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TABLE OF CONTENTS

Title page.....i

Editorial Board.....ii

Call for Papers.....iii

Table of contents.....iv

1. Critical Assessment of Corporate Governance in Nigeria.....1
2. Current Judicial Approach to Customary Law and the Repugnancy Doctrine.....12
3. Bigamy: A Superfluous and an Insipid crime in Nigeria.....22
4. The Dilema of obtaining justice in the Nigerian Legal System.....34
5 The Role of Equity in the Development of Mortgage institutions in Nigeria.....50
6. My Witness Became Hostile! National and Supra-National Criminal Justice Systems Examined.....70
7. Consequences of Recapitalization of the Banking Sector and Nigerian Economy.....94
8. Alternative Dispute Resolution (A.D.R.)A blessing or a curse on jural relations.....103
9. Contesting the Administration of Land within the context of Nigerian Federation. An Examination of the Land Use Act 1978 and Allied Matters.....114
10. Rebranding the Nigerian Polity through rule of law and good governance.....136

CHAPTER SIX

MY WITNESS BECOMES HOSTILE!! NATIONAL AND SUPRA-NATIONAL CRIMINAL JUSTICE SYSTEMS EXAMINED.

By

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There are treacherous witnesses who will hold out that they can prove facts on one side in a case and then for bribe or for some other motive, make statements in support of the opposite interest. In such, the law undoubtedly ought to permit the party calling the witness to question him as to the former statements and ascertain if possible what induces him to change it., as per Lord Erle, CJ.[1]

PART 1

1.1 INTRODUCTION

Judicial bodies are established with responsibilities of ensuring justice and bringing defaulters to face the consequences of their breach of the law. However, an accused person can only be found guilty through the statement of witnesses. Evidence is the prime basis for any successful or unsuccessful law suit; criminal or civil. Judicial evidence is used to prove either facts in issue, or facts from which facts in issue may properly be inferred.[2]

Both parties to a law suit reserves equal rights to call witnesses through whom they seek to establish evidence in support of their cases. It is trite to state that a case is not grounded by the number of witnesses called by either parties rather on the weight attached to the admissible statements of witnesses.

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[1] Melhusih V Collier (18500 15 QB 878 @890.

[2] Cross and Tapper on Evidence, p28.

Witnesses are described as the eyes and ears of justice.[3]

In any criminal matter both parties are allowed to call witnesses. The witnesses are subsequently examined in chief by the party calling them, crossed examined by the opposing party and if need be re-examined by the part calling them. As a matter of procedure, all the above procedures regarding a witness must be exhausted before a case is closed. In the case of R V Day[4] a conviction of forgery was quashed because the judges allowed the prosecution to call a witness after it had closed its case.

While judges are not allowed to descend into the arena of justice[5] they reserve the right to examine witnesses to aid the right decision making. This approach must however, be made with so much caution.[6]

In both municipal and international law, evidence and the role witnesses play in any trial is paramount. However, in some circumstances, witnesses called by a party to a law suit deviate substantially from the evidence that they had earlier deposed to prior to a trial. Thus a part calling a witness to prove certain facts may be disappointed by his failure to do so. His difficulties may be increased by the witness's manifest antiparty to his cause.[7] Cross and Tapper draws a distinction between a favourable witness and a hostile witness in the sense that the formers testimony is merely not relevant to the issues he has been called to support while the later is completely not desirous of telling the truth at the instance of the party calling him.

The jurisprudence in municipal jurisdiction can be said to be already well developed. The same cannot be said of international judicial bodies. The International Criminal Court (ICC) embarked on its first trial in 2009.[8] It is therefore envisaged that issues of witnesses making different statements in court as against their earlier depositions and statements made to investigators of the Office of the Prosecutor (OTP) is eminent. If the reason for setting up the ICC will be met, it is important to draw a comparison on how the rules of evidence before the court are able to tackle such challenges. As much as the system of witness protection is seemingly well entrenched under the

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[4] (1940) 1 ALL ER 402

[5] R V Grafton (1993)QB 101

[6] In R v Hook (1994) 158 JP 1129, CA. the court was of the opinion that it can take this approach in order to ensure that proper procedures are followed in a trial.

[7] Cross and Tapper on evidence P 222.

[8] Thomas Lubanga Diyalo is the first trial commenced by the Office of the Prosecutor.

Rome statute, certain witness have grown cold feet in the evidence they have given before the court.[9]

This paper makes a comparison between the positions of hostile witnesses in Common and Civil law jurisdiction and international criminal justice system. Nigeria and Uganda are examined under the Common law systems, France and Argentina in the Civil law system and the International Criminal Tribunal for Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and International Criminal Court (ICC) under international criminal justice system. The need for this research is borne against the back drop of ensuring that perpetrators of the most grievous nature as set out in the Rome statute does not go unpunished based on the 'hostility of witnesses'. It is envisaged that the conclusion and recommendation made at the end will aid the International Criminal Court in building the jurisprudence of the court and assist the OTP procedurally in curbing the adverse effect of hostile witnesses.

This paper is divided into three parts. Part one deals with conceptual framework? Applicable rules of evidence and procedure for witness evidence in both municipal and international criminal justice system are also examined. Part two interrogates the situation in which a witness turns hostile. A Comparison is made. Part three considers available remedies open to the party calling the witness. Part four is the conclusion and recommendation.

1.2 CONCEPTUALISING A WITNESSES, EVIDENCE IN LAW AND HOSTILE WITNESS

Various legal traditions govern the administration of justice. Prominent among these legal systems are the Civil and Common law legal systems. While the civil law system relies on deductions from a general legislative provision to arrive at different conclusions, the common law is potentially tied to the vestiges of the past by the rule of stare decisis.[10] Despite the notable differences between the various legal regimes, certain procedure finds convergence in the quest to maintain justice in the entire regimes.[11]

A witness is someone who claims to have information on evidence. The

[9] For instance, the Deputy Prosecutor of the ICC cited threats as the reason why one of the prosecution witnesses called during the Thomas Lubanga case withheld information previously divulged to the prosecutor's investigators.

purpose of any witness evidence is to establish the truth of alleged fact. Evidence can be used to denote that some facts have relevance to the issues of fact. It is that which can be placed before the court in order that it may decide the fact.[12] Evidence can also be described as something which may satisfy an inquirer of the existence of a fact.[13] A witness testimony is of value only to the extent which it can testify to the knowledge of its truth and reality.[14] Probity is the qualitative value of evidence, making it persuasive or giving it weight or cogency. It is the duty of the court to evaluate any piece of evidence and determine what its probative value is, if any.[15]

The term "hostile" witness has its genesis in the Common Law. The function of the term was, to provide adequate safeguard against the "contrivance of an artful witness" who wilfully by hostile evidence "ruin the cause" of the party calling such a witness. It was felt that such actions are per se destructive, not only of the interests of the litigating parties, but also in the quest of the courts to meet the ends of justice.[16]

Witness demeanour, terms of inconsistent statement and the circumstances in which the statement of a witness was made goes a long way in proving weather such a witness should be treated as hostile cr not.[17] It is however, doubtful whether the mere existence of an inconsistency between a witness previous statement and his testimony at trial will necessarily lead the judge to allow the witness to be treated as a hostile witness.[18]

Among the options open to a party who feels that his witness has been hostile is to seek to impeach such a witness. He may cross-examine him by means of leading questions, ask him about his previous inconsistent statements and prove them if they are denied.[19]

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[12] Phipson on Evidence 15 edition p2.
[13] As in 1 above p1.
[14] Chittharanjan A 'Evidence in international litigation' p 200.
[15] D Nsereko, Rules of Procedure and Evidence of the ICTY in The prosecution of International Crimes ed by Rogers clerk and Madeleine Sann p 327.
[16] Hostile witness a critical analysis of key aspects hitherto ignored in Indian law, available at www.indian.com (accessed on the 20 of February 2009).
[17] R v Hunter (1956) VLR 31.
[18] Cross and Tapper on evidence P 330. In the ongoing case of the Prosecutor V Thomas Lubanga, the Presiding judge of Trial Chamber one insisted that the prosecutor must not merely allege that his witness is giving contradictory testimony as a result of fear but is required to prove such claims before the court.
[19] Cross and Tapper on evidence P 327

However it is enunciated that a party is prohibited from impeaching his own witness as a general rule.[20] In R V Darby[21] the bench reiterated that it was saddled with the wisdom of determining whether or not a witness is unfavourable or hostile to the party calling him.[22] A judge may therefore allow the cross examination of a witness by the party calling him. The basis for the general rules is founded on the presumption that 'a party ought not to have means of discrediting his witness, or that he guarantees the trust worthiness of evidence he adduced, or it would be unfair to subject the witness to two cross-examinations'.[23]

The solution seems to be that the witness may be asked leading questions, while challenging his knowledge of the situation he is been examined on or which he has deposed to. The general conclusion is as such that discrepancy in statements of witnesses will generally affect the weight to be attached to the statements.[24]

PART 2

2.1 RULES OF EVIDENCE AND PROCEDURE MUNICIPALLY AND INTERNATIONALLY.

Rules of Evidence provide the means by which a court ascertains the truth.[25] The law that relates to evidence in the old Common law jurisdiction is found in the Criminal Procedure Act (CPA)[26] and currently Civil Evidence Act of 1995 and the Criminal Justice Act of 2003. Currently, in various countries, the Evidence Act governs the applicability of evidence before judicial bodies.

Rules applicable in international law include the constitutive instruments of international courts, their rules of procedure, general principles of law and rules developed in international judicial practice.[28] The rules of procedure of international courts represent a significant source of rules of evidence and often amplify the provision of the statute.

Discussed below are the situation in Uganda, Nigeria, France, Argentina, ICTY, ICTR and ICC.

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20 R v C (JR) (1996) (110) CCC.
21 (1989) CRIM LR 817
22 Bastin V Carew (1824) RY & M 127.
23 Cross and Tapper on evidence P 329
24 R v Goodway (1993) 4 ALL ER 894 @899.

2.2 COMMON LAW JURISDICTIONS

2.2.1 UGANDA SITUATION

In Uganda judicial evidence is regulated by the Evidence Act[29], The law on witnesses in Uganda basically deals with competence and compellability. Competence refers to the capacity of a person to give evidence in court. This is important because there are categories of people that do not have the capacity to be witnesses.[30] Compellability of a witness refers to whether a person can be subjected to compulsory processes of the court.[31] Compellability is derived from the general rule that 'All persons shall be competent to testify unless court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of the mind, body or any other cause of the same kind'.[32]

Accordingly, the examination of witnesses is done in the order regulated by law and practice, both in civil and criminal matters.[33] Examination of a witness by a party who called the witness is done and this is the examination in chief, then the adverse party which is the cross examination.[34] Leading questions may not be asked unless during cross examination.[35] Also there is no obligation placed on either party to call a particular number of witnesses to prove any fact.[36]

Despite these provisions, witnesses have in some situation turned hostile in proceedings. In Uganda, therefore, a hostile witness is one who from the manner in which he gives evidence, within which is included the fact that he is willing to go back upon previous statements made by him, shows that he is not desirous of telling the truth.

29Evidence Act ,Cap 6 Laws of Uganda section 133.
30lunatics, very young children and very old people.
31Diplomats and Presidents are not compellable witness's.
32Evidence Act, Cap 6 Laws of Uganda section 117.
33Evidence Act, Cap 6 Laws of Uganda, section 134.
34Evidence Act ,Cap 6 Laws of Uganda s.136 and 137
35Evidence Act, Cap 6 Laws of Uganda section 140.
36Evidence Act, Cap 6 Laws of Uganda section 142.

In the case of Okwonga Anthony v Uganda,[37] the hostile witness was determined when his testimony was contrary to his prior statement. As such the testimony is not admissible as evidence. Invariably, this leads to impeaching of a witnesses' credibility.[39]

A party seeking to impeach a witness who turns hostile can achieve same with the consent of court; by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.

2.2.2 NIGERIAN SITUATION

Evidence in Nigeria is regulated by the Evidence Act. The Act makes provision for the procedure of admission of evidence in Nigerian courts.[40] The relevance of evidence to a fact in issue determines the admissibility of such evidence in Nigeria.[41] In Agunbiade v Sasegbon,[42] relevance was held to be the basis of the Nigeria evidence procedure. Examinations of witness in chief and cross examination are provided in the Evidence Act.[43]

While a party calling a witness is barred from cross examining his witness, an exception is made in the Act. It is provided that;

> *The party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the court, prove hostile, contradict him by other evidence, or by leave of the court, prove that he has made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness and he must be asked whether or not he has made such statement.*[44]

Thus, a hostile witness is one who by his conduct shows that he is hostile to

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[37](Appeal from the judgment of the Court of Appeal dated 23.3.2000 in Court of Appeal Criminal Appeal No. 1 of 1998.

[38]Evidence Act ,Cap 6 Laws of Uganda section 153..

[39]CAP E112 Laws of the Federation 1990.

[40]Evidence Act, section 2(3).

[41]Evidence Act, section 6, see also Agunbiade v Sasegbon

[42](1968) NMLR 223.

[43]Section 186-189.

[44]Evidence Act section 207.

the party calling him. The mere fact that the witness had made a statement previously contradicting his evidence in court is not sufficient to declare him hostile. This is because of the general rule that prevents a party from discrediting his witness. However, if the court is satisfied from the general conduct of the witness that he is hostile to the party calling him, then the court, in its discretion, may allow the party calling the witness to put leading questions to him or cross examine him.

In the case of S.O Esan Vs the state,[45] a witness was considered hostile when he bears a hostile animus to the party calling him and so does not give his evidence fairly with a desire to tell the truth to the court. Where a witness called by the prosecution on a material point turns hostile, the prosecution ought to lay some foundation, such as showing that the witness is hostile before they can ask the court to reject the testimony of one witness and accept that of another witness in preference to the evidence of the discredited witness. It is not competent for the prosecution which called them to pick and choose between them. The prosecution cannot, without showing clearly that one is a hostile witness discredit him and accredit the other.[46]

In Nathaniel Nasami vs The State,[47] it was held that before the question of making a choice can arise, the contradiction in the evidence of the witnesses must be on a material point. Before a hostile witness can be discredited, it must be upon cross examination as to a former statement made by him relative to the subject matter of the trial. The inconsistency with his present testimony does not distinctly admit that he has made such statement, proof can be given of the circumstances of the supposed statement sufficient to designate the particular occasion.[48]

In all, the prosecution is not under any obligation to call all his witnesses in a trial. Upon suspecting that any witness may become hostile, he should avoid calling such a witness. In the case of Osuagwu v State, [49]it was held that the prosecution is not bound to call all his witnesses so far it presents material evidence to prove his case.

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[45](1976) I I S.C 93, 104 – 105

[46]Christopher Onubogu and another vs The State (1974) 9 S.C 1, 20

[47](1979) 6-9 Sc 153.

[48]Evidence Act, section 208.

[49](2009) 1 NWLR PART 1123, P523-d.

2.3 CIVIL LAW JURISDICTION

The civil law system is steeped in Roman law, which eventually led to the Napoleonic Code, the foundation of French law. The civil law spread to the rest of continental Europe, Russia, and China, most of Asia, Latin America, and part of Africa.

Civil law jurisdictions use the inquisitorial method. Judges and arbitral tribunals actively elicit the facts and law from counsel and witnesses. A party or counsel who wants to question a witness must present the question to the tribunal, which then questions the witness.

According to Zelezeck,[50] witnesses are not as such witnesses of the prosecution or the defense. However, there is what is referred to as 'temoins a charge' (witnesses whose testimony is against the accused) and 'temoins a decharge (for the accused). But these witnesses are not as such called by the prosecution or the defence, they are called to testify by the judge and it is primarily him (the judge) who put questions to them.

During the proceedings, the onus is on the judge who 'dialogues' with witnesses in the light of the information contained in the 'dossier' he had already read before coming to court and which are contained the proceedings of the preliminary investigation carried out by the police or the state counsel. However, it is important to state that defence and state counsel do also put question to witnesses, but 3/4 of the time it is the judge who puts questions and the intervention of the counsels only serve to clarify some few issues, mainly, though not exclusively, those that arose during the questioning of the witness by the judge.

A counsel is thus theoretically able to raise issues of hostility of a witness to the judge and seek that such a witness be so treated. This is however, only obtainable if the counsel has knowledge that the witness previously held favourable views for his side. He would simply remind the witness that he previously made a different testimony and draw the attention of the judge to this fact in order to discredit the witness.

Zelezeck is of the view that civil law jurisdiction rather places emphasis on the sanctity of the testimony before the court. Witnesses are not witnesses of any

[50] "Email" received on 14 April, 2009.

side but are rather citizens who are called before a sacrosanct institution of the State to state truthfully what they know of a matter.
This position informs the rather harsh penalties that are melted out on those who make false testimony before the courts.[51]
Considered briefly in the situation under civil law jurisdictions

2.3.1 FRANCE SITUATION

Under the French Code of Criminal Procedure,[52] criminal procedure should be fair and adversarial and preserve a balance between the rights of the parties.[53] The judge d'instruction (investigating judge) or the presiding judge of the court call for a witness to appear before him when this witness is intended to be called by a party (prosecutor or defence or the victim).[54]

Subsequently, the investigating judge summons any person whose statement appears useful to him before him through a bailiff or a police officer. A copy of this summons is handed over to the person. Witnesses may also be summoned by an ordinary letter, a recorded delivery letter or through administrative channels; they may also appear on their own volition.[55]

The statements of the witnesses are taken in Camera by the Investigating judge in the presence of his clerk. The service of an interpreter may be required if need be.[56] Article 114 of the Code provides in terms of fair hearing that no witness shall be heard in trial in the absence of his lawyers. Indeed, the procedure ensures that the advocates are availed of the case file a minimum of 5days before the commencement of the trial to peruse the contents. In contrast in extreme circumstances, the trial Judge is empowered to carry out private investigation of the testimony of the witness.[57]
While the position of hostile witness is generally not provided for the Code of Criminal Procedure, a safe guard is provided for in the code. In an event where

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[51] See generally, Article 434-13, Article 434-14 of the Penal Code of France.
[52] France, du code de procédure pénale http://195.83.177.9/upl/pdf/code_34.pdf (accessed 14 April 2009).
[53] N 48 above, article 1.
[54] N 48 above article 324.
[55] N 48 above article 101.
[56] N 48 above article 102.
[57] N 48 above, article 118.

a witness either refuses to appear or gives false testimony, such a witness is liable to a fine to the sum of €3750.[58]

2.3.2 ARGENTINEAN SITUATION

According to the constitutional regulations currently in force in Argentina (since 1853), there is a constitutional Power distribution among the federal government and the states (Provinces) governments, with each arm having the power to dictate its own constitutions (strictly inside the national constitutional frame regulations[59] and their own rules (codes) of procedures as well as their judicial competencies.[60] Criminal Evidence in Argentina is regulated by National criminal procedure code and each state (province), has its own evidence law (e.g., Criminal Procedures Code of Buenos Aires Province), establishing different jurisdiction in one harmonic and balanced law regulations.

There is an important complex of basic dispositions in evidence matter as an essential way to strictly respect the constitution, especially as it relates to the rule to collect evidence,[61] evidence valuation,[62] or exclusions of evidence.[63]

In the judiciary process in Argentina, the witness is the person who personally knows the facts under investigation[64] and his statements could be useful to discover the truth. Every person will have the obligation to concur to the calling of the public Prosecutor. The Public Prosecutor receives the witness declarations and declares the truth of facts, except the exceptions established by the laws.

Every person is capable of testifying, with the Judge having the responsibility

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[58] N 48 above, article 326.

[59] 5th article of the National Constitution.

[60] Under the rules of the second part and second title of the National Constitution.

[61] 209th article of the Buenos Aires Province Criminal Procedure Code; every relevant fact and circumstances regarding to the object of the judiciary process may be collect them by any evidence thru of the means authorized by the criminal code, also may be used others means no authorized if they no affected any constitutional guaranties.

[62] 210th article of the Buenos Aires Province Criminal Procedure Code; evidence valuation requires the sincere conviction expression and written over the truth of the facts.

[63] 211th article of the Buenos Aires Province Criminal Procedure Code; every evidential activity in the judiciary process does not can affect constitutional guaranties.

[64] A person who perceives the facts directly through his senses (e.g. saw, listened, touched, etc.), may be not taken as a witness, any person who did not know personally and directly the relevant facts investigated. Generally, hearsay evidence is not admissible in both common and civil laws.

to value the testimony according to the dispositions of the criminal procedures code.

In Argentina, the situation of hostile witness is governed by the general rule established in criminal procedure codes of the punishments of witness not cooperating with the public prosecution.

A witness who thus refuses to make a truthful testimony may be arrested at the request of the Public Prosecutor. The detention would last for 24hours in order to elicit information from the witness. During this detention, the Public Prosecutor observes the demeanor of the witness in ascertaining the weight to be attached to his testimony.

According to Luis Alberto Regueira[65] this regulation will keep in force the indispensable time to receive the witness statement and also ensure its integrity.[66] Regueira, is of the opinion that while the term hostile witness does not exist in the Civil Law jurisdiction, the policies put in place are meant to shield the judiciary from being misled by false testimonies of witnesses

2.4 INTERNATIONAL JURISDICTIONS

2.4.1 ICTY SITUATION

The ICTY, unlike national courts deals with incidents which cover a number of years of conflict and involve many locations and incidents as opposed to single incidents covered by municipal courts.[67] In most situations the trials are long and complex and do not involve ordinary crimes but crimes in the magnitude of genocide, crime against humanity, massive rape etc. Like municipal courts a prosecutor must prove its case beyond reasonable doubt. It is a settled principle of law that it is better for one criminal to go free than for one innocent person to be punished.

The rules of evidence procedure before the ICTY are modified to ensure speedy but fair trials.[68] In a bid to achieve this, the tribunal must rely on available credible testimony of witnesses.[69] The rules of procedure and

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[65] Lecturer College of Law of the National University of Mar del Plata.
[66] Compulsion – arrest; art. 239th B.A.P.C.P.C.
[67] Chittharanjan A 'Evidence in international litigation' p 316.
[68] Prosecutor v Aleksovski, case no IT-95-14/1-AR73 @19.
[69] Kupreskic & ors case No IT-95-16-T@758.

evidence provides for the accused to cross examine prosecutor's witness and also call and examine his own witness.[70]

However, the restrictions on evidential rules as obtainable in the common law situation are generally avoided.[71] The basis of the application of evidential procedure before the ICTY is on a fair determination of matter before it which must be in consonant with the spirit of the law and the statute establishing the court.[72] Rule 95 of the Rules of Procedure and evidence provides for the exclusion of evidence in certain circumstances. The ICTY while following the common-law system is not constrained by its restrictive rules and can always seek its own evidence outside that provided by the parties.[73]

Furthermore, the reliance on life evidence by the physical presence of a witness at the seat of international tribunal enables the judges to evaluate the credibility of a witness and may discourage the witness from giving false evidence.[74]

2.4.2 ICTR SITUATION

In the ICTR, evidence is governed by the Rules of Procedure and Evidence.[75] Rules 89 is to the effect that, the rules of evidence set forth in the Section shall govern the proceedings before the Chambers. It further states that national rules of evidence shall not be a limitation to the application of evidence before the various Chambers. It is provided that in cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favor a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.

Furthermore, the Chambers are empowered to request verification of all evidence which is obtained out of court.[76] This provision therefore may prove important in situations where a party raises questions as to inconsistency of

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[70]Rule 85.
[71]Chittharanjan A 'Evidence in international litigation' p318.
[72]Rule 89 of the Rules of Procedure and Evidence.
[73]Rules 98.
[74]Case No 94-1-T (June 1996) @11.
[75]Rules of Procedure and Evidence, Règlement de Procédure et de Preuve International Criminal Tribunal for Rwanda (ICTR), Tribunal pénal international pour le Rwanda (TPIR), 14 March 2008 / 14 mars 2008 Section 3 Rules of Evidence.
[76]Rule 89(c).

witness statement. The presentation of evidence before the ICTR is same as in other situations already discussed. Each party is entitled to call witnesses and present evidence.[77] The sequence for the presentation of evidence is firstly, evidence for the prosecution; evidence for the defense; prosecution evidence in rebuttal; defense evidence in rejoinder. The trial Chamber is also empowered to take evidence by its order.[78]

Also of importance is that as early as reasonably practicable and in any event prior to the commencement of the trial, the Prosecutor shall notify the Defence of the names of the witnesses that he intends to call to establish the guilt of the accused.[79] An important aspect of the evidence procedure before the ICTR is the situation of a Pre-Trial Conference.[80] In addition, the Trial Chamber or the Judge may order the Prosecutor to provide the Trial Chamber with copies of written statements of each witness whom the Prosecutor intends to call to testify.[81] As obtainable in the common law jurisdiction, after commencement of trial, the Prosecutor, if he considers it to be in the interests of justice, may move the Trial Chamber for leave to reinstate the list of witnesses or to vary his decision as to which witnesses are to be called.[82] This provision should assist the prosecutor in avoiding to call any witness whom for any reason he is suspicious of that may become hostile during a trial,

Under the protection of witnesses, protection is accorded the witness in that the witness may refuse to make any statement which might tend to incriminate him. The Chamber may, however, compel the witness to answer the questions put to him in the interest of ensuring that justice and fairness is done to both parties. However, testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than perjury.[83]

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[77]Rule 85.
[78]Rule 98.
[79]Rule 67 A (i).
[80]Rule 75.
[81]Rule 75(v).
[82]Rule 73 (v)(e).
[83]Rules 90 (E).

The occurrence of a witness becoming hostile though possible is avoidable under the rules of ICTR because of the provision on false testimony by witnesses. To this effect, the rules of evidence provides that a Chamber, proprio motu or at the request of a party, may warn a witness of the duty to tell the truth and the consequences that may result from a failure to do so.[84] It is further provided in bid to curbing the menace of a witness giving false testimony that a prosecutor may investigate such on the direction of the Chamber or where the former has conflicting interest, the registrar may be ordered to appoint an amicus curiae to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating proceedings for false testimony.[85]

In the case of The Prosecutor v Édouard Karemera, Mathieu Ngirumpatse, Joseph Nzirorera,[86] the issue of false witness across in the testimony of withness BTH. In the Chambers' view, neither the statements made by the Senior Trial Attorney (STA) nor the omission to adduce evidence or further evidence in opposition to BTH's allegations can support or confirm the allegations of BTH. The absence of an adequate factual basis to support the application makes it unnecessary for the Chamber to assess rebuttal evidence.

This suggests that either party has to lay proper foundations to justify its claim that a witness has turned hostile as it is only then that an investigation can be grounded. Where this requirement is met, the Chambers can invite such a witness for cross examination.

2.4.3 ICC SITUATION

Pursuant to Article 21 of the Rome Statute, the ICC shall apply in the firs place, elements of crimes and its Rules of Procedure and Evidence; where appropriate, applicable treaties and the principles and rules of internationa law, including the established principles of the international law of arme conflict;

[84] Rule 91.
[85] Rule 91 (b)
[86] Case No. ICTR-98-44-T.

Other sources are only consulted when there is an ambiguity. Article 21(1) b and c gives the court room to rely on any law and procedure it considers appropriate at any time. Like the ICTY the ICC does not align itself with any single existing domestic and international system of criminal procedure. It is neither a common law accusatorial nor a civil law inquisitorial system.[87] According to Kress, it is more of hybrid system as is also visible from ICTY.[88] In addition, before the ICC like other municipal and international judicial organs any evidence which is found to be irrelevant or inadmissible shall not be considered by the Chambers during trial.[89]

For evidence to be admissible, its probative value must be put into account in ensuring a fair trial before the court.[90] Rule 64 of the Rules of Procedure of Evidence provides for the procedure relating to the relevance or admissibility of evidence.

Witnesses are protected from making self incriminating statement during trials before the ICC.[91] Furthermore, under the ICC regime a witness can decline to give information if he thinks such information may incriminate him or that might tend to incriminate him.[92] Though not expressly provided for, the provision of assurance,[93] from self incrimination may save the chances of a witness turning hostile before a proceeding. This provision is presumed to be help especially in curing the deficiency of the Nuremburg trials where several witnesses became hostile for fear of being incriminated by their testimonies.

The question therefore is, in a situation where the statement of a witness proves relevant but substantially adverse to the party calling such a witness what remedy is open to the party, prosecutor or defence? A possible solution can however be read into the provision of Regulation 43,[94] which confers upon the presiding judge, in consultation with other members of the chambers to determine the mode and order of questioning witnesses in other to ensure fair presentation of evidence and effective determination of the truth.

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[87] S De Smet ' structural analysis of the role of the pre-trial chambers I the fact finding process of ICC'.
[88] Kress ' the procedural law of ICC in outline: anatomy of a unique compromise' 2003.
[89] Rule 64(3).
[90] Rome statute, article 69 (4).
[91] Rules of Procedure and Evidence, rule 74.
[92] Rule 74 (3).
[93] Rule 74 (2) abd Rule 74 (3) (b).
[94] Regulations of the court.

Interestingly, priority is given to a witness before the ICC to give consent on whether or not his recorded testimony can be relied on.[95] This provision therefore does not favour the reliance of record of previous statement in impeaching the testimony of a hostile witness. However, it is argued that the onus is on the court to take all necessary steps in ensuring that the veracity of a witness testimony is ascertained.

The court shall have the authority to request the submission of all evidence that it considers necessary of all evidence that it considers for the determination of the truth.[96]

From this provision, it is suggested that the dangers of the hostile witness during proceeding before the ICC can be curbed. It is therefore suggested that on either party's cogent application a witness having turned hostile can be cross examined by the party calling him and have his witness impeached.

2.5 COMPARATIVE ANALYSIS

The common law legal system traditionally imposes restrictive rules on the admission of evidence as against the civil law legal system. The system to which the international courts lean to is unsettled but authors like Sandifer are of the view that they are more inclined to the civil system.[97]

Important however is the fact that most international tribunals have not bound themselves with exclusionary rules of evidence as obtainable in the municipal settings. In Prosecutor v. Sefer Halilovic (decision on admission into evidence of prior statement of a witness). The tribunal stated clearly that it is not bound to follow the rules of common law in allowing parties discredit its own witness.[98]

Tribunals have rather imbibed a more liberal approach to the issue of evidence before it.[99] Nsereko, expounds a deviation from the common law practice of terminating a trial where the prosecutor fails to prove his case. He posits that the ICTY has embraced the civil law procedure which does not require the prosecution to establish a prima facie case.

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[95]Rules of Evidence and Procedure, rule 68.
[96]Rome Statute article 69(3).
[97]D Sandifer ' Evidence before international tribunals' 2nd ed 197.
[98]Prosecutor v. Milosevic. Case No. IT-02-54-T, T. 16732.
[99]See Prosecutor v Aleksovski ICTY App Ch,1999 @ para 19.

In addition, international tribunals have expressed their freedom to estimate the value of the various elements of evidence.[100] However, most international tribunals draw inspiration from municipal rules of evidence to guide the admissibility or inadmissibility of evidence.[101]
A variation of a testimony by a hostile witness in court points to the difficulties surrounding the gathering of evidence before international tribunals. The difficulties thus created by such instances though a clog in the wheel can also be removed. For instance, in the ICTR, Rwandan victim-witnesses frequently voiced concerns about the "accuracy" of particular kinds of evidence they are asked to provide and consistently demonstrated an awareness of the limitations of the estimates in their testimonies, particularly in regard to discrete and quantitative measurements.[102] The initial task facing courts municipally and internationally is to establish whether the party making such claims of the hostility of a witness is genuine.[103]

Methods adopted by tribunal include relying on indirect evidence as against direct evidence,[104] and the use of prima facie evidence.[105] Conversely, where the testimony of a witness has successfully been subjected to interrogation of the tribunal and crossed examination by the opposing part, its value as evidence will be considerably enhanced.[106] The situation is the same in municipal courts were as shown from Nigeria case law; all the prosecution needs to do is to show the basis of the desire to declare a witness hostile and subsequent disregard to the witness testimony.

However, an important excuse for the factors that might lead to inconsistency in the testimony of a witness in international tribunals is length of time it takes trials in to commence. Thus, infirmity of memory is pointed to be a major factor that influences the accuracy of witness testimonies. In addition, considering

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[100] See the Nicaruga case.
[101] Cheng, 'General priniciples of law as applied by international courts and tribunals' p 303. 1987.
[102] Establishing Credible Evidence: Victim-Witness Testimony at the International Criminal Tribunal for Rwanda Jenna Appelbaum.
[103] Chittharanjan A 'Evidence in international litigation' p 139.
[104] See the Corfu channel case where the UK proved its claim by indirect evidence.
[105] See the Rockwell Case (1989), 23 Iran-US CTR.
[106] See The Cameron case 1929, G.B V MEXICO @43.

the trauma several witnesses pass through from the point of the alleged war crimes or violence's against them and their communities. In addition, insider witnesses and their families are particularly vulnerable to acts of retaliation and potential harm, due to their testimony implicating directly the accused.[107] It is inherent that some of them might suffer from infirmities of memory. Whether, municipally or internationally, evidence of witnesses must be examined. This must be in the light of the witness source of information, his capacity to ascertain and his willingness to tell the truth.[108]

International criminal justice is mainly supposed to serve as a protection against any form of human rights violations of both the victim and accused.[109] Thus, urgent care must be taken to ensure that justice is not miscarried. It is important to take into account that fairness of judicial proceeding is indispensable for the establishment of confidence in national or international adjudication and this guarantee is vital for every defendant

Having considered the situation of hostile witness, options available to the prosecution in such situations are examined below. As already highlighted in previous sections of this work, the general rule is that the prosecution is not allowed to pick and choose which of his witness testimony the court will take into account or discountenance. However, despite the general rule, certain options are open to the prosecutor in ensuring that his case is not run aground by the acts of such unreliable witnesses. This can only be achieved via the impeachment of a witness. The procedure provided for impeaching a witness is discussed briefly below.

PART 3

3.1 IMPEACHING WITNESS STATEMENTS

Discrepancies between prior statements and current testimony commonly form a central focal point for testing credibility in international criminal trials. This can risk the placement of undue probative weight on earlier statements

[107] Prosecutor v Sesay et all Case No SCSL-04-15-T @32.
[108] Kling case, USA v Mexico (1930) @47. See also the Naomi Russell Case 1931@ 188, where it was stated that due to frailty of human contingencies, testimonies are liable to arouse distrust.
[109] C Stahn and G Sluter ed' the emerging practice of ICC' p617.

and the diminished opportunity for current testimony to be properly heard and assessed. It is in the interest of justice that any evidence necessary to ascertain the truth be presented to it and subjected to examination by the parties.[110]

A clear example of the dangers of hostile witnesses was shown during the Nuremburg trials. For instance, during the trials, a number of witnesses gave testimony on matters favourable to the defence because they themselves could either be implicated or they were closely related to defendants.[111]

In the Flick case,[112] the prosecutors attempt to impeach the testimony of his witness was cautioned by the tribunal. In the prosecutions argument, it was reiterated that the application of conventional rules of impeachment had been developed and such rules should be subject to the discretion of the court.[113]

In the medical case,[114] the prosecution request for the tribunal to call the witness was upheld by the court stating 'we are concerned of course with learning the whole truth about the charges pending against the defendants'. From the above, it is inferred that the option open to the prosecution is to lay a foundation to the witness apparent hostility and seek the courts discretion in calling such a witness.

Highlighting inconsistencies between prior statements given by witnesses to investigators and their subsequent court room testimony in trial is a core strategy in impeaching witness credibility.[115]

In Tadic case,[116] prior statements of the witness was used in cross-examination and proved invaluable in revealing inconsistencies that may affect the Trial Chambers assessment of the credibility of the witness. Based on the decision of the trial chambers in the Akayesu case,[117] admission of evidence goes to the weight that can be placed on the evidence of a witness. Thus where a witness is treated as a witness of straw, his testimony will have

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[110] V Tochilovsky, Jurisprudence of the international criminal courts and the European Court of Human Rights, Procedure and Evidence p219

[112] Judge May R and Wierda M, International Criminal Evidence p 169.

[113] Judge May R and Wierda M, International Criminal Evidence p 170.

[114] Transcript, Dec 16 1946, XV NMT @691.

[115] Kayshema and Ruzindana , ICTR Trial Chamber Judgment and Sentence, 21 May 1999, paras. 78-9.

[116] Decision on the prosecutors motion for production of defense statements, Nov 27, 1996 para 46.

little or no weight at all. In some situation, the chambers will be assisted by the demeanour of a witness. However, the relevance of a witness demeanour should not be wholly relied on to determine if a witness is hostile as a confident demeanour is a personality trait and not necessarily a reliable indicator of truthfulness or accuracy.[118]

While the previous statements of a witness cannot be used to bolster witness credibility it should not be precluded if it is shown to be relevant and reliable.[119] As already discussed, trauma and infirmity of memory are factors that may inform inconsistency in testimony of witness. In the ICTY, trials chambers have as a matter of procedure assessed witness testimony bearing in mind the degree of trauma suffered and the possibility of post traumatic stress disorder.[120] Thus, where the court warns itself of the weight to be attached to either party especially where such a party raises a doubt as to the witness becoming hostile.

PART 4

4.1 CONCLUSION

In matters of admissibility of evidence the procedure in international tribunals is a unique mixture of common law and civil law rules.[121] However, the process of achieving justice in international criminal justice system is froth with several challenges. With the human rights provision that an accused person is deemed not guilty until proven by the prosecutor and the protection of a witness before the courts are also challenges to be contended with. The proceedings relating to examination of witness in the ICTY and ICTR draw upon the common law tradition of adversarial procedure but do not reflect that tradition completely.[122]

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[117] Judgement, September 2, 1998 para 137.
[118] Judge May R and Wierda M, International Criminal Evidence p 169.
[119] V Tochilovsky, Jurisprudence of the international criminal courts and the European Court of Human Rights, Procedure and Evidence p321.
[120] Akayesu Judment, Sept 2 1998 para 142-144.
[121] V Tochilovsky, Jurisprudence of the international criminal courts and the European Court of Human Rights, Procedure and Evidence p321.
[122] Robert Cryer, The law and Practice of International courts and Tribunals 3: 411-439,2003.

As highlighted, the courts both municipally and internationally have tried to put measures in place to ensure that the course of justice is not averted by the sheer act of witnesses becoming hostile in court. However, despite the strong holds put in place to curb the menace of hostile witnesses, it is proven that witnesses have lied before tribunal, as was obtained in the case of Dragan Opacis.[123] Therefore, the practice of a witness prior to giving evidence makes the solemn declaration is insufficient to guarantee veracity of witness testimony.

The provision that a witness must answer all questions put to him is important in ensuring that the court is seized of all evidence that it needs to make its decision is important. The rule of non incrimination serves as a valid haven for witnesses for not telling the truth even when any implicating testimony will not be used against them subsequently in any trials.

Finally, it is concluded from the detailed analysis of the most important features of international criminal procedure, that the traditional common-civil law divide has been overcome, although most rules can be traced back to common or civil law origin, they are rendered sui generis and unique in their application.[124]

5.1 RECOMMENDATIONS

While there is considerable controversy regarding the appropriateness of adversarial methods for the examination of victims of serious abuses, common law trials offers insights into assessing credibility because of the serious attention that is paid to the form and substance of questions put to witness. It is recommended that where necessary, questions of counsel should be reframed or followed up, serving as a corrective mechanism for the barriers to the effective examination of witnesses of international crimes.[125] Furthermore, it is also recommended that flexibility govern caution in making

[123] Prosecutor v Tadic, para 33 IT-94-I-T, 7 May 1997.
[124] International criminal Justice, A critical analysis of institutions and procedures ed M Bohlander p500.
[125] Rosemary Byrne, Proceedings: Guiding Standards from the International Criminal Tribunals.

decision as to which legal regime should be applied in a case. For instance, in Limaj et al.,[126] three applications by the prosecution to cross-examine their own witness were made at the time when such applications are usually made in common-law jurisdictions, i.e. during examination-in-chief. Two of the applications were granted; one was denied. The case offers a clear illustration of the potential for a collision between the two legal systems. The prosecution sought the admission, as substantive evidence, of video-recordings with transcripts of the interviews given to its representatives by the two witnesses who had been found by the Chamber to be hostile. The Chamber's decision provides an excellent analysis of the underlying problems in a regime such as the Tribunal's, which draws from both legal systems. A potential conflict arose because in the common-law system (from which the concept of a hostile witness is derived), the contents of the previous inconsistent statement are only received for the purpose of challenging the credibility of the hostile witness; such a statement is only received as evidence of the truth of its contents if the witness changes his position and adopts it. On the other hand, no such problem arises in the civil-law system, since witnesses are called and questioned under the control of the court, which has available to it any previous statements of the witness.[127]

In assessing the probative weight of conflicts between prior statements and court room testimony, the bench should have access to transcripts of testimony and earlier interviews in order to scrutinize the nature of the questions and the quality of translation and interpretation.[128] It is anticipated that this will ensure that when a witness turns hostile, the bench can therefore warn itself of the value to be placed on such witness testimony.

Premised on the above recommendation, it is important to note that upon reflection, the question as to whether or not the International Criminal Court is the way ahead and possesses a more mercurial element to it in ensuring international justice. Callaghan, is of the view that it is not a statement as to the present but provokes a consideration of the success or failure of the Court in

[126] Case No. IT-03-66-T.

[127] Patrick L. R, Rough, Edges in the Alignment of Legal Systems in the Proceedings at the ICTY available at (accessed 14 April 2009).

[128] Prosecutor v. Musema , Appeals Chamber Judgment, 16 Nov. 2001, para. 20.

the future; both the near future and a time beyond this generation.[129] The judges of the ICC are consequently saddled with the responsibility to adopt the most relevant legal system despite the broad powers of the trial chambers in it mixed approach combining civil and common law features.[130]

It is however, believed that from the above jurisprudences highlighted, the ICC should be able to avoid the pitfalls of having the course of justice impeded by the acts of witnesses turning hostile for whatever purpose. Finally, investigators must take extra caution in ensuring that all potential witness before major trials are assured full protection to avoid them becoming hostile by the reason of threats from the network of the accused person. Furthermore, proper documentation and preservation of evidence is crucial from the initial point of investigation as this may prove vital in any attempt to rebut the testimony of a hostile witness.

Finally, in determining which system is better applied in a particular case, the issue oriented approach distinguishing between pre-trial and trial phase of proceedings must be examined. Primarily, this approach aims at issue analysis rather than terminology or ideology.[131]

[129] O'Callaghan, International Criminal Law Review 8 (2008) 533-556.
[130] Inter Criminal Justice. A critical analysis of institutions and procedures. M Bohlander ed 493.
[131] Inter Criminal Justice. A critical analysis of institutions and procedures. M Bohlander ed 501.