimonies for fear of reprisal. Some of the procedural rules and principles meant to safeguard the right of an accused to fair trial are inherently adversarial in nature and generally tend to cause challenges in prosecution of certain offences such as murder, rape, robbery with violence and defilement. These principles include constitutional entitlement to bail; presumption of innocence; the rule on competency of witnesses; the standard and burden of proof; the rule on admissibility of hearsay evidence; the requirement that criminal proceedings be held in public and the courtroom set up; the passive role of a judge; the requirement that evidence should be adduced orally in examination-in-chief; and the right of the accused to cross-examine witnesses.

In the interest of justice and pursuit of fair trial, there is an incredibly undeniable consensus among experts as demonstrated by the study that such adversarial approach must be tampered with an introspective evaluation of every trial process. Such a review would yield credence to otherwise important matters often ignored. These include witness safety and confidentiality and the likelihood of an accused to seek revenge or reprisal against witnesses. To this end, there is an undeniably deep understanding and unanimity that the rights of victims and witnesses to crimes are human rights and are thus as important as those of the accused and must be equally enforced in criminal proceedings.

## 4.5 Recommendations

Based on the outcome of the study and the conclusions already highlighted, this research recommends as follows:

- a) An urgency for countrywide sensitization of investigators and the prosecution on their role in the trial process. The police and prosecutors need to be made to understand that their role is seldom to secure convictions at all costs but rather to help the court make informed decisions based on credible and ethically gathered and adduced evidence. The pressure to secure convictions has been established as the biggest motivator for blatant suppression of potentially exculpatory evidence.

These aspects of police and prosecutorial conduct can be included in the police training curriculum and succinctly captured in both on-boarding and continuous on-job training of prosecutors. The Office of the Director of Public Prosecutions (ODPP) in Kenya in 2018 established the Prosecutors Training Institute (PTI) to offer specialized prosecutorial training which is envisaged to enhance execution of the office's mandate under Article 57 of the Constitution of Kenya. It would be a good step if the institute offers standardized training on areas of evidentiary disclosures especially exculpatory evidence. The institute can serve as a resource centre for prosecutors and other justice stakeholders.

- b) Both ethical and procedural rules on violation of prosecutorial disclosure obligations should be made as clear and concise as possible with specific punitive sanctions for violations to discourage deliberate, blatant and malicious infringement of the right to fair trial through suppression of material evidence. The punishments should be so severe as to disincentivize violation and prosecutors should bear individual responsibility. Only then will cases of malicious prosecution be reduced to an absolute minimum if not eliminated entirely.

- c) There is also need to revitalize and strengthen the legal, policy and institutional framework governing the rights of both the accused and victims of crimes to fair trial. In particular, the Witness Protection Agency needs to be empowered both legally and financially through adequate funding to operate autonomously without undue external influence. There is a need to inspire confidence in the general population that the Agency is unlikely to be influenced by influential persons accused of crimes. Witnesses taken under the wings of the Agency must not only feel safe but also find peace in helping the cause of justice rather than feel guilty or threatened by their mere thought of it. While this endeavour could in application prove incredibly costly, it could be achieved through partnership with other organizations and entities. Protection programmes can progressively build cooperation with counties to help build trust and confidence.
- d) Judicial officers also need to be constantly made aware that their duty is to pursue justice dispassionately without pandering to the whims either of the witnesses, victims and their sympathizers or the accused. Through the Judiciary Training Institute (JTI) an introduction of continuous periodic trainings of judges and other judicial officers on the nuance between the right of accused to fair trial and the need to shield witnesses from harms likely to result from evidentiary disclosures should be fast-tracked, and especially in the wake of the Witness Protection Act. The Witness Protection Agency is a stakeholder at the institute therefore more needs to be done to ensure witness safety is a paramount consideration. The continued training on evidentiary issues and procedure would facilitate growth of jurisprudence and enhance performance of judicial duties promoting pursuit of juristic excellence.
- e) The rules of disclosure should provide that specific evidentiary requests by the defence be made over broad ones. This would save time and costs made for blanket applications for exculpatory evidence. It would also make it easier for the court to make

determinations as to whether rationales for withholding evidence qualify as exceptions to the general rule. This can be enforced as a judicial practice guideline.

- f) Statutory reforms should be taken into consideration for example the Evidence Act needs to be aligned with Constitution especially Article 50(2) (j) which covers the right of the accused to information which is held by the state. The reform could come in Chapter III (Part II), immediately after Section 63(3) of the Evidence Act which outlines issues of oral evidence.

Secondly an amendment in the Criminal Procedure Code and the Evidence Act to make witness protection a substantive provision rather than an in-passing proviso would be go a long way in solidifying witnesses protection.

## BIBLIOGRAPHY

### Books

Ambos K, *Treatise on International Criminal Law*, 1ed, Oxford University Press, 2013.

Carter L and Pocar F, *International Criminal Procedure*, Edward Elgar Publishing, 2013.

Gideon Boas and William Schabas, *International Criminal Law: Development in the Case Law of the ICTY*, Vol. 6 Martinus Nijhoff Publishers, 2003.

Klamberg M, *Evidence in International Criminal Trials*, 1ed, Martinus Nijhoff Publishers, 2013.

Malekian F, *Jurisprudence of International Criminal Justice*, 1ed, Cambridge Scholars Publishing, 2014.

MacDermot N and Arns P, *Torture, How To Make The International Convention Effective*, 5ed, International Commission of Jurists & Swiss Committee against Torture, 1979.

The Nicomachean Ethics of Aristotle, (Book V), 10ed, Keagan Paul, Trench, Trubner and Company Limited, 1906.

Welch C and Meltzer R, *Human Rights and Development in Africa*, State University of New York Press, 1984.

### Journal/Articles

Adele J, 'Comparative Analysis between Adversarial and Inquisitorial Legal Systems' *SSRN Electronic Journal*, 2017.

Ambani J, 'Navigating Past the "Dualist Doctrine": The Case for Progressive Jurisprudence on the Application of International Human Rights Norms in Kenya' in M Killander (ed), *International Law and Domestic Human Rights Litigation in Africa*, Pretoria University Law Press, (2010).

Ambos K, 'Confidential Investigations (Article 54(3) (e) ICC Statute) v. Disclosure Obligations: The Lubanga Case and National Law' 12 *New Criminal Law Review* 4, 2009.

Bax M, 'Mass Graves, Stagnating Identification, and Violence: A Case Study in the Local Sources of "The War" In Bosnia Herzegovina' 70 *Anthropological Quarterly* 1, 1997.

Bhardwaj R, 'A Critical Study of the Role of Prosecutor in Criminal Law' 3 *International Journal of Law* 4, 2017.

Bilder R and others, 'The Universal Declaration of Human Rights: A Commentary', 88 *The American Journal of International Law* 3, 1994.

Barnidge R, 'Anti-Zionism, Jus Cogens, and International Law: The Case of the Banjul Charter and Arab Charter', 9 *The Journal of the Middle East and Africa* 1, 2018.

Catani L, 'Victims at the International Criminal Court: Some Lessons Learned from the Lubanga Case' 10 *Journal of International Criminal Justice* 4, 2012.

Chinkin C, 'Due Process and Witness Anonymity ' 91 *The American Journal of International Law* 1, 1997.

Dressler J, *Encyclopaedia of Crime & Justice*, Macmillan Reference USA, 2ed, 2002, (eBook).

Fedorova M, *The Principle of Equality of Arms in International Criminal Proceedings*, Intersentia, 1ed, 2012.

Fisher S, 'The Prosecutor's Ethical Duty To Seek Exculpatory Evidence In Police Hands: Lessons From England' *SSRN Electronic Journal* [2000].

Fordham M, 'Disclosure Principles' 12 *Judicial Review* 4, 2007.

Ford S, 'Measuring, Understanding, and Predicting Trial Complexity at the ICTY' *SSRN Electronic Journal*, 2012.

Green B, 'Prosecutors and Professional Regulation' 25 *Fordham Law Review* 28, 2012.

Grey R, 'Interpreting International Crimes from A 'Female Perspective': Opportunities and Challenges for the International Criminal Court' 17 *International Criminal Law Review* 2, 2017.

Harmon M and Karagiannakis M, *The Disclosure of Exculpatory Material by the Prosecution to the Defence under Rule 68 of the ICTY Rules*, 2001.

Hughes G, 'The Concept of Dignity in the Universal Declaration of Human Rights', 39 *Journal of Religious Ethics* 1, 2011.

Irving E, 'Protecting Witnesses at the International Criminal Court from Refoulement' 12 *Journal of International Criminal Justice* 5, 2014.

Jixi Zhang, 'Fair Trial Rights in ICCPR', 2 *Journal of Politics and Law* 4, 2009.

Kabau T and Ambani J, 'The 2010 Constitution and the Application of International Law in Kenya: A Case of Migration to Monism or Regression to Dualism?' 1 *Africa Nazarene University Law Journal* 1, 2013.

Kearney M, 'The Prohibition of Propaganda for War in the International Covenant on Civil and Political Rights', *Netherlands Quarterly of Human Rights*, (2005), 23.

Kiprono W, Ngetich K and Mwangi W, 'Challenges Facing Criminal Justice System in Relation to Witness Protection in Kenya' 20 *IOSR Journal Of Humanities And Social Science (IOSR-JHSS)*, 2015.

Klamberg M, 'What are the objectives of International Criminal Procedure? - Reflections on the Fragmentation of a Legal Regime' 79 *Nordic Journal of International Law* 2, 2010.

Kurcias M, 'The Duty of the Prosecutor to Disclose Exculpatory Evidence' 69 *Fordham Law Review* 3, 2000.

Lippke R, 'The Presumption of Innocence in the Trial Setting', 28 *Ratio Juris* 2, 2015.

Moranchek L, 'Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY' 31 *Yale Journal of International Law* 2, 2006,

Negri S, 'The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure' 5 *International Criminal Law Review*, 2005.

Nofer P, 'Specific Requests and the Prosecutorial Duty to Disclose Evidence: The Impact of United States v. Bagley' 1986:892 *Duke Law Journal*, 1986.

Omondi S, 'The Right to a Fair Trial and the Need to Protect Child Victims of Sexual Abuse: Challenges of Prosecuting Child Sexual Abuse under The Adversarial Legal System in Kenya' 2 *Quest Journals Journal of Research in Humanities and Social Science* 3, 2014.

Rowzey M 'International Criminal Law Manual' *International Bar of Association Report*, 2010.

- Rydberg A, 'Case Analysis: The Protection of the Interests of Witnesses – The ICTY in Comparison to the Future ICC' 12 *Leiden Journal of International Law* 2, 1999.
- Sadat L, 'The Legacy of the International Criminal Tribunal for Rwanda' *SSRN Electronic Journal*, (2012).
- Sanan-Ogly G, 'Adversarial Principle and Principle of Equality of Arms as a Subject of Adversarial type of Criminal Proceeding' 7 *Journal of Advanced Research in Law and Economics* 4, 2016.
- Sangkul K, 'ICC Prosecutor's Duty to Disclose Exculpatory Evidence' *Korean Lawyers Association Journal*, 2009.
- Silwal R, 'Right against Torture and Case of Maina Sunuwar: An Analysis in the Light of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)' *SSRN Electronic Journal*, 2011.
- Smith L and Olivier M, 'How the International Criminal Court is balancing the Right of Victims to Participate with the Right of the Accused to a Fair Trial', T.M.C. Asser Institute, 2008.
- Swoboda S, 'Confidentiality for the Protection of National Security Interests' 81 *Revue internationale de droit pénal* 2, 2010.
- Sznajder R, 'Provisional Release at the ICTY: Rights of The Accused and the Debate That Amended a Rule' 11 *Northwestern Journal of International Human Rights* 3, 2013.
- 'Victims at the International Criminal Court: Some Lessons Learned From the Lubanga Case' *Journal of International Criminal Justice*, (2012), 10.
- Ward A, 'The Evidence of Anonymous Witness in Criminal Courts: Now and Into the Future' 21 *The Denning Law Journal* 1, 2009.
- Weissbrodt D and Hallendorff M, 'Travaux Préparatoires of the Fair Trial Provisions -- Articles 8 To 11 -- Of The Universal Declaration Of Human Rights', 21 *Human Rights Quarterly*, 1999.

Wilson R, 'Expert Evidence on Trial: Social Researchers in the International Criminal Courtroom' 43 *American Ethnologist* 4, 2016.

Zappala S, 'The Prosecutor's Duty to Disclose Exculpatory Materials and the Recent Amendment to Rule 68 ICTY RPE' 2 *Journal of International Criminal Justice* 2, 2004.

Zhang J, 'Fair Trial Rights In ICCPR' 2 *Journal of Politics and Law* 4, 2009.

## **Thesis**

Biomdo J, 'Judicial Enforcement of the Right to a Fair Trial without Unreasonable Delay under Article 50 of the Constitution Of Kenya' Unpublished LLM Thesis, University of Nairobi, 2015.

## **Internet Sources**

'About The International Criminal Court' (*Icc-cpi.int*, 2019) <<https://www.icc-cpi.int/about>> accessed 15 April 2019.

'About The ICTY | International Criminal Tribunal for the Former Yugoslavia' (*Icty.org*, 2019) <<http://www.icty.org/en/about>> accessed 15 April, 2019

Cornel University Law, at [https://www.law.cornell.edu/wex/exculpatory\\_evidence](https://www.law.cornell.edu/wex/exculpatory_evidence) .

IAP (1999) “*Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*,” adopted by the International Association of Prosecutors on the twenty third day of April 1999, at [http://www.iap-association.org/getattachment/Resources-Documentation/IAP-Standards-\(1\)/English.pdf.aspx](http://www.iap-association.org/getattachment/Resources-Documentation/IAP-Standards-(1)/English.pdf.aspx)

International Criminal Tribunal for the former Yugoslavia (ICTY), 16 June 2004, available at: <https://www.refworld.org/cases,ICTY,47fdb590.html> [accessed 21 March 2019]

Rohde D, 'Graves Found That Confirm Bosnia Massacre' *The Christian Science Monitor*, (1995) <<https://www.csmonitor.com/1995/1116/16012.html>> accessed 12 April, 2019.

'The ICTR In Brief | United Nations International Criminal Tribunal for Rwanda'  
(*Unictt.irmct.org*, 2019) <<http://unictt.irmct.org/en/tribunal>> accessed 15 April, 2019.

## APPENDICES

### Appendix 1: Ethical review



**Strathmore**  
UNIVERSITY

20<sup>th</sup> November 2020

Ms Otulo, Mary  
maryotulo@gmail.com

Dear Ms Otulo,

**RE: Examining Prosecutor's Duty to Disclose Exculpatory Evidence and the Right to Fair Trial in Kenya**

This is to inform you that SU-IERC has reviewed and **approved** your above research proposal. Your application reference number is **SU-IERC0943/20**. The approval period is **20<sup>th</sup> November 2020 to 19<sup>th</sup> November 2021**.

This approval is subject to compliance with the following requirements:

- i. Only approved documents including (informed consents, study instruments, MTA) will be used
- ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-IERC.
- iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-IERC within 48 hours of notification
- iv. Any changes, anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-IERC within 48 hours
- v. Clearance for export of biological specimens must be obtained from relevant institutions.
- vi. Submission of a request for renewal of approval at least 60 days prior to expiry of the approval period. Attach a comprehensive progress report to support the renewal.
- vii. Submission of an executive summary report within 90 days upon completion of the study to SU-IERC.

Prior to commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology and Innovation (NACOSTI) <https://oris.nacosti.go.ke> and also obtain other clearances needed.

Yours sincerely,

*Dr Virginia Gichuru*  
Dr Virginia Gichuru,  
Secretary; SU-IERC

Cc: Prof Fred Were,  
Chairperson; SU-IERC



Ole Sangale Rd, Madaraka Estate. PO Box 59857-00200, Nairobi, Kenya. Tel +254 (0)703 034000  
Email [info@strathmore.edu](mailto:info@strathmore.edu) [www.strathmore.edu](http://www.strathmore.edu)

## Appendix 2: Plagiarism report

ORIGINALITY REPORT			
<b>19%</b>	<b>17%</b>	<b>10%</b>	<b>7%</b>
SIMILARITY INDEX	INTERNET SOURCES	PUBLICATIONS	STUDENT PAPERS
PRIMARY SOURCES			
<b>1</b>	<b>www.mcgeorge.edu</b> Internet Source		<b>1%</b>
<b>2</b>	<b>docshare.tips</b> Internet Source		<b>1%</b>
<b>3</b>	<b>pure.uva.nl</b> Internet Source		<b>1%</b>
<b>4</b>	<b>bura.brunel.ac.uk</b> Internet Source		<b>1%</b>
<b>5</b>	<b>ir.lawnet.fordham.edu</b> Internet Source		<b>1%</b>
<b>6</b>	<b>kenyalaw.org</b> Internet Source		<b>1%</b>
<b>7</b>	<b>su-plus.strathmore.edu</b> Internet Source		<b>&lt;1%</b>
<b>8</b>	<b>Kelly Pitcher. "Judicial Responses to Pre-Trial Procedural Violations in International Criminal Proceedings", Springer Science and Business Media LLC, 2018</b> Publication		<b>&lt;1%</b>