KIGALI INDEPENDENT UNIVERSITY (ULK)

DEPARTMENT OF LAW

P.O BOX: 2280 KIGALI

CRITICAL ANALYSIS ON PROTECTION OF SUSPECTS AGAINST UNFAIR TRIAL UNDER RWANDAN CRIMINAL LAW

A research proposal submitted in partial fulfillment of the academic requirements for the award of the degree Bachelor's Degree in Law (LLB) at Kigali Independent University (ULK)

Presented by RWANZIZA Innocent

SUPERVISOR: Me BAHATI Vedaste

Academic year 2024

DECLARATION

This is to certify that this dissertation I have presented for examination for the bachelor's law degree of Kigali independent university is exclusively my work other than where I have clearly indicated that it is the work of others; I also undertake that any quotation or paraphrase from published or unpublished work of others have been duly acknowledged.

RWANZIZA Innocent

Date: ……………..…

Student's signature………………………

CERTIFICATION

This is to certify that this research project entitled critical analysis on protection of suspects against unfair trial under Rwandan Criminal law was done by Mr. **RWANZIZA Innocent** Under our supervision, and recommended it for acceptance by Kigali Independent University (ULK)

Supervisor: Me BAHATI Vedaste

Date: ………………………….

Supervisor Signature:……………

DEDICATION

To the almighty God for his blessing,

To my parent for their endless moral support,

To my classmates for the moments shared together,

To my relatives, friends and family friends,

Your love, patience, and support helped me through this entire Bachelor's education,

May Almighty God richly bless you All.

ACKNOWLEDGEMENTS

I would like first to acknowledge and thank Almighty God for his endless blessings from birth up to now. I wish to acknowledge the help of all those persons who helped me in one way or another in realizing this research work. The success of this research cannot only be attributed to me. It is the result of the collective efforts of several persons.

I thank particularly **Supervisor Me BAHATI Vedaste** who devoted part of his time to the supervision of this work. His guidance contributed to the successful completion of this dissertation. I also thank the management of the Kigali Independent University for their time for the achievement of our studies. I always recognize the contribution of my parents who cared for me before and during the preparation of this dissertation. May God bless each and every one in whatever he/she does!

Special thanks go to all my classmates from my faculty; their valuable collaboration has embellished the years that i spent at ULK.

Thank you, thank you and thank you to everyone!

LIST OF ABBREVIATION AND ACCORNIMS

ACHPR: African Charter on Human & People's Rights

ACHR: American Convention on Human Rights

B.C: Before Christ

DNA: Deoxyribonucleic Acid

ECHR: European Convention on Human Rights

HRC: Human Rights Council

HRC: The Human Rights Committee

ICC: International Criminal Court

ICCPR: International Covenant on Civil and Political Rights

LAF: Legal Aid Forum

NCHR: National Commission for Human Rights

NPPA: National Public Prosecution Authority

RIB: Rwanda Investigation Bureau

UDHR: Universal Declaration of Human Rights

UK: United Kingdom

ULK: Kigali independent University

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1. Introduction

One of the most crucial protections against unfair or illegal violations of an accused person's freedom and human rights is the right to a fair trial. According to international human rights law, the states must respect, protect and fulfill its obligations related to the enjoyment of fair trial rights by the accused persons within their territory and/or jurisdiction. To uphold the right to a fair trial, the nations enacted rules guiding the criminal procedure. If the procedure is done against the law, it will be an unfair proceeding that will produce an unfair trial.

The constitution of Rwanda of 2003 as revised in 2015 like many other countries' constitutions; they included an extensive Bill of Rights. The Bill of Rights in Rwanda's constitution is contained in Chapter 4, which deals with the freedoms and human rights. It is provided that a human being is sacred and inviolable.[1] This means that individual rights of human being are not favors granted by the States or anyone but are entitlements of the person by the fact that she is created as such. The constitution states also that a human being must be respected, protected and defended by the State.[2] The right to a fair trial is one of the non-derogable fundamental rights under the constitution. In fact, the current constitution provides provisions related to the fairness of criminal proceedings. Article 29,[3] titled "right to due process of law", is the operative segment establishing guarantees for people accused of criminal offenses during the court trial.

It is emphatically stated, in this provision, that every person has the right to appear before a competent Court.[4] It provides the presumption of innocence to everyone charged with a criminal offense until proved guilty or until that person pleads guilty before a competent court, the right to legal representation and defense, and be informed of the cause and nature of charges.[5] It also provides that everyone must not be prosecuted, arrested, detained, or punished for omissions or acts that did not constitute a crime under international law or domestic from the time they were committed.[6]

[1] Constitution of the Republic of Rwanda of 2003 revised in 2015, Article 13.
[2] Ibid.
[3] Article 29 of the constitution of 2003 revised in 2015.
[4] Ibid, Article 29, 3.
[5] Ibid, Article 29, 1.
[6] Ibid.

Generally, law determines offenses and their penalties. In this context, the Constitution requires that a person should not be responsible for an offense he or she did not commit.[7] As a critical aspect of the right to a fair trial, a person must not be punished for an offense of a severer sentence than the one provided for by the law at the time the offense was committed.[8] Accordingly, a person should not be imprisoned simply for failure to fulfill a contractual obligation;[9] and should not be subject to prosecution or punishment for a crime that has been prescribed.[10]

The purpose of all of those provisions and others is to protect a person or a suspect when he/she is being accused in trial. If all of those provisions have been fulfilled, a suspect already get Fair trial. In order for a fair trial be achieved, the cooperation of different institutions is required. In Rwanda, they are Police, investigation, prosecution, courts and collection services. If one of these institutions does not comply with the provisions of the law, it becomes an unfair proceeding that produces an unfair trial.

In Rwanda, the biggest problem that often appears as an obstacle to the right to affair trial is unlawful detention. Some time, a suspect may be innocent after to be detained a long or short time but there is no compensation he/she can ask.

2. Historical background of the study

A brief description of right to a Fair Trial, having its roots in the *Law of the Twelve Tables,*[11] the right to fair trial was taken into account under the Universal Declaration of Human Rights (UDHR) which describes it as "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of

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[7] Ibid, Article 29, 5.
[8] Ibid, Article 29, 6
[9] Ibid, Article 29, 7.
[10] Ibid, Article 29, 8.
[11] The earliest attempt by the Romans to create a code of law was the Laws of the Twelve Tables. A commission of ten men (*Decemviri*) was appointed (c. 455 B.C.) to draw up a code of law binding on both patrician and plebeian and which consuls would have to enforce. The commission produced enough statutes to fill ten bronze tablets. The plebeians were dissatisfied and so a second commission of ten was therefore appointed (450 B.C.) and two additional tablets were added. What follows are a selection from the Twelve Tables. [Source: Oliver J. Thatcher, ed., *The Library of Original Sources* (Milwaukee: University Research Extension Co., 1901), Vol. III: *The Roman World*, pp. 9-11. See also *Lex Duodecim Tabularum*, by George Long in William Smith, A Dictionary of Greek and Roman Antiquities, John Murray, London, 1875, pp. 688-690.]

any criminal charge against him". A Fair Trial is the best means of separating the guilty from the innocent and protecting against injustice. Without this right, the rule of law and public faith in the justice system collapse. The right to a fair trial has been described as a central pillar of our legal system[12], 'fundamental and absolute'[13] and a 'cardinal requirement of the rule of law. Some years after the UDHR was adopted, the right to a fair trial was defined in more detail in the International Covenant on Civil and Political Rights (ICCPR). The right to a fair trial is protected in Articles 14 and 16 of the ICCPR, which is binding in international law on those states that are party to it. The key legal texts on fair trial are also to be found in, African Charter on Human & People's Rights, the American Convention on Human Rights, and the European Convention on Human Rights.

The right to fair trial includes the following rights.

- Right to be heard by a competent, independent and impartial tribunal.
- Right to a public hearing.
- Right to be heard within a reasonable time.
- Right to counsel.
- Right to interpretation.
- Right to be presumed innocent until proven guilty, according to law[14].
- Right to have adequate time to prepare his defence and to communicate with counsel of his own choosing.[15]
- Right to examine the witnesses against him and to obtain examination and attendance of witnessed on his behalf.[16]

[12] Dietrich v The Queen (1992) 177 CLR 292, 298
[13] Brown v Scott [2003] 1 AC 681 719.
[14] Article 14.2 ICCPR
[15] Article 14.3a ICCPR
[16] Article 14.3d

3. Interest of the study

This study will be having an interest in three categories, as there are person, academic and scientific interest.

3.1.Personal interest

This study will help to clarify the impact of unfair trial especially for unlawful detention under Rwandan Criminal Law and how a suspect could be compensated if he/she detained illegally.

3.2.Academic interest

This study will help the students to understand the concept, historical, compliance and implementation of Rwandan criminal law, and how it may be implemented illegally that produce unfair trial.

3.3.Scientific interest

This study will help to compare The Rwanda Criminal Law with other countries laws in order to find out a solution on unfair procedure based on unlawful detention and decreasing of its effect to the suspects.

4. Scope of the study

To be more exact, the research is constrained in terms of space, time and domain as it going to be demonstrated below in details.

4.1. In place

This study will be conducted in Rwandan territory but may be based on examples from other countries.

4.2. In time

This study will take a time equal their years from 2003 to 2023. It will take all that time in order to know and analyses the Rwandan laws related to this study and comparing them to other countries.

4.3.In domain

This study is on the domain of law. It works in deeply law of criminal procedure, the institutions in charge of that law and how it implemented in Rwanda.

5. Problem Statement

The National Commission for Human Rights (NCHR) in Rwanda reported a number of cases of illegal detention in its annual reports from 1999 to 2016 despite the existence of these regulations protecting against arbitrary arrest and unlawful detention. For example, the 2009–2010 report reported the release of two individuals who had each been detained illegally for more than ten years.[17] Furthermore, the Legal Aid Forum (LAF)[18]of Rwanda stated in 2013 that more than 700 individuals were detained without authorization.[19] The End-to-End Process Mapping of the Criminal Justice System in Rwanda study conducted that same year showed that poor communication between the prosecution, courts, police, and prisons results in unlawful detentions, unnecessary case adjournments, and delays in the release of inmates who have been found not guilty.[20]

In order to protect the suspect against unlawful detention, the state has the obligation to regulate the detention of suspects in the country. The Law Nº 027/2019 of 19/09/2019 relating to the criminal procedure set out the condition, which can lead to unlawful detention.[21] Those conditions are the followings:

1° Detaining a person in an irrelevant facility;

[17] Nyirababirigi was released after 13 years in unlawful detention as she was detained without a criminal case and without a valid detention order. Nyiraminani was released after 14 years in unlawful detention. NCHR, Annual Report 2009-2010, pp. 48-51

[18] LAF is a Rwandan non-government organization which was established in 2006, it creates a space where organizations that wished to provide legal aid to indigent and vulnerable groups could share information and best practices and collaborate in research, and evidence-based advocacy

[19] LAF, *Improving the Performance of the Criminal Justice System through Improved Pre-trial Justice,* The Impact of Pre-trial Detention on Access to Justice in Rwanda, Kigali, p.29, (2013).

[20] Dr. Muyoboke K. Aimé, Me Niyibizi Tite, and CIP Bisangwa Modeste conducted that study under the supervision of Prof Nick Huls, *Study on the End to End Process Mapping of the Criminal Justice System in Rwanda,* Institute of Legal Practice and Development (ILPD), May 2013.., available at https://ilpd.ac.rw/fileadmin/user_upload/ILPD_Document/Publications/STUDY_ONEND_TO_END_MAPPING_TO_CRIMINAL_JUSTICE.pdf [accessed 03/04/2024].

[21] Art 143 of the law № 027/2019 of 19/09/2019 relating to the criminal procedure

2° Detaining a person for a period longer than the period specified in the arrest statement and in the provisional detention warrants;

3° Continued detention of a person after a decision rejecting provisional detention or its extension or granting provisional release was taken; 4° continued detention of a person after a decision of acquittal was taken;

5° Continued detention of a person who was punished by a fine;

6° Detaining a person whose sentence was suspended;

7° Continued detention of a person who served his or her sentence;

8° Being detained by an unauthorized person;

9° Detention that does not comply with formalities of arrest and provisional detention

It is unclear what legal consequences will be if detention continues in spite of the fact that it is illegal. The victims of unlawful detention might be impacted by emotionally, socially, physically, and financially. Further, if that person in prison is the primary provider for the family, the detainee's family may also be impacted by that unlawful detention.[22]

Another issue, comes when a suspect has been realized after to be detained illegally. In civil cases, a party who fail a case may be charged damages for any loss suffered to another party. One may claim that although there is no statute in Rwanda offering compensation for wrongful detention, those who have been imprisoned illegally may pursue compensation under administrative, criminal procedural, and tort law.[23]

Furthermore, regional and international agreements accepted by Rwanda have legal force and supersede ordinary laws, according to Article 168 of the Rwandan Constitution. Rwanda has accepted regional and international agreements that guarantee the right to be released from

[22] JRLOS, *The Republic of Rwanda Justice, Reconciliation, Law & Order Sector Strategic Plan*, July 2013 to June 2018, p.8.

[23] The submitted Rwandan report in 2014 to the United Nations Human Rights Committee (UNHRC) on the enforcement of the right to compensation for unlawful detention in Rwanda indicated that an unlawfully detained person enjoys the right to lodge an appeal before a court to obtain compensation through a habeas corpus procedure. See the Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant Fourth Periodic Reports of States Parties Due in 2013 Rwanda, p. 47, (30 October 2014)

unlawful imprisonment and to be compensated for it. These documents compel the State to offer remedies in the event that a person's rights are violated, as well as to take particular legal and other actions to give effect to the right against unlawful detention.[24] Rwanda adopted the International Covenant on Civil and Political Rights (ICCPR) in 1975, for instance.[25]

The Covenant's Articles 9(4) and (5) provide victims of unlawful detention or arrest the ability to challenge the legality of their imprisonment, request their release from unlawful detention, and seek compensation. Victims of human rights breaches must look to international, regional, or sub-regional mechanisms for protection and recompense when their home legal system is unable to provide adequate protection against such violations. When evaluating claims brought by victims of unlawful detention, the courts in Rwanda may apply the ICCPR and other related documents as relevant sources of law.

Furthermore, those tools offer international, regional, or sub-regional tribunals and organizations that might meet the requirements of people who have been violated of their human rights but were unable to receive justice from national courts.[26] However, as of April 2018, no one who had been unlawfully imprisoned in Rwanda has received compensation from a Rwandan court,[27] a regional court, or foreign organizations in accordance with those international and regional agreements.[28] Even though unlawful detention is the biggest issue that causes unfair trial, there are other things that are different, such as announcing the suspect before to be convicted by the court, being forced to admit a guilt if necessary and being tortured[29], being imprisoned for a long period of time in provisional detention while he/she is waiting the hearing of that case on its merits, corruption and so on. According to all of those, everyone can ask him/herself how the suspects are protected and what law provides.

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[24] Joseph, S., Schultz, J., & Castan, M., *The International Covenant on Civil and Political Rights, Cases, Material and Commentary,* p.viii, (2004).

[25] Rwanda ratified the covenant on 16/04/1975, entry into force on 16/07/1975. It has been incorporated into domestic law pursuant to Decree-Law no . 8/75 of 12 February 1975, Official Gazette, no . 5, 1 March 1975

[26] REDRESS, *Reaching for Justice The Right to Reparation in the African Human Rights System*,p.3, (October 2013).

[27] The US Department of State, *Country Reports on Human Rights Practices for 2016*, Rwanda, p.12.

[28] Finalized cases before the African Court on Human and People's Rights, available at http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#finalised-cases [accessed 08/04/2024].

[29] Article 112 of the law №68/2018 of 30/08/2018 Law determining offences and penalties in general explains well this torture stated above

By understanding well the protection of the suspect against unfair trial in Rwanda, this Research will answer the following questions:

1. ***What challenges against fair trial on the suspect under Rwandan criminal law***
2. ***What are the mechanisms that can facilitate to avoid unfair trial in Rwanda?***

6. Research Hypothesis

1. This research will find out the way suspects are protected under Rwandan Law.
2. This research will find out the mechanism that can facilitate in solve the problems that like to affect the suspects.

7. Research Objectives

This research will be done for two mains of objectives, which are general objective and specific objective

7.1. General Objective

The general objective of this study is to make analysis on protection of suspects against unfair trial under Rwandan criminal law

7.2. Specific Objective

1. Disclosure of the impact of unlawful detention to the suspect, the family and the country;
2. Disclosure where there is a gap in implementing the criminal law that leads to unfair trial;
3. To find out the role of corporation in institutions in charge of justice and how they can avoid unfair trial based on illegal detention.
4. To find out how the suspect should be protected with complying what law provides.
5. To find out the compensation to a suspect who has been not guilt by crime if he/she was detained.
6. To compare the Rwandan law to other countries about the protection of suspect against unfair trial
7. To find out a sustainable solutions

8. Research Methodology and Techniques

In this research, a researcher will use the techniques and different methods in order to achieve on this research as there are following:

8.1.Research Techniques

The techniques are the procedures that will be used by a researcher to collect information about his/her topic. By answering questions raised in problems statement, the researcher will use documentary technique, which helped him to collect the data through the reading written works, scientific works and the national instruments relating to this topic of the work.

8.2.Research Methodology

After to collect all data, there are the different ways the researcher will use in analyzing the data has collected. Those are the methods will be used.

8.2.1. Analytical Method

A researcher will use an analytical method as a technique in order to know the qualitative and composition of any material in which it is located and analyses the gaps in the implementing the domestic laws which is connected to the topic.

8.2.2. Synthetic Method

A researcher will use the synthetic method as a process of summarizing or selecting the data and information have been collected in research.

8.2.3. Historical Method

This method will be used in collection of information of how it was in past and the history about the topic. A researcher will use it in order to know the cause of the problem of unlawful detention by referring to its history.

8.2.4. Comparative Method

This is the method used in comparing some issues in different places. We used the comparative method, in order to compare the Rwandan laws and other countries' law

9. Subdivision of the Study

The outline of this study will be structured in three chapters after general introduction. Those chapters will be follow in the following ways: The first chapter will be dealing with the definition of key concept and the theoretical framework on the protection of suspects against unfair trial under Rwandan criminal law**.** The second chapter will be dealing with the challenges against fair trial on the suspect under Rwandan criminal law. The third chapter will be dealing with the mechanisms that can facilitate to avoid unfair trial in Rwanda. At the end, this work will be covered by the general conclusion, recommendations and bibliography.

CHAPTER I: CONCEPTUAL AND THEORETICAL FRAMEWORK

I.1. Introduction

The only sociopolitical context in which there is a constitutional guarantee of the independence of the judicial system, the right to a public and fair trial, and equality before the law is one in which effective judicial protection may be established.[30] The most crucial need for guaranteeing justice in case settlement is definitely "the right to a fair trial," which is deeply associated with principles of justice administration in international law. Setting aside crucial components that are used to understand the origins or the beginning of the right to a fair trial, its definition, its scope of application, and its significance, it is necessary to define the term "fair trial" and guarantee the validity of the rights established in it.

This Chapter contains two parts. The first part contains different definitions that has been used in dissertations. The second part covers the theoretical framework that underscore the root of this fair trial is being researchable in this research, its Historical background, its development, the Duties for a State in Promotion and Respect of Fair Trial Rights how it applicable in Rwanda.

I.2. Definition of key terms

I.2.1. Evidence

Evidence is any item that makes an effort to convince the court that the claim or statement made in front of it is true or reasonable. There are four types of evidence namely: oral testimony, documentary evidence, real evidence and circumstantial evidence.[31] Furthermore, according to Cambridge Dictionary, evidence means one or more reasons for believing that something is or is

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[30] Arewa, J.A, Judicial integrity in Nigeria: *challenges and agenda for action, judicial reform and transformation in Nigeria,* Nigerian Institute of advanced Legal studies, 228-271, [Online] Available at: http://www.nialsnigeria.org/journals/Arewa-Judicial%20Integrity.pdf Accessed on 26 May 2024

[31] Senior Inspector Sehloho *"NC Law of evidence, course notes, LLM, Police Training College"* [Online]Available at: https://www.researchgate.net/publication/319243871_LAW_OF_EVIDENCE_SEHLOHO_NC Accessed on 25 May 2024

not true.[32] Broadly speaking, evidence is anything that you see, experience, read, or are told that causes you to believe that something is true or has really happened.[33]

I.2.2. Hearsay

According to black's law dictionary, hearsay is defined as testimony given by a witness who relates, not what he knows personally, but what others have told him, or what he has heard said by others. It is in other words an out of court statement that is involving someone other than the person that is testifying.[34]

Hearsay is the legal term for testimony in a court proceeding where the witness does not have direct knowledge of the fact asserted but knows it only from being told by someone. In general, the witness will make a statement such as, "X told me Y was in Huye," as opposed to "I saw Y in Huye," which is direct evidence. Hearsay is not allowed as evidence in the United States, unless one of about thirty-eight exceptions applies to the statement being made.[35]

I.2.3. Cross-examination

This is a concept used of court proceedings, to mean the opportunity for the advocate or an unrepresented party to ask questions in court of a witness who testified in a trial on behalf of the opposing party. The questions on cross-examination are limited to the subjects covered in the direct examination of the witness,[36] but importantly, the advocate may ask leading questions, in which he/she is allowed to suggest answers or put words in the witness's mouth. Sometimes, a strong cross-examination can force contradictions, expressions of doubts or even complete

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[32] The Cambridge Dictionary "evidence" [Online]Available at: https://dictionary.cambridge.org/dictionary/english/evidence Accessed on 20 May 2024

[33] Collins Dictionary "definition of evidence" [Online]Available at: https://www.collinsdictionary.com/dictionary/english/evidence Accessed on 20 May 2024

[34] Black's law dictionary free online legal dictionary 2nd ed. What is HEARSAY EVIDENCE? definition of HEARSAY EVIDENCE (Black's Law Dictionary) (thelawdictionary.org)

[35] Anon "Hearsay in united states law" Hearsay in United States Law | Hearsay United States Law (liquisearch.com)

[36] Examination of witness by the party that brought him to be testify on his side, and the leading questions are prohibited at this stage unless for some circumstances such as under judge permission, etc

obliteration of a witness' prior carefully rehearsed testimony. In this regard, repetition of a witness's story, vehemently defended, can strengthen his/her credibility.[37]

I.2.4. Confrontation

A confrontation often consists of the direct expressing of one's opinion (thoughts and feelings) about a conflict situation, followed by an offer to the opposing party to voice their opinions as well.[38] In actuality, confrontations entail outlining conduct and responding to it, as well as explaining on and investigating the conflict's substantive, relational, and procedural aspects. It also takes into account the kind and quantity of each party's wants, interests, and problems. It consequently includes an admission of pertinent emotions.[39]

I.2.5. Suspect

In criminal law, a suspect is under suspicion, often formally announced as being under investigation by law enforcement officials. Probable cause for an arrest exists when the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to believe that a suspect has committed, is committing, or is about to commit a crime.[40]

I.2.6. Probable cause for an arrest

According to the Oxford Dictionary of Law, "probable cause" for an arrest is a legal word primarily used in criminal law. It is defined as "reasonable grounds to believe that a particular person has committed a crime," particularly to support a search or charge.48 Stated differently, probable cause of arrest refers to the degree of reasonable belief based on demonstrable facts that is necessary for an arrest to be made and for a person to be prosecuted in a criminal court. Before

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[37] Anon *"Cross-examination"* Law .Com [Online] Available at: https://dictionary.law.com/default.aspx?selected=408#:~:text=cross%2Dexamination,behalf%20%20of%20the%20opposing%20party Accessed on 20 May 2024

[38] Gregg W *"Conflict management and constructive confrontation"* Oregon State University Accessed on 20 May 2024

[39] Richard D. F., *"Truth and Its Rivals in the Law of Hearsay and Confrontation Symposium: Truth and Its Rivals: Evidence Reform and the Goals of Evidence Law"* Hastings L.J. (1998), p. 554.

[40] Anon *"Suspect"* [Online] Available at: https://definitions.uslegal.com/s/suspect/ Accessed on 20 May 2024

making an arrest, the police or the prosecution need to have enough evidence to support the accusations.[41]

I.2.7. Witness

In a natural sense, a witness is someone who is called upon to testify under oath or affirmation, either in person or through a written statement or transcripts, in a court of justice, tribunal, or office established by law for that purpose, on any subject matter pertaining to which an oath or affirmation may be necessary or authorized by law.[42] In a legal context, a witness is anyone competent to testify in court about any subject matter, but it may simply refer to someone who knows enough about an event or fact to be able to testify about it.

I.2.8. The prosecution

The word "prosecution" refers to any act aimed at instituting legal proceedings in the court, summoning parties and appearing before court, preparing the hearing, litigating and using appeal procedures.[43]

The people's law dictionary defines the prosecution as the process in criminal law, whereby the government attorney is charging and trying the case against a person accused of a crime. It is also referred to as a common term for the government's side in a criminal case.[44]

I.2.9. Hearing

The situation where the judge makes a record of the evidence given by the claimant and defendant, the witnesses or the expert.[45]

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[41] Farlex, *the free legal dictionary Probable Cause legal definition of Probable Cause*, thefreedictionary.com

[42] Anon *"Witness definition"* [Online] Available at http://www.duhaime.org/LegalDictionary/W/Witness.aspx Accessed on 20 May 2024

[43] Art. 3 (3o), Law nº 027/2019 of 19/09/2019 relating to the criminal procedure (O.G. Special of 08/11/2019)

[44] Gelard and K. hill *"Prosecution"* [Online] Available at: Legal Dictionary | Law.com Accessed on 26 May 2024

[45] Rwanda Law dictionary page 255

I.2.10. Testimony

Testimony, also known as testimonial evidence, is defined by Rwandan laws on the production of evidence as comments made in court by a person about something they directly saw or heard that is relevant to the case at hand.[46] Written testimony should, in theory, be produced by one or more witnesses who take an oath or acknowledge the authenticity of their production under penalty of perjury in order for it to be acceptable in court and to have the highest level of trustworthiness and validity.[47]

Testimony in the form of perceives or inferences is often confined to those that are logically founded on the witness's reports and are helpful for an obvious understanding of the testimonial evidence, unless the person is called as an expert witness.[48]

I.2.11. Testimonial evidence

statements made before the competent organ by an individual regarding what he or she personally saw or heard that is relevant to the subject matter of the dispute; with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he or she perceived it by that sense or in that manner; with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who presents that opinion or, as the case maybe, who presents it on those grounds. The competent organ for receiving testimonial evidence may be a court, the public prosecution, an investigation authority or any other organ with the competence to receive and settle a claim basing on evidence

I.2.12. Preventive detention

Exceptional measure of detaining an accused person pending investigation. A suspect may be subjected to preventive detention if there are concrete grounds to prosecute him or her and the offence he or she is accused to have committed is punishable with a term of imprisonment determined by law[49]

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[46] Art. 62 of law No 15/2004, supra note 10.
[47] Anon, supra note 39.
[48] Anon, supra note 40
[49] Rwanda Law Dictionary P73

I.2.13. Conditional release

Release from prison of a convict before the expiration of his or her term, subject to continued monitoring as well as compliance with certain terms and conditions to emphasize rehabilitation rather than retribution.[50]

I.3. Theoretical Framework

I.3.1. A Brief Overview of Historical Development of the Right to a Fair Trial

The Bible, the Koran, and the Code of Hammurabi are just a few of the oldest documents that include references to specific ideas related to a fair trial in criminal procedures.[51] Despite its length, the history is not one that can satisfy everyone. The earliest documented set of laws of the Roman Republic, known as the Lex Duodecim Tabularum, or "The Law of the Twelve Tables," was composed in 455 BC. This is where the historical foundations of the essential concepts of the right to a fair trial lie.[52] These statutes established the right of all parties to attend the hearing,[53] a prohibition on bribery of judges, and the equality of all people.[54]

An important historical reference to the right to a fair trial may be located in England. The Magna Carta,[55] a peace pact between the monarch and the rebellious barons, was signed in 1215. This treaty, one of the key foundations of Common Law as it exists today,[56] had the most early impact on the protracted historical process that resulted in the English-speaking world's current system of constitutional law.[57] Due process and equality before the law were established by the

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[50] Ibid

[51] Mwimali, B. J, *Conceptualization and Operationalization of the Right to a Fair Trial in Criminal Justice in Kenya,* PhD thesis, University of Birmingham, United Kingdom, 2012.

[52] Robinson, P, *The right to a fair trial in international law, with specific reference to the work of the ICTY,* Berkeley JL Int'l L Publicist, 2009, Vol.3, No.1

[53] Lex Duodecim Tabularum, T*he Law of the Twelve Tables,* Tablet II, Law 3.

[54] ibidem

[55] Magna Carta, or "Great Charter," signed by the King of England in 1215, was a turning point in the process of human rights recognition. It was proclaimed in England by King John of England. In May 1215, the group rebel barons captured London, King John's hand has negotiated with the group, and the Magna Carta was created as a peace treaty between the king and the rebels.

[56] Hudson, J, *The formation of English common law: law and society in England from the Norman Conquest to Magna Carta,* Routledge, 2014; Poirier, D., Debruche, A, Introduction Générale à la Common Law (general introduction to the common law), 3rd edition, Yvon Blais, Paris, 2005, p.146.

[57] Maley, B, *Magna Carta Talisman of Liberty*, Centre for Independent Student, Occasional Paper 142, 2015, at p.3. https://www.cis.org.au/publication/magna-carta-talisman-of-liberty/, Accessed 26 May 2024.

Magna Carta.[58] It declared that no freeman would be seized, displaced, imprisoned, prohibited damaged, or banished in any way, nor would we go upon or send upon him, unless it were by the law of the country or by the just judgment of his peers.[59] It also included clauses outlawing governmental misconduct and bribery.[60] Magna Carta, which is often seen as one of the most significant legal texts for the evolution of contemporary democracy, marked a turning point in the fight for the establishment of freedom and the rule of law.[61]

After one century, in 1320 the treaty of Arbroath[62] was signed. It expressed the notion of equality for all,[63] a principle that was then replicated in other developing democracies, such as the twelve American colonies of the British Empire and France. It is claimed also that the United States declaration of independence was linked to that treaty.[64]

The extent of the right to a fair trial was expanded upon and legislated in the 18th-century enlightenment period. During this period, the government's political orientation started to shift away from an all-powerful the ruler and towards the will of the people, and the boundaries of governmental authority started to be reorganized in line with this shift. Written laws that included the right to a fair trial were frequently the result of this transformation.[65] There are significant historical events and references in both France and the US.

The 1789 French Declaration of the Rights of Man and Citizen is another important historical document that has contributed significantly to the evolution of the right to a fair trial. The 1948 Declaration of Human Rights continues its first article, which states that "men are born and remain free and equal in rights." Second, the basic principles of a fair trial are outlined in the

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[58] Clause 39 and 40 of Magna charta

[59] The British Library, Magna Carta, http://www.bl.uk/magna-carta, Accessed 26 May 2024.

[60] Magna Carta, Clause 39.

[61] Kumar, K.S, *History of the development of Human rights,* International Journal of Academic Research, 2014, Vol.3, No. 1, at p.45; Breay, C., Harrison, J, Magna Carta an introduction, 2015, at http://www.bl.uk/magna-carta/articles/why-magna-carta-still-matters-today, Accessed 26 May 2024.

[62] This was a declaration of Scottish Independence sent by 51 Scottish nobles and magistrates as evidence o f a contract between Robert the Bruce and his subjects.

[63] Transcription and Translation of the Declaration of Arbroath, 6 April 1320, paragraph 2. National Records of Scotland, SP13/7 https://www.nrscotland.gov.uk/files/research/declaration-ofarbroath/declaration-of-arbroath-transcription-and-translation.pdf, Accessed 26 May 2024.

[64] Robinson, P, *The right to a fair trial in international law, with specific reference to the work of the ICTY*, Berkeley JL Int'l L Publicist, 2009, Vol.3, No.1.

[65] Ibid.

Declaration of Human and Citizen Rights, which include the separation of powers[66] and the supremacy of the law.[67] It also prohibits unlawful detention[68] and protects the presumption of innocent.[69]

The United States ratified "the sixth amendment to the United States constitution" in 1791, following two years of the French Revolution. The evolution of the right to a fair trial has advanced significantly with the passage of this constitutional amendment. It grants criminal defendants seven different personal liberties: the right to an impartial jury, the right to a speedy Trial, the right to legal counsel, the right to be informed of pending charges, the right to compel witnesses to testify at trial, the right to confront and to cross-examine witnesses and the right to a public trial.[70] The current right to a fair trial was established in the 18th century, during the Age of Revolution.

The boundaries of government power started to change as the government's political orientation shifted from an all-powerful sovereign to the will of the people.[71] It was at this time that the natural law idea was developed in Europe.
As Nowak points out, this ideology positioned people at the heart of social and legal institutions and acknowledged them as right holders.[72] In actuality, this time served as the conceptual basis for the acceptance of individual rights, especially the right to a fair trial.

Before World War II, the phrase "fair trial" was hardly ever used. In actuality, the right to a fair trial was uniformly defined following World War II. Entitled to a fair and public hearing by an independent and impartial court in the determination of his rights and obligations and of any criminal charge against him, everyone is entitled to a universal declaration of human rights (UDHR), which was adopted by the United Nations general assembly in December 1948.[73] The

[66] Ibid. Article 16
[67] Declaration of the Rights of Man and of the Citizen in France of 1789, Article 9
[68] Ibid. Article 7
[69] Ibid. Article 9
[70] Constitution of United States, 6th amendment, part of United States Bill of Rights, amendment of 1791.
[71] Robinson, P, The right to a fair trial in international law, with specific reference to the work of the ICTY, Berkeley JL Int'l L Publicist, 2009, Vol.3, No.1.
[72] Nowak, M, *Introduction to the International Human Rights Regime,* Vol.14, Raoul Wallenberg Institute of Human Rights Library, Brill Academic Publishers, 2003
[73] UDHR, Article 10

right to a fair trial then made an appearance in a number of international documents following the 1948 Universal Declaration of Human Rights, including the 1966 International Covenant on Civil and Political Rights and other declarations.

I.3.2. Developing the Concept of the Right to a Fair Trial

One of the most important rules of international law is the right to a fair trial, which protects individuals against arbitrary and unlawful restrictions on their other fundamental rights, the most important of which is their right to life and freedom.74 Article 38 (1) of the Statute of the International Court of Justice holds that the right to a fair trial is still a treaty requirement,75 as well as a general legal concept acknowledged by civilized states and a customary international law norm.76 To ensure that the accused people have protection against arbitrary or illegal loss of their freedom and human rights is a fundamental protection.

The Lawyer Committee for Human Rights has also noted that the right to a fair trial extends to determining an individual's rights and obligations under the law as well as to determining whether to file a criminal case against an accused person.[77] It has to be carried out consistently and in accordance with the terms of the civil and political rights agreement. In addition, the effectiveness of safeguarding the other human rights and fundamental liberties[78] of accused individuals depends critically on the right to a fair trial. The personal freedom and other rights of those accused are still at danger during criminal procedures if this privilege is not granted.

Therefore, it is appropriate to agree with Naluwailo[79] that the safeguarding of all other individual rights in a State depends on the availability of fair trial processes in national courts, whereby a

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[74] Lawyers Committee for Human Rights, *What is a fair trial?* A Basic Guide to Legal Standards and Practice, USA, 2000, p.1.
[75] ICCPR, Article 14.
[76] For a thorough discussion of general principles of law as a source of international law, see Dixon and Mc Corquodale (2003), supra note 30, pp.43-47 and Harris D J (2004), Cases and Materials on International Law, Sweet and Maxwell, London, pp.44-50
[77] Ibid.
[78] HRC General Comment 32 (2007), supra note 2, para.2. See also *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 218/98 (1998), para.30.
[79] Naluwairo, Ronald (2011) *Military justice, human rights and the law: an appraisalof the right to a fair trial in Uganda's military justice system.* PhD Thesis. SOAS, University of London p 49.

person who has been violated by human rights can seek remedies. As a result, when the fairness of judicial procedures is not ensured, the effective protection of basic freedoms and other individual rights is unrealistic.

According to the convention on civil and political rights, "everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial court established by law in the determination of any criminal charge against him, or of his rights and obligations in an action of law.[80] In this sense, the concept of a "fair trial" is distinct from the concept of "fairness," since it is characterized by a number of essential components and involves a range of procedural characteristics. The right to a fair hearing, the right to a public hearing, and the right to an impartial and independent court are the four fundamental principles that make up this right.

A summary of the concept of a fair trial indicates that it is based on the principles of natural justice, which prohibits the use of illegal methods by the state, its agencies, and its officers in the fight against criminal activity and juvenile offenders. From this angle, the idea of a fair trial leads to the following conclusions: First, it is a fundamental human right to which all parties involved in criminal proceedings are entitled, and it plays a significant role in the handling of criminal cases.

A brief overview of the concept of a fair trial indicates that it is based on the principles of natural justice, which forbids the use of extralegal techniques by the state, its agencies, and its officials in the fight against crime and delinquency. From this angle, the idea of a fair trial leads to the following conclusions: First of all, it is a fundamental human right to which every individual who is accused of a crime has the right and is a crucial component of the criminal justice system in any democracy. regardless of the type of judicial system utilized to prosecute an accused individual.

Second, it has demonstrated that the concept of fairness and the right to a fair trial are different. Thus, the right to a fair trial in the most general sense must be used by any court or judicial body dealing with criminal proceedings. In this regard, it is possible to interpret the right to a fair trial as a guarantee of the impartiality of criminal courts in addressing criminal cases and making

[80] ICCPR, Article 14(1).

certain that the administration of justice is not only carried out but also clearly and clearly shown to be carried out or completed.

I.3.1.1. Right to a Fair Hearing

Fair hearing is another concept, which acts as a key player in proceedings of the trial. In civil law jurisdiction like Rwanda, it refers to a period from which the case instituted to a court of law to its final judgment. During this period, the accused is needed to have every opportunity to reflect his plea and questioning the actions of the prosecutor and the legal proceedings during court trial. The concept of a "fair hearing" is an ethical and legal term used to define a court's procedural rules and the treatment of the accused person in a court trial.[81] This is essential because when accused person is charged to commit a criminal offence, he is opposed with the state's machinery. It implies that in order to maintain justice, the rights of an accused during the court trial have to be observed and protected by the court established by law.

The right to a fair hearing is enshrined in many international instruments, such as the International Covenant on Civil and Political Rights[82] in the European Convention on Human Rights,[83] and the American Convention on Human Rights, which speaks of "due guarantees".[84] Largely, the right to a fair hearing occurs as an essential aspect and part of the scheme of the protection of accused persons in the international field. The legal frameworks of the operation of this rights in national legal systems precede the Universal Declaration relating to Human rights (UDHR) and has been existed in various national laws prior to the international rules established by the United Nations.

The European Court of Human Rights has interpreted that the right to a fair hearing is enshrined in the right to a fair trial. In a democratic society, it is among the basic principles of the rule of law. It seeks to secure the right to good administration of justice.[85] In the case of Prosecutor v Slobodan Milosevic, the court expressed that nation of fairness, rests essentially on the power

[81] WiseGeek, *What is a Fair Trial?* [Online] Available at: http://www.wisegeek.com/what-is-a-fair-t rial.htm Accessed on 27 May 2024
[82] ICCPR, Aricle 14.
[83] ECHR, Article 6(1)
[84] ICCPR, Article 8(1).
[85] *Bonisch v. Austria* (1991) 13 E.H.R.R. 409; [1986] E.C.H.R. 8658/79 European Court of Human Rights

exercised by the tribunal or court over the accused person.[86] Thus, the accused must be guaranteed of the fair chance or opportunity of dealing with the allegations against his person.

More importantly, in terms of fairness, a trial is evaluated upon numerous standards of guarantees. Such guarantees are purely procedural in nature and create a benchmark of fairness in any criminal trial. The Committee on Human Rights considered that the notion of a fair hearing under Article 14(1) of the Covenant should be interpreted as having a number of circumstances, such as regard for the principle of adversary proceedings, equality of arms, the right to be heard within a reasonable period of time, and preclusion of ex officio reform in pejus.[87]

According to the Principles of the African Commission, in the fundamental elements of the right to a fair hearing is included the equality of arms between the parties to the all court proceedings; equality of all persons before any court of justice, without any distinction of ethnic origin, race, gender, sex, colour, religion, age, language, creed, national or social origin, political or other convictions, status, means, birth, disability or other situations.[88] Accordingly, in these values, equal access for men and women to justice and equality before the law is provided for in all legal proceedings.[89]

Furthermore, it is also provided in those African principles, the guarantee of accused persons to present arguments and his proofs in court proceedings, the adequate opportunity to prepare a case, and to respond or challenge the pieces of evidence or arguments opposed to him.[90] It further states that the accused persons have the guarantee of consulting and being represented, at all stages of the proceedings, by a legal representative or other qualified persons chosen by him; the right to have the a court decision based only on law and evidence presented in court of justice or judicial body and the right to assistance of an interpreter if he cannot speak or understand the language used in or by the court or in other of justice sector.[91] Moreover, the African principles provided as part of the fair hearing, the guarantee of accused persons to the guarantee to an appeal to a higher judicial body, and the determination of their rights and obligations without

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[86] Prosecutor v. Slobodan Milosevic, Case No. IT-02-54-AR 73.4.
[87] Yves Morael v. France, U.N. Doc. Supp. No. 40 (A/44/40) at 210 (1989), para.9.3.
[88] According to Section A (2) of the African Commission Principles
[89] African Commission Principles, Section A (2).
[90] Ibid.
[91] Ibid.

undue delay and with adequate notice of and reasons for the decisions.[92] Additionally, the guarantee of equality is one of the general principles of the fair hearing. It prohibits discriminatory laws and includes the right to equal access to the courts and equal treatment by the courts. Its most important practical aspect is the equality of arms, comprising the idea that each party to a proceeding should have an equal opportunity to present its case and that neither party should enjoy any substantial advantage over its opponent.[93]

In short, it is clear that the concept of fair hearing applies to all proceedings in criminal courts and is an ethical and legal concept served to define the rules of court procedure and how the accused must be treated in the discourse of criminal adjudication. In this respect, the criminal court have to protect the accused person's rights during pre-trial stage, court proceedings and post-trial with respect to uphold justice and protect the dignity of the accused persons. It is important to note that the most important practical aspect of fair hearing includes the right to be tried within a reasonable time, equality of arms, chance to prepare a case, the right to have a legal counsel, present arguments and pieces of evidence in court proceedings, and right to appeal.

I.3.1.2. Right to a Public Hearing

The concept of public hearing can be understood as an opportunity in which the accused persons and public can express their views, explanation, available defenses, rebuttal and opinion on matters that affect them in a given case; the accused present all the defenses available to him, may show that the allegations against him do not constitute an offence, raise a plea of inadmissibility or other sorts of defense. Principally, all criminal trials must be performed publicly and orally.

In particular, the publicity of hearings guarantees that the court proceedings are transparent and thus offers a significant safeguard for the interests of society at large and individuals.[94] General comment no 32[95] also addressed the significance of public trials in ensuring transparent proceedings in the interest of a fair trial of the accused person, as well as informing the society's

[92] African Commission Principles, Section A (2).

[94] Zhang, J, *Fair trial rights in ICCPR*, Journal of Politics and Law, Vol. 2, No. 4, at p.43.
[95] HRC, General Comment 32, 2007.

perception of the efficacy of the judicial system. Public hearing, therefore, refers to the opportunity for accused persons to present their plea in an open hearing before a competent criminal court.

This requirement increasingly regarded as a method of ensuring the respect of the rights of accused persons and the accountability of judges or court trial within a state with democracy. It may safely be said that a judge is obliged to be fairer and more cautious when dealing with a case and making a judgment in public than when the proceedings are held in secret or in camera.[96] In the words of Jurist Bentham, "in the darkness of secrecy, sinister interest, and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate.

Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest guard against improbity. It keeps the judge himself while trying under trial".[97] More importantly, the mere fact that the criminal hearing was conducted in secrecy, is sufficient for making a doubt in the public's mind. In that regard, in Axen v Germany, the European Court of Human Rights has stressed the importance of the right to a public hearing under the ECHR; it asserted that the public nature of the procedure protects the litigants against the administration of justice in secret, without any governmental control.

It is also one of the means by which confidence in the judicial body, both inferior and superior, can be preserved.[98] In this respect, the publicity of criminal court proceedings also contributes to maintaining the confidence of the members of the public in criminal court processes. The vital aspects of the right to a public hearing necessitate that all required information of the court sessions be made accessible to all, and that a permanent place for all courts must be legally established and commonly publicized by the State.[99]

In regard to the ad-hoc court, the place and duration of their proceedings should be designated and made public; adequate facilities must also be provided for the participation of interested

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[96] Naluwailo, p.89.

[97] Bentham, J., Rationale of Judicial Evidence, 1827, Vol.1, Hunt & Clerke, London, c.10, [Online] Available at: https://books.google.rw/books/about/Rationale_of_Judicial_Evidence.html?id=6G9VF_qJFyMC&redi%20r_esc=y Accessed 27 May 2024.

[98] *Axen v. Germany* (1984) 6 EHRR 195, para.25

[99] Principles and guidelines on the right to a fair trial and legal assistance in Africa (African Commission Principles), A (a), at p.2.

members of the public.[100] The court should therefore not place any restrictions on the category of persons authorized to attend hearings when the merits of a case are under review or at the time of pronouncement.

Media officials should attend the hearing and report on the legal proceedings unless a judge is able to limit or restrict the use of cameras.[101] Furthermore, the general public and the parties deserve the right to know in what way justice is done.[102] Internationally, both the UDHR and the ICCPR protected the right to a public hearing.[103] Only specific grounds of public order, morality, and national security permissible in a democratic system may constrain the presumption in favor of public trials.[104]

Even when such grounds precluded the attendance of the public or media at the trial, the final decisions of a court must be made available to the public, unless the publication of such findings would prejudice the rights of a child or would infringe the privacy of the parties such as in divorce proceedings.[105]

In sum, it is established three distinct rights. First, the trial should be carried out in public; secondly, the procedural aspect of proceedings must be fair; finally, the judgment must be publically, in its delivery and the public accessibility of all the documents for a good preparation of the pleading. Thus, public hearing procedure has to guide the process in court proceedings to ensure that a hearing is conducted fairly.

However, the camera can be pronounced during the whole or a part of the court trial either when the respect of the private life of the parties in question requires either in the interest of public morals, national security or public order in a democratic state, either still in the measure or the court deems it absolutely necessary, because of the particular circumstances of the case, when the public hearing can prejudice the interests of justice. Nevertheless, any judgment rendered in

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[100] Section A (b) of the African Commission Principles.
[101] Ibid
[102] Part 3 of Article 9 of the UN declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms (Declaration on Human Rights Defenders).
[103] UDHR, Articles 10, and 14 (1) of ICCPR.
[104] *Lubuto v Zambia* (1995), UNCHR Coin No 390/1990, UN Doc CCPR/C/55/D/390/Rev 1.
[105] Ibid.

criminal matters will be public, except when the trial relates to the guardianship of children or the matrimonial disputes and where it is required in the interest of juvenile persons.[106]

In any way, as analyzed above, in order to protect and assuring the rights of accused persons, the publicity of hearing remains an important rights, therefore any exceptions to it must be rigorously interpreted and motivated and must be applied only where necessary. The criteria on how the exceptions of the publicity of hearing should be interpreted have to be clearly established with aim to fight against the abuse and evasion of the right to the public hearing.

I.3.1.4. Right to an Independent Court

The right to an independent court is a concept, which guarantees everyone accused of crimes that their case will be heard by an independent and impartial court. As pointed out by Landsberg,[107] two kinds of definitions of the concept of right to an independent court may have emerged; an institutional-type definition, and a performance-based definition. As required by the principle of separation of powers, the court must be institutionally independent, particularly from the legislature and the executive[108] while, on the other side, individual independence necessities that only persons with adequate legal training and skills and who have and integrity and competence should be agreed as judges.[109]

Consequently, judicial independence is both a set of the arrangements of the institutional aspect and its operation and a state of mind. The former is in fact concerned with identifying the relationships between the judicial power and other branches of powers, in order to ensure the appearance of independence and the truth, the latter is worried with the individual independence of the judge.

As established in Venice Commission recommendations, when judges make decisions must be able to act without improper influence, any restriction, threats or interferences, inducements, pressures, indirect or direct, for any motive or from any sector.[110] Judges should be free when they decide cases, in accordance with appropriate rules of law, with their consciousness and

[106] International Covenant on Civil and Political Rights, Article 14, (1).
[107] Brian K. Landsberg, *The Role of Judicial Independence*, 2007, pp.331-335
[108] Naluwairo, *R, Military justice, human rights and the law: an appraisal of the right to a fair trial in Uganda's military justice system.* PhD thesis, University of London, England, 2011, p.83
[109] Ibid.
[110] Venice Commission, Recommendation (94)12, principle I.2.d.

interpretation of the facts. Judges could not be requested to report to anyone outside the courts on the merits of their judgments.[111]

Rapporteur on the independence of judges highlights that the judicial independence remains an essential component of a state governed under a system of democracy.[112] It is recognized as central to the proper functioning of the judiciary within the concept of separation of powers. This last principle is the foundation of the requirements of impartiality and judicial independence. Consideration and respecting the doctrine of separation of power is an essential condition for a state governed under a system of democracy;[113] it requires the three arms of government to constitute a system of checks and balances in order to avoid and mitigate abuses of government authority.

In this respect, the Human Rights Committee has highlighted that the prerequisite of court's independence refers, among other things, to "the actual independence of the judiciary from political interference by the executive branch and the legislature".[114] On the other hand, the decisional independence of judicial officers requires legal protection of judges' term of office, security, adequate remuneration, their independence, conditions of service, the age of retirement and pensions.[115]

In this view, the requirement of an independent judiciary is the symbol of the basis and legitimacy of judicial functioning in every State, having both institutional and individual judge dimensions. Without the independence of the judiciary justice remains illusory, thus, this rights remains a precondition for access to justice. Only an independent court is able to render justice impartially on the basis of law.[116] Guarantees of judicial independence are the means to protect

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[111] Ibid.

[112] Report of the Special Rapporteur on the independence of judges and lawyers, UN document E/CN.4/1995/39, para 55.

[113] Ibid

[114] HRC General Comment No 32, 2007, para.19.

[115] Dugard, J*, International Law: A South African Perspective*, 3rd edn Juta & Co, Lansdowne South Africa, 2005, at para 241

[116] Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers,* United Nations, New York and Geneva, 2003, p.115.

judicial decision-making in individual cases from external influence and provide for a genuinely impartial arbiter.[117]

Furthermore, the right to an independent court, as well the right to impartial court, is an absolute right; it is not subject to any exception and that

> *"all persons shall be equal before the courts" and further, that "in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by an independent and impartial court established by law";*[118]

The Human Rights Committee (HRC) has clearly assumed that "the right to be tried by an independent and impartial court is an absolute right and would not suffer any exception".[119] Therefore, this right is applicable in all courts and all circumstances, whether special or ordinary. Accordingly, the African Charter on Human and Peoples' Rights obliges State parties to ensure the independence of the courts.[120] In this perspective, that the African commission on human and peoples' rights held that the independence of the court should be considered "non-derogable" as it affords minimum protection to persons".[121] It is thus a right, which applies in all situations.

The absence of impartiality and independence of court may lead to a denial of justice and makes the credibility of the judicial process dubious. It needs to be highlighted that independence as well as the impartiality of the judiciary are important in protecting individual rights of accused or the consumers of justice in general than a privilege of the judiciary as organ for its own interest.

Most importantly, the independence of justice applies to both judiciary as a system and courts as institution, and to the judges called to decide on particular matters. Institutional independence emphasizes the requirement that the judicial institution itself, as an organ, should be free of

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[117] Streeter, P.A, *Fair trial in Lithuania: from European convention to realisation*, PhD thesis, University of Leicester, England, 2012, at p 41.
[118] ICCPR, Article 14(1).
[119] Roza Pati, *Due Process and International Terrorism*, Martinus Nijhoff, Leiden.Boston, 2009, P56
[120] African Charter on Human and Peoples' Rights, Article 26.
[121] ACHPR, *Civil Liberties Organisation, Legal Defense Centre, Legal Defense and Assistance Project v. Nigeria,* Communication No. 218/98, decision adopted during the 29th Ordinary session, 23 April - 7 May 2001, p.3, [Online] Available at: http://www1.umn.edu/humanrts/africa/comcases/218-98.html, Accessed 27 May 2024

control and pressures.[122] Usually, threats to the institutional independence through control, pressure or any form of improper influence could emanate from external as well as internal sources.[123] Bahma posits that personal independence or individual independence, on the other hand, rests on the individual judge who should be able to exercise his judicial functions without fear or favour of any control or pressure from any party.[124] If it could be shown that a judge is not independent by virtue of his connection to a party to the action, whether a private party or the State, there would be doubts as to his impartiality and consequently, the correctness of his decision, even if he did ensure that the proceedings were fair in every other aspect.[125]

Both postulates of judicial independence have a bearing on each other. A judge may be individually independent but if the court, of which he is a member, is not independent, then, any convictions issued by the court could be rendered unsafe by virtue of that dependence. This would adversely affect the decisions of the court even if the convictions were arrived at after observation of other standards of fair trial.[126] In a democratic state, the right to an independent court and the right to an impartial court maybe the most important tenet in the administration of justice.

I.3.1.5. The Impartiality of Court

Impartiality means that a judge is not biased in favour of the other party. In this context, a judge must have the freedom to float the positions of the parties and finally make a fair and adequate solution by correctly applying the law and the rules of the jurisprudence relating thereto.[127] According to MacDonald and Vohrah, impartiality is characterized by objectivity in balancing the legitimate interests at play.[128] Thus, the impartiality may refer to the fact that judges are not prejudiced and they do not have any interest in terms of moral values and material in an indirect or direct way. The European court of human rights has explained the concept of impartiality in

[122] 4 Bahma, S, *The Right of an Accused to a Fair Trial: The Independence of the Impartiality of the International Criminal Courts*, PhD theses, Durham University, England, 2013, at p.100.
[123] Ibid.
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Trechsel, S, *Human rights in criminal proceedings*, Vol. XII/3. Oxford: Oxford University Press, 2005, p.50
[128] *Prosecutor v. Kanyabashi,* ICTR-96-15-A, Appeal Chamber, 3 June 1999, Decision on the Defense Motion for the interlocutory appeal on the Jurisdiction of Trial Chamber I, Joint and Separate Opinions by Judge MacDonald and Judge Vohrah, para. 35.

Morris v UK.[129] The court considered that in the concept of judicial impartiality there are two dimensions. Firstly, the Court should be objectively impartial, which means that there should be adequate guarantees for the Court to reject any illegitimate objection regarding impartiality.[130] Second, the Court should also distance itself from personal bias and influence.[131]

The impartiality is essential element for the good administration of justice in decision making process. The European Court of Human Right has well established in Sramek v. Australia that the principle of impartiality is an important element in support of the confidence which the courts have to stimulate in a society governed under a system of democracy.[132] The Bangalore Principles of Judicial Conduct,[133] in its second significance, impartiality is considered as crucial element for the correct execution of the judicial function, associated not only to the decision making process but also to the court decision. With regard to the conduct required of judges, the Bangalore Principles provides the guidance on conduct within and outside the courts and contains restrictions on liberty of speech, establishing the "appearance of impartiality" as an appropriate factor.

The determination of impartiality of the court is based on both subjective and objective criteria. The committee has reaffirmed this point of view in its general comment no 32 of 27 July 2007 relating to the issue of impartiality of a court.[134] Consequently, for the first aspect, the court must be subjectively impartial; in this case, the members of the court should not hold any bias or personal prejudice, nor have preconceived ideas about a specific case before him or her.[135]

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[129] This doctrine has been consolidated by the ECHR in numerous subsequent Judgments: Case De Cubber, Judgment of the ECHR of 26 October 1984, in which De Cubber, a Belgian citizen was condemned by a court one of the members of which had acted as investigating judge; Case of Gomez de Liaño and Botella, judgment of 22 July 2008.

[130] Ibidem.

[131] The case originated in an application (Case Number 38784/97) against the Northern Ireland and the United Kingdom of Great Britain lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mr Morris ("the applicant"), on 31 October 1997.

[132] *Sramek v. Australia,* judgment of 22 October 1984, Application no 8790/79, par 42

[133] The Bangalore Principles, endorsed through ECOSOC Resolution 2006/23, set up a veritable code of judicial ethics, although they have not received this designation expressly because it has “prescriptive and exhaustive connotations in civil law countries.”

[134] General comment no 32 of the international human rights committee, par.21; also the communication of *Karttunem v. Finland*, communication no 387/1989, views of 23 October 1992. CEU, 2007 by Natia Katsitadze

[135] Ibidem.

Second, from an objective viewpoint, the court must also be impartial; in this respect the court must offer satisfactory guarantees, for exclusion of any kind of legitimate doubt.[136] Weissbrodt posits that subjective impartiality is the personal impartiality of the judge as an individual. A judge is supposed to be subjectively impartial until proven otherwise. A reasonable third party must discern a behavioural impartiality based on how the trial is conducted.[137] Subjective impartiality necessitates a considerable effort in adjudicating; the Judicial Ethics Report 2009-2010[138] provides subjective impartiality as a set of rules of conduct aimed at ensuring the impartiality of judges, which refers not only to the exercise of their judicial role but also to the sphere of their personal and social life. However, objective impartiality is the conviction of the parties and the public that the court as an institution is not partial. In this case, an absence of personal bias, prejudice, or pre-judgment must be demonstrated.[139] Objective impartiality needs that judges confer certain guarantees to eliminate any suspicion of impartiality.

From the above analysis and an overview of understanding of the concept of impartiality of court reveals that the notion of fair trial is founded on the behavior of the criminal court as institution and of the individual judge. The criminal court and the individuality of judge must appear to be impartial to a reasonable person. This requirement is very important, and it may be the utmost significant safeguard for ensuring the right of accused to a fair trial. For accused persons, the impartiality of criminal court is more likely more than any other fair trial guarantees.

Therefore, the criminal court that lacks impartiality is not a court at all. A democratic State should take all legal and practical measures in the respect for minimizing all doubts concerning the impartiality of the criminal judges and their jurisdictions. Now that the different concepts of fair trial relating to the proper administration of criminal justice has been examined. As a matter of importance, it is established that the right to a fair trial encompasses in particular the right to a public and fair hearing and the right to be tried by an impartial and independent court. It is apt to start analyzing its value and importance in a fair administration of criminal justice and, before analyzing the scope of its application in criminal court proceedings.

[136] Ibid.
[137] Weissbrodt, D, *Administration of justice and Human rights*, 2009, at p.29.
[138] The Judicial Ethics Report 2009-2010 of the European Network of Councils for the Judiciary, June 2007
[139] Weissbrodt, D, 2009, at p.29.

I.3.2. The Objectives and Importance of the Right to a Fair Trial

The right to a fair trial is an essential right in States respecting the principle of rule of law. When this right is respected fairly, the accused person can be sure that processes will be fair and certain. The Inter-American Commission on Human Rights has considered, in case of Malary v Haiti, the right to a fair trial as one of the foundations of a society governed under the system of democracy.[140] The commission considers it also as a basic safeguard of respect for the other rights provided in the Convention, as it is a real limitation to the State to abuse of its power.[141]

Generally speaking, the fairness of criminal process and judgement are the most important components of administration of criminal justice. Weissbrodt stressed that the right to a fair trial remains one of the essential individual rights aimed for ensuring the good administration of justice as it ensures proper administration of justice by providing procedural safeguards to the rule of law.[142]

Accordingly, it prevents governments from abusing their powers, and it remains the best means of separating the guilty from the innocent and protecting against injustice.[143] In this context, the objective of securing the interests of the community is considered as the utmost significant objective of a fair trial in crimes against the physical integrity of individuals that are committed against the integrity of the body and the life of a living person.[144]

In accordance with the interpretation of the Court of Strasbourg, the right to a fair trial is a fundamental principle of the rule of law in society governed by the system of democracy and is aimed to guarantee the right to the proper administration of justice.[145] It is arguable that the notion of fairness, and justice go together specifically in criminal matters. It is very difficult to get justice from a criminal court which is not guaranteeing the right of citizen or suspect to the procedural fairness and which is not independent and impartial.

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[140] *Guy Malary v. Haiti,* Report Nº 78/02, Case 11.335, 27 December 2002, para 53.
[141] Ibid.
[142] Weissbrodt, D, *The Administration of Justice and Human Rights*, City University of Hong Kong Law Review, 2009, Vol. 23, No. 1, at p.28.
[143] Fair Trial, *The Right to a Fair Trial,* [Online] Available at: https://www.fairtrials.org/about-us/the-right-to-a-fair-trial/ Accessed on 28 May 2024
[144] Preamble of UDHR
[145] *Demir and Baykara v. Turkey*, Judgment of 12 November 2008, paragraphs 65-68.

It is impossible to overemphasize the significance of the right to a fair trial in a community governed by the system of democracy. In this community, it is taken as the most significant human right in the administration of justice.[146] Moreover, the right to a fair trial guarantees neutrality in the adjudication of conflicts through the multiple guarantees it offers in the conduct of trials. In this connexion, as also pointed out by Naluwailo, specifically in criminal proceedings, it is arguable that the notions of fair trial and justice are inseparable.[147] It is impossible to have or to get justice rendered by a court which is neither neutral nor independent, and which does not guarantee the other rights associated with fair trial rights and legal procedures.[148]

More importantly, the fundamental importance of right to a fair trial is greatly illustrated by its inclusion in the non-derogable rights. The ACHPR[149] and HRC[150] have said that the right to a fair trial must be considered non derogable. Indeed, in Chad v Commission Nationale des Droits de l'Homme et des Libertes,[151] the ACHPR noted that, unlike other human rights instruments, the African Charter does not permit countries to derogate from their commitments under the Treaty during the emergency circumstances. Therefore, even in the situations of emergency, the provisions of the African Charter dealing with the right to a fair trial are not derogable.[152]

In the above case, the ACHPR argued that even a civil war in Chad could not be used as a pretext for the State to violate or allowing violations of rights enchrined in the African Charter.[153] HRC also emphasized that States derogating from the standards of fair trial in the event of a government emergency should guarantee that such derogations do not exceed those strictly needed by the requirements of the real state.[154] It stressed that fair trial guarantees could certainly not be subject to derogation policies that would avoid the protection of the entrenched

[146] Naluwairo, R, p 48.
[147] Ibid.
[148] Ibid.
[149] Civil Liberties Organisation, et al v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 218/98 (1998), para.27.
[150] UN Human Rights Committee, General Comment No.32, 19th Session of the Human Rights Committee, 23 August 2007, CCPR/C/GC/32, para.6.
[151] Commission Nationale des Droits de l'Homme et des Libertes v. Chad, African Commission on Human and Peoples' Rights, Communication No. 74/92 (1995), para.21; Naluwairo, R, at pp.49 -51.
[152] Naluwairo, R, at pp.49 -51
[153] Ibid
[154] HRC, General Comment No.32, para.6. Ibid. (n 150)

rights.[155] Because it is inherent in the protection of freedoms explicitly recognized as non-derogable in Article 4(2) of the ICCPR that procedural safeguards, including often-judicial guarantees, must be guaranteed.[156] Indeed, the HRC declared well before that even in emergency situations, certain aspects of the right to a fair trial cannot be subject to derogation.

Certainly, the lack of fair trial in administration of justice generates so many bad impacts in the country, society and on individual person. Normally, the fair trial is a set of rights aimed to secure the fair administration of justice during different time periods of the trial process, the violation of rights or one right during one stage may well have an effect on another stage. This view has also been pointed out by Longford.

He expressed that without fair trial, all other rights are at risk and if the state is unfairly advantaged in the trial process, it cannot be prevented in the courts from abusing all other rights.[157] For Weissbrodt the impact of the administration of justice in a state has a practical significance on the affairs of groups and ordinary individuals. First, the fair administration of justice is essential for the rule of law in that it ensures that state practice and policies protect against the infringement of the fundamental human rights to liberty, life, personal security and physical integrity of the human being.[158]

Second, as the main vehicle aimed to safeguard the human rights at the national level, a strong system for administration of justice remains obligatory for the peace and stability of a state. Thirdly, a fair and efficient administration system of justice is indispensable for the protection of minority rights, which is crucial for ensuring the flourishing of inclusive democracy.

From the above analysis, it is true to affirm that without respect the rights of fair trial, the rule of law and public confidence in the justice system collapse.[159] The international community asserted the right to a fair trial to be a foundation of peace, justice and freedom in the world.[160] Therefore, the right to a fair trial is an incomparable way to avoid miscarriages of justice in criminal proceedings and is indispensable for a just society. Without it, the rule of law may be

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[155] Ibid.
[156] Ibid.
[157] Langford, I, Fair Trial: *The History of an Idea, Journal of Human Rights*, 2009, Vol. 8, No.1, at p.37.
[158] Weissbrodt, D, *The Administration of Justice and Human Rights,* City University of Hong Kong Law Review, 2009, Vol. 23, No. 1, at p.25.
[159] The Right to a Fair Trial, Supra note 1
[160] Preamble of UDHR.

considered as having failed to demonstrate its standards and importance in a particular society. In this connection, there is no insurance nor confidence in a given country that the criminal court cannot convict the accused persons or take away their liberty, without observation of the facts, pieces of evidence, law and protection of other individual rights related to the protection of the integrity of human being.

Therefore, the denial of fair trial to the accused persons may be considered as a denial of justice. Rwandans accused of a crime as well as other persons should have their guilt or innocence plea determined by a fair and effective legal process, because getting a criminal trial free from atmosphere of partiality may be listed among the most valuable rights of every accused person. In sum, it has been shown that the right to a fair trial occupies a prominent place in a society governed under a system of democracy.

The notions of fair trial and justice are not separable; thus, denial of fair trial is much injustice to the accused person as it is to the victim and society. Rwandan legal system and court practices need to take into consideration the importance of a fair trial guarantees with respect to protect individual rights and upholding the rule of law principles because without this right, public faith and the rule of law in the justice system can collapse.

Having established the importance of fair trial, it is also important to scrutinize its scope of application, particularly with the criminal courts. In a society governed under a system of democracy, the position and weight of the right to a fair trial cannot be underestimated. Even if it is important, it does not explain that the right to a fair trial must be applied to all proceedings before criminal courts. The section below addressed the applicability of fair trial rights in all proceedings before criminal court.

I.3.2. The Scope of Application of the Right to a Fair Trial in Criminal Matters

The major important components of criminal justice are its fairness. The right to a fair trial is considered in the most famous, most popular and most important human rights that emerged during the development of human rights civilization.[161] Article 14 (1) of the ICCPR states that "in the determination of *any criminal charge against him, or of his rights and obligations in a*

[161] Sasan Rezaeifard S, Akbar Varvaii A, Mohammad Javad Jafari MJ. *Principles and Objectives of Fair Trial, in Crimes Against Physical Integrity of Individuals, in Iran's Penal System,* International Journal of Scientific Study, 2017;5(4):915-920, at p.915.

suit at law ... everyone shall be entitled to a fair and public hearing by an independent and impartial court established by law".[162]

Likewise, the UDHR provides that "everyone is entitled to a fair and public hearing by an independent and impartial court, in the determination of his *rights and obligations and of any criminal charge against him"*.[163] The right to a fair trial therefore refers to trials concerning the determination of the rights and responsibilities of a person in a lawsuit and those related to the determination of a criminal charge.

Criminal courts hardly ever deal with the rights and responsibilities of a person in a lawsuit. Consequently, the civil matters are deliberately excluded from the scope of this thesis. With regard to proceedings relating to the determination of a criminal charge, the HRC indicated that, in principle, criminal charges relate to the actions, which are provided to be punishable under national criminal law.[164] This implies that in determining whether there is a criminal charge for the reasons of applying the right to a fair trial, the classification of the offense and criminal court proceedings under domestic legislation should be considered.

I.3.4. Fair Trial in Rwanda

It is essential to guarantee that States are in the line to abuse their authority and deny people the fair trial rights by simply designating as disciplinary certain omissions or acts. In fact, while this thesis argues that the practice of courts in Rwanda reveals that laws are still lagging behind and do not correspond to the requirement of having good justice administration, it must be acknowledged that the rights of the accused person play a central role in proceedings and they must be kept at the top standards of fairness. Furthermore, the judgments rendered by Rwandan courts have to stress the importance of ensuring the fairness of trials. In the Rwandan context, judicial authorities are competent to investigate, prosecute and try offences committed on the territory of Rwanda by either a Rwandan or a foreigner.[165]

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[162] ICCPR, Article 14 (1).
[163] UDHR, Article 10
[164] HRC General Comment 32 (2007), para 15.
[165] Article 9 of the law №68/2018 of 30/08/2018 Law determining offences and penalties in general as it was amended by the Law nº 059/2023 of 04/12/2023 determining offences and penalties in general

They are also competent to deal with accomplices of felonies and misdemeanors committed outside Rwanda if they are both punishable by the law of the country where they were committed and the Rwandan law. The criminal proceedings, in Rwanda, involve, four distinct phases: Investigation phase, prosecution, criminal action and adjudication. The development in this thesis examines the Rwandan commitment to respect of fair trial rights during the discourse of the trials. In fact, Rwanda is a civil law country, but its legal system has also some common law elements, particularly, its procedural laws.

The criminal procedure code is used in order to prosecute and find the guilt of a person who is presumed to commit an offence; therefore, the criminal liability is personal.[166] It is widely agreed that, at least one of the purposes of the criminal trial is to discover whether the charges laid on the defendant are true, in the sense of being sufficient to justify a guilty verdict in relation to the particular offences charged.[167] Hence, procedure is heavily geared towards promoting the finding of this legal truth.

Furthermore, the Rwandan penal code provides different crimes and their penalties with intention to protect the citizen against arbitrariness of the judge. Thus, it is the principle of legality of sentences and penalties often explained by Latin maxim “nullum crimen, nulla poena sine lege" (there is no punishment or crime without legal text). Even provided as such, the legitimacy is lacking if the defendant had no chance to properly rebut the charges put on him/her.[168] In order to do so basic rights have to be afforded by the defendant, commonly expressed in the right to a fair trial.

Hence, limitations of the defendant’s participation in the trial, including the non-disclosure of relevant information, which impairs rebuttal of the charges, may seriously impair the legitimacy of the trial. In Rwanda as well as in other democratic states, the rights of the accused must be the primary concern in the conduct of any criminal proceedings, starting at preliminary investigation, prosecution and judging process.

The character of a procedure under national law cannot be decisive for the question whether the right to a fair trial is applicable, otherwise the national authorities could evade these obligations

[166] Article 83 of the of the law Nº68/2018 of 30/08/2018
[167] Hock, H. L, Liberalism and the criminal trial, Sydney Law Review, 2010, Vol 32, 243 – 246.
[168] Krebs, J, *The Right to a Fair Trial in the Context of Counter-Terrorism: The use and suppression of sensitive information in Australia and the United Kingdom*, PhD thesis, The Australian National University, 2016.

by introducing disciplinary proceedings for offenses which should be part of the criminal law; that is to say, the operation of fair trial rights would be subordinated to the sovereign will of state. Therefore, as Johannes pointed out the adoption of an autonomous interpretation, independent of the national legal system, was inescapable.[169]

In sum, the trials aim at rendering justice, but when citizen are subjected to unfair trials, justice cannot be served. For instance, when trials are manifestly unfair or are perceived to be unfair, the justice system loses credibility. Therefore, this makes the right to a fair trial a basic individual right. Its applicability on a criminal charge start from the first contact between State officials involved in investigations and the suspect, not when charges are filed to criminal court. As shall be discussed presently, the analysis in this thesis focuses to total trial process, from the trial to final judgement.

I.3.5. Legal Duties for a State in Promotion and Respect of Fair Trial Rights

Fair trial rights carry corresponding obligations that must be translated into concrete duties to guarantee these rights. International human rights law obligations require that the State must respect, protect and fulfill[170] its obligations related to the enjoyment of fair trial rights by the accused persons within their territory and/or jurisdiction. In fact, first obligation of a State is the duty to respect which in its turn is considered as a negative obligation.[171] It denotes that the State have the obligation to guarantee that all its legislations, policies, etc. comply with the human rights obligations.

It requires responsible parties to the treat relating to a fair trial, to refrain from acting in a way that deprives people of the guaranteed rights. Second, the duty to protect requires that the State has to respect and implement the provisions of ICCPR and other international legal frameworks aimed at ensuring the protection of accused persons to the infringement of the other people.

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[169] Ibid.

[170] The Maastricht Guidelines on violations of Economic, Social and Cultural Rights, *"Limburg Principles"*, 1997, point 6.

[171] Filmer, W.E, *The human rights-based approach to development: The right to water,* Netherlands Quarterly of Human Rights, 2005, Vol.23, No.2 at 218.

Bindu pointed out that it is required to States to prevent the violations of such rights by third parties and to ensure provisions for redress.[172]

Third, for the duty to fulfil necessitates a State to take appropriate administrative, legislative, judicial, budgetary, and other different measures on the way to the full realisation of such rights for all members of society.[173] Therefore, the State should facilitate and promote the full exercise of rights by its citizens. Moreover, as prescribed in UN basic principles of independence, the State has a constitutional obligation to ensure the right to a fair trial of all people by an impartial, independent, and competent court.[174] The HRC stressed that the public hearing requirement is an obligation placed on the State and does not rely on the parties' request to the courts proceedings.[175] Specifically, for European states, the ECHR imposes an obligation upon states to organise their judicial and legal systems well as to align with the requirements of right to a fair trial.[176]

In order to ensure proper realization of rights of accused persons in the discourse of criminal court proceedings, states have the responsibility to organize their criminal courts in order to respect each of the requirements of the right to a fair trial. This comprises of complying with the right to a public hearing, fair hearing, impartial, independent and competent court. With regard to the fore mentioned approaches, Rwanda as well as other States, party to international instruments relating to a fair trial, is obliged by the legal frameworks to respect, protect and fulfill the fair trials in good faith, due to the principle commonly referred to as "the doctrine pacta sunt servanda".[177] In this sense, Rwanda is technically obliged to comply with its treaty obligations

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[172] Kihangi, Bindu K, *Environmental and developmental rights in the SADC: Specific reference to the Democratic Republic of Congo and the Republic of South Africa,* Lambert Academic Pushing, LAP, Germany, 2011, p.195.
[173] Ibidem
[174] UN Basic Principles on the Independence of the Judiciary, 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 08/26-09/06/1985 and 40/146 of 12/13/1985; UN GAOR, 40TH Session, Supp. no. 53, UN Doc. a/40/53 (1985); The Bangalore Principles of Judicial Conduct, Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Roundtable Meeting of Chief Justices held at the Peace Palace, the Hague, the Netherlands,11/25- 26/2002.
[175] *G. A. Van Meurs v. The Netherlands.*
[176] Weissbrodt, D, *The Administration of Justice and Human Rights,* City University of Hong Kong Law Review, 2009, Vol. 23, No.1, at 39.
[177] The doctrine of pacta sunt servanda provides that any treaty in force binds the parties. This doctrine is a principle of customary international law and is codified in Article 26 of the Vienna Convention on the Law of Treaties, 1969.

and fulfill those obligations by putting in place appropriate administrative and legislative measures.

CHAPTER II: THE CHALLENGES AGAINST FAIR TRIAL ON THE SUSPECTS UNDER RWANDAN CRIMINAL LAW.

The fair trial rights of the accused are an indispensable component of any criminal proceedings. By assuring the rights of the accused, courts and tribunals ensure not only that justice is assured by delivering just outcomes, but by guaranteeing that the narrative of the events is accurate and that the verdict can be trusted by future generations. The accused person needs a fair trial from the day he/she arrested to the judgement execution. The law provides the all procedures that fair trial can be served.

However, according to how the suspect served fair trial, there is some challenges are still affect that fair trial and leads to unfair trial to the suspect. Someone can ask him/herself if the problem is law or is implementers. They are different issues against the fair trial to the suspect, but in this research, two are enough to discover how the suspect some time are not get fair trial in Rwandan criminal law. Those two issues are the unlawful detention and publication of the suspect before to be convicted by the court.

II.1. Unlawful detention

Unlawful detention is defined differently in international, regional and domestic procedural legislation. There is no universal or common definition of "unlawful detention" in comparative law.[178] In this study, the detention is considered as unlawful if it contravenes any provisions of Rwandan or international law. The Article 143 of the Law Nº 027/2019 of 19/09/2019 as it was amended by the law nº 058/2023 of 04/12/2023 relating to the Criminal Procedure provides the unlawful detention. It stipulates that: *Any detention in violation of provisions of Articles 66, 74 and 79 of this Law is unlawful and punishable.*

Unlawful detention provided under Paragraph One of this Article includes:

1° detaining a person in an irrelevant facility;

2° detaining a person for a period longer than the period specified in the arrest statement and in the provisional detention warrants;

[178] Van Kempen, P.H.P.H.M.C., *Pre-trial Detention. Human Rights, Criminal Procedural Law, and Penitentiary Law, Comparative law = Detention avant jugement. Droits de l'homme, droit de la procédure pénale et droit pénitentiaire, droit comparé* (International Penal and Penitentiary Foundation, 44) p.7, (2012).

3° continued detention of a person after a decision rejecting provisional detention or its extension or granting provisional release was taken;

4° continued detention of a person after a decision of acquittal was taken;

5° continued detention of a person who was punished by a fine;

6° detaining a person whose sentence was suspended;

7° continued detention of a person who served his or her sentence;

8° being detained by an unauthorized person;

9° detention that does not comply with formalities of arrest and provisional detention.

Unlawful detention in Rwanda tends to be reflected on the provisional detention and release. The people like to say that 30 days is worse than admitting a crime and being punished early. The law clearly explains how this punishment is implemented but in fact the way the law provides are not the way implanted.

The Article 79 provides that “the provisional detention order against a suspect is valid for thirty (30) days including the date on which it was rendered. The order is subject to renewal for more thirty (30) days on a continuous basis. The renewal of such thirty (30) days must be justified in relation to what was done in the previous thirty (30) days in regard to the investigation and the objective of additional time requested.

However, for petty offences, if the period of thirty (30) days expires, it is not renewed. For misdemeanours, the period cannot be renewed after three (3) months the person is in detention, and for felonies such a period cannot be renewed after six (6) months the person is in detention. If the time limits provided for under this Paragraph expire before the case file is submitted to the court, the suspect under provisional detention is granted provisional release.

A court order for renewal of provisional detention is rendered by the court under the circumstances and time limits provided for under Article 77 of this Law.

A court order for provisional detention or renewal of the provisional detention must be reasoned.

A court order to release or renew provisional detention is rendered by the judge who is nearest to the place of detention of the accused after considering whether the grounds that led the previous judge to order detention are still valid.

Provisional detention may also be ordered if the accused deliberately failed to comply with conditions imposed on him or her by the court."

However, even it provided by law, it is very rare for the prosecution to file a complaint again asking for a person to be imprisoned for the second time for provision detention in 30 days until the time provided by the law. Often, a suspect imprisoned 30 days on the first time, then after no additional claim for other 30 days. He/she waits for the date of the hearing of the case on its merits. This date should be after two or three year according to the number of cases are in the court. There are various examples of people who imprisoned in provision detention in prison for more than one year while the law stipulates that no one should be imprisoned for more than one year in provisional detention. . While this exists and done are complying with the second paragraph of article 143 of the Law No 027/2019 of 19/09/2019, as it was amended by the law no 058/2023 of 04/12/2023 relating to the Criminal Procedure provides the unlawful detention. It stipulates that unlawful detention is detaining a person for a period longer than the period specified in the arrest statement and in the provisional detention warrants. This leads unfair trial to the suspect.

II.2. Publication of the suspect before to be convicted

The repeated publication of some crimes creates a dangerous social dimension in the mindset of the individual and the group if it is to form public opinion, as publishing to form public opinion sometimes constitutes pressure on the judiciary and all parties to the criminal case. For this reason, it may sometimes constitute slander against the presumption of innocence or it may push the criminal judge to move away from the principle of impartiality and independence.

II.2.1. The effect on the presumption of innocence

There is no doubt that a person is born free, having a free opinion and body, without any concerns. Therefore, on the criminal level, a person is born innocent, in harmony with an

individual's original innocence, unless proven otherwise[179]. This is what was recently called the principle of the presumption of innocence, as this principle laid a basis for protecting the personal freedom of the defendant, as well as being the main pillar and base of procedural legitimacy[180].

What is meant by this principle is that the accused, no matter how serious their crime is, and no matter how dangerous they are, is innocent until proven guilty according to the law. Accordingly, they must be treated as innocent people, not convicted defendants, until the court rules that they must be indicted by a decisive and final judgment.

The accused does not have to prove their innocence if the Public Prosecution is unable to establish evidence. Likewise, this evidence must be firm and decisive, by means of which the trial judge shall be convinced.[181]

The Universal Declaration of Human Rights and international conventions came to confirm this principle by saying that the accused is innocent until proven guilty by a legal trial in which the legal guarantees are secured for his defense.[182] In Article 7 of the Declaration of Man and of the Citizen Rights proclaimed by the French Revolution of 1789, stipulated that every person is presumed innocent until sentenced as a guilty. Likewise, Article 11 of the Universal Declaration of Human Rights of 10 December 1948 stipulated that "every person accused of a crime shall be considered innocent until proved that he committed it legally in a public trial in which all the guarantees necessary for his defense were provided."

Then, the European Convention on Human Rights (1958) confirmed this principle in Paragraph 2 of Article 6, which stipulates that every person accused of a crime is considered innocent until legally proven guilty. Paragraph 1 of the aforementioned article indicated that journalists and the

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[179] Al-Qahwaji, A. *Fundamentals of Criminology and Penology*. Al-Halabi Legal Publications.2002

[180] Procedural legitimacy means that no action shall be taken against individuals and the accused except under the obligatory legal provision of the law. Therefore, it is not permissible to carry out an arrest, search, or interrogation unless the conditions stipulated in the Code of Criminal Procedure are fulfilled for its establishment. This is completely different from the objective legitimacy related to the legitimacy of crimes and penalties, which means that there is neither crime nor punishment without a legal text. These two laws together constitute criminal legitimacy.

[181] Awad, M. (1988, April 9–12). *Human rights, procedures and investigation procedures - research within the second conference of the Egyptian Society of Criminal Code (protection of human rights in criminal procedures), 109.* Egypt: Higher International Institute of Criminal Sciences, International Association of Penal Law.

[182] Kalzi, Y. *Human rights in the face of criminal investigation authorities*. Comparative Study (2007). (1st ed., pp. 148). Riyadh Naif University for Security Sciences.

public may be prevented from attending all or some of the sessions according to the requirements of public order. The international community has unanimously adopted the principle of the presumption of innocence in Article 14 of the International Covenant on Civil and Political Rights of 1966, which stipulates that everyone accused of criminal charges has the right to be considered innocent unless his guilt is proven in accordance with the law. The Jordanian legislator approved the principle of the presumption of innocence that the accused is innocent until proven guilty by a final judgment, a constitutional principle that may not be overridden or violated.[183] This principle has also been included in the Code of Criminal Procedure; to demonstrate that the Jordanian legislator is looking for the consolidation and application of this principle, since Article 147, paragraph 1 of this law stipulates that the accused is innocent until proven guilty. Moreover, paragraph 4 of said article also states that if the evidence is not given regarding the incident, the judge shall decide the innocence of the accused, suspect, or defendant of the crime ascribed to him.[184]

From this principle, it is established that at all levels of the justice systems dealing with the defendant shall be done pursuant to said principle, and that behavior shall be based on the fact that he is innocent, so that he shall not be subject to humiliating or degrading treatment during his investigation and trial.[185] That is why we must avoid any suspicion that affects or causes prejudice upon this principle, in order to preserve the dignity and existence of the defendant. Because of social media networks and what individuals circulate through these networks of

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[183] Article 101, paragraph 4, of the Jordanian constitution, states that the accused is innocent until proven guilty by a final judgment: The Supreme Constitutional Court in Egypt concluded that the origin of the acquittal is a legal assumption based on the instinct upon nature which man has been brought as he was born free of guilt and sin. So it is supposed that the origin of innocence is still latent in him, accompanying his actions until the trial court overturns a firm and irrevocable judgment on this assumption in light of the evidence presented by the public prosecution confirming the crime attributed to him in every aspect of it, according to every incident necessary to its establishment. Refer to case No. 5 of the year 15 / constitutional judicial / on 5/20/1995 was published in the Official Gazette No. 23 dated 6/8/1996 referred to on the Internet on the website: www.albahaa.com.

[184] If the defendant's defense is limited to mere denial, then he is not required to establish evidence of his denial or innocence. This is a statement to the principle that "the accused is innocent until proven guilty," as the presumption of innocence is one of the accused's guarantees and personal freedoms. The legislator codified it in Article 147/1 of the Code of Criminal Procedure, "if he does not provide the judge with conclusive evidence of the conviction, the judge shall acquit the defendant. This means that condemnation is only based on certainty and assertion. On the other hand, the judge does not require conclusive evidence for the judgment of absolution, but it is sufficient for the judge to question the validity of the accusation attribution to the defendant to rule with absolution and the presumption of innocence. (Discrimination Penalty 1419 / Date of 11/15/2015—kistas Program)

[185] Al-Sharif, A. *General Theory of Criminal Evidence,* p. 44, 2002, Dar Annahda Al Arabeya

publishing and commenting on news related to the defendant directly, the presumption of innocence is affected so that the person is convicted by society and is dealt with on this basis.

However, not every socially condemned person is necessarily legally guilty, and not every legally innocent person is socially innocent. Since social innocence is when a person has not committed acts or behavior that are inconsistent with the values and morals prevailing in society, even if they do not lay under any criminal text. Therefore, someone is said to be innocent, and it is inconceivable that he would commit such acts, and this is called the popular aspect of innocence. "There is no smoke without fire", the prevailing perception and the general public belief is what determines a person's innocence or not. At this point, the problems regarding the presumption of innocence start, due to society and what it circulates through social media networks. The danger of the media outlets publishing news related to the accusation and the investigation gives the direct impression that this defendant is the real perpetrator of the crime.[186] It is also a clear violation of the principle of confidentiality in the investigation, which constitutes the main pillar for preserving the presumption of innocence and dignity of the accused, in addition to preserving evidence of the crime in all its forms.

II.2.2. The effect on the confidentiality of the investigation

The secrecy of the investigation is an important principle and major necessity in criminal cases, as well as being one of the important characteristics that the primary investigation has.[187] The Article 73 of the Law N° 027/2019 of 19/09/2019 as it was amended by the law nº 058/2023 of 04/12/2023 relating to the Criminal Procedure provides Confidentiality during investigation. It stipulates, *"Unless otherwise provided for by law, investigation and evidence collection are conducted in a confidential manner. Any person involved in investigation and evidence collection is bound by an obligation of professional secrecy"*

This principle is intended to conceal the course of the investigation from public view, so that only those who have a relationship with this investigation or who have the right to be informed

[186] Al-Sharif, A. (2002). General Theory of Criminal Evidence (p. 446). Dar Annahda Al Arabeya. Seealso Muhda, M. (1992). Guarantees of the accused during the investigation C 3. Edition 1. Dar Al-Huda.
[187] Al-Gharib, M. *Explanation of general principles in the Kuwaiti criminal procedures and trials law* (1st ed., pp. 161). 1998 Kuwait University Press. See also Awad, A. (1999). General principles in criminal procedure law (pp. 349). University Press.

of the investigation may be informed.[188] It is not permissible for the public to attend the course of the investigation or be informed of what is taking place, except for those people who have the right to be informed.[189]

Confidentiality begins from the start of the investigative procedures carried out by the judicial police officers, including preliminary inquiries and primary investigations, such as questioning, hearing witnesses, collecting evidence, seizing or inspecting people and residences, as well as the decisions of the Public Prosecution in facing the primary investigation, such as an indictment. Then, confidentiality ends as soon as the criminal case comes before the judiciary to conduct the proceedings, whereby publicity becomes the principle and the exception is confidentiality.

The reason for confidentiality lies in protecting the interest of the investigation on the one hand, and protecting the innocence on the other hand, in avoiding exposure of the accused person and his reputation and avoiding influencing witnesses. It is not permissible to interfere with the investigation process by publishing it to the public, commenting on it, expressing observations, and turning it into informational material for individuals to share on social networks.

Individuals publishing the investigation course in a heavy and continuous manner through these networks and commenting on them poses a grave danger to the freedom and reputation of individuals whose destinies have led them into the courts as a result of the error of others or of injustice, and after the truth becomes clear to the judges

The publication of any information related to a criminal action that is still at the level of the investigation and has not yet been decided upon is an unsuccessful interference by social media in the judicial course, but more than that, it is a clear violation of the good administration of criminal justice and of the investigation . This is a great danger to the accused whose life or money is dependent on the publishing of an article or commenting on it by individuals who are only trying to satisfy the curiosity of public opinion, to learn more details about that crime and its ugliness and about the accused's crime and description.

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[188] Litigants, their attorneys, and witnesses may attend and access the investigation procedures.
[189] Ghanem, G. *Confidentiality of evidence and criminal investigations and their impact on the human rights of the accused*, Journal of Law (Kuwait University), (1993). 17(4), 193

The disclosure of news of the investigation by the persons entrusted with it or other curious persons before its completion and discussion of its results in a public session will nullify the rationale behind it, which is to spare the accused a preliminary trial, to preserve his honor and reputation, on the one hand, and on the other hand, to preserve the investigation procedures and track the truth, by not giving anyone the opportunity to dispel persuasion documents.

Likewise, the publishing of the details of the crime and its circulation clearly affects the witnesses in that case. If the crime is circulated in a specific context and takes a social dimension through social networks, the witnesses may find themselves in front of a social tornado that forces them to follow the societal narrative and not what they saw or heard directly. Also, the circulation of the image and the malicious biography of the accused person may cause witnesses' reluctance to give any information and to go to the court and serve the criminal justice system, and herein lies the problem.

II.2.3. The effect on the Testimonial

Testimony is of great importance in criminal evidence, and the witnesses are the eyes and ears of the court, and it is often the case that testimony during the investigation has a great impact regarding innocence and conviction.[190] In addition, testimony is an inevitable consequence of what is going on in the human soul of the witness from telling the truth and bearing the result of that, or avoiding the truth and evading everything that may entail something he cannot bear.

Testimony, like all other human actions and behavior, is subject to many concerns, to other psychological factors and more. Given the importance of testimony, most legal systems have sought to formulate legislative texts and programs to ensure the protection of witnesses and workers in the field of criminal justice in order to obtain their testimony in an objective and correct manner in which justice is achieved among members of society[191]

The danger of intensive and repeated publishing on social networks on an issue and in a direction different to the truth leads to eradication of the existing knowledge assets of that issue and the substitution of new knowledge assets in place of them, which negatively affects the way the

[190] Pradel, J. (2003). Manuel de Procédure pénale-2002/ 2003-11ème édition, Dalloz. 351.
[191] Maron, A. (1998). La lutte contre la délinquance organisée, R.I.D.P, 887. Toulose, France: Érès. See Also, Pradel, J. (1998). Les systèmes pénaux a l'épreuve du crime organise (pp. 662). R.I.D.P

witness thinks about what he received from the information and transforms his conviction and beliefs to different ones.

As conclusion to this publication of the suspect, the best investigation is done with confidentiality. The Rwandan criminal procedure also provided for it. Publication that a person is suspected of a crime and not yet convicted has different consequences to him or her including defamation and public exposure of the Suspect. When RIB arrests a person, they immediately invite journalists to show the suspects and says the investigation proceeds. What they do is to ignore that, that person can be acquitted by the court. When a person becomes innocent, it does not remove the consequences he had in society caused by social media. Publication of the suspect, not only affect the suspect but also to the witness because he/she can hide the truth according to what he/she heard in the media and become influenced. However, his/her testimony would exculpatory the accused person. Therefore, the fair trial that was expected of the suspect was not achieved. That is why the publication of the suspect is the element of unfair trial

CHAPTER III: THE MECHANISMS THAT CAN FACILITATE TO AVOID UNFAIR TRIAL IN RWANDA

Everything that could be required to provide a justice, it could be given because injustice hurts and causes loss to those who have been subjected to it. Although in this dissertation, two things that make justice impossible are revealed as namely the illegal detention and publication of the suspect before to be convinced. In this chapter there are proposed solutions to these issues but there is another additional solution that can facilitate in decreasing many cases, loses where the suspect who spent a long time in prions then after he/she became acquittal can be compensated.

III.1. Illegal detention

The right to a fair trial is a norm of international law intended to safeguard people from illegitimate and arbitrary curtailment or deprivation of other fundamental rights and liberties, of which the person's right to life and freedom is the most prominent.[192] It is a fundamental safeguard to ensure that accused persons are protected from arbitrary or unlawful deprivation of their freedom and human rights.

The constitution of Rwanda of 2003 as revised in 2015 like many constitutional frameworks in other countries contains an extensive Bill of Rights. The Bill of Rights in Rwanda's constitution is contained in Chapter four which deals with the freedoms and human rights. It is provided that a human being is sacred and inviolable.[193] This means that individual rights of human being are not favors granted by the States or anyone but are entitlements of the person by the fact that she is created as such. The constitution states also that a human being must be respected, protected and defended by the State.[194] The right to a fair trial is one of the non-derogable fundamental rights under the constitution. In fact, the current constitution provides provisions related to the fairness of criminal proceedings. Article 29,[195] titled "right to due process of law", is the operative segment establishing guarantees for people accused of criminal offenses during the court trial. It is emphatically stated, in this provision, that every person has the right to appear

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[192] Lawyers Committee for Human Rights, *What is a fair trial?* A Basic Guide to Legal Standards and Practice, USA, 2000, p.1.

[193] Constitution of the Republic of Rwanda of 2003 revised in 2015, Article 13

[194] Ibid

[195] Article 29 of the constitution of 2003 revised in 2015.

before a competent Court.[196] It provides the presumption of innocence to everyone charged with a criminal offense until proved guilty or until that person pleads guilty before a competent court, the right to legal representation and defense, and be informed of the cause and nature of charges.[197]

Several international documents relating to human rights have given them since the Universal Declaration of Human Rights recognized fair trial rights. Articles 14 and 15 of the ICCPR are the most comprehensive and detailed provisions on fair trial rights among these international documents. The Lawyers Committee for Human Rights,[198] in its guide-book on fair trial criteria, categorized fair trial in three categories namely pre-trial rights, in-trial rights and post-trial rights. The pre-trial phase involves the rights to legal counsel, the right to appear promptly before a judge to contest the legitimacy of arrest and detention, prohibition on incommunicado detention, the right to know the reasons for arrest, prohibition on arbitrary detention and arrest, the right to respect the human condition during pre-trial detention and prohibition on torture. In criminal proceedings, the accused person must enjoy these rights in the stage of pre-trial which consists of the investigation stage usually carried out by the RIB Station, and the prosecution stage.

Although the law is clear in the protection of faire trials in Rwanda, but as explained above, unlawful detention is still a serious problem that has not been solved. The fact that the law provides for the maximum number of days a person must be in prison for provisional detention but find that he/she has been in prison for more than one year, is a very serious problem. The root of that problem is not that law enforcement are not aware of them but that their number is very small according to the cases they have. Those are Investigators, Prosecutors and Judges.

Today there are courts that reach in 2030 in providing trial dates for criminal cases. These cases included those who were imprisoned for provisional detention of 30 days. The law states that the maximum period of this kind of imprisonment is one year. Therefore, the problem is that someone who will go to trial in 2030 can stay in prison until the end of that period. Whether the cases are many in the court is based on the small number of employees. Therefore, at this point,

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[196] Ibid, Article 29,3.
[197] Ibid, Article 29,1.
[198] 9 Lawyers Committee for Human Rights*, What is a fair trial?* A Basic Guide to Legal Standards and Practice, USA, 2000

the Judicial of Rwanda is required to increase the number of employees so that speedy cases can be tried quickly then people can get justice.

III.2. Publication of suspect before convicted of the court

Imagine that you have seen someone on Television, RIB is explaining that he is being prosecuted for the crime of embezzlement. The next time you are looking him/her in front of you as an interviewee on the post of managing director in your company. After the investigation and found that he/she was innocent, would you give him/her that job without worry among the many others who applied for that position or you can give it to someone else?

Some time, RIB calls the social media and publishing the suspects who have been arrested for different operations. RIB spokesperson explains that it should be a lesson for people do, or think about committing crimes like those who would have shown. That is not bad and it really gives a lesson but it also has consequences because of the time it was done.

The law states that a suspect is considered innocent as long as he is not convicted by the court. So when he is declared not guilty it affects him physically or mentally, including being known about evil, losing confidence, honest and so on. There are many people who are arrested and being published and after to get hearing, they become acquitted by the court but to be acquitted does not remove the consequences. This also affects not only the accused, but also the investigation, prosecution, witness and others. For example, Publication of Suspect and explain the way a suspect did that crime, should be the way of teaching new criminals, to change testimonials, to influence investigator, prosecutors sometime.

The Publication of Suspect before to be convicted by the court is very opposite to the Article no 73 of the law Nº 027/2019 of 19/09/2019 as it was amended by the law Nº 058/2023 OF 04/12/2023 relating to the criminal procedure. It provides the “Confidentiality during investigations” instead of keeping confidentiality, Rwanda Investigation Bureau pronounce or publish the suspect and the way they did crimes.

By correcting this issue, The Justice of Rwanda can avoid this publication and states that a suspect will be published after to be convicted by the court. While they do this before that conviction, there is a violation of principle of presumption of innocent.

III.3. Compensation to the suspect detained illegally.

Even Though, the Unlawful detention especially basing on the detaining of a person for a period longer than the period specified and published of suspect before to be convicted by the court are the main problems pointed out and the solution has been given, in this part the lasting solution that would provide fair justice to the suspect is to be compensated if he/she become acquittal.

This part not only focus on the people detained illegally but also the people detained legally but at the end be acquitted. The reason is that, when they detained and after become acquittal, is the sign that investigators and prosecutors did not make a deep investigation because if they did it deeply, they would see that a suspect is innocent and close the file without file claim in the court as one of the things delayed him in prison.

Takings analogy of different arguments it clear that compensation is a right that a person is entitled to enjoy whenever it proven. Some legal systems recognize that provisional detention is a temporally act which is done by government organ which takes person rights of liberty in the public interest because it is done in order to dissuade criminal behavior and protect the society.[199] Therefore, it would be unfair or wrong to force innocent detainees alone to bear this public burden; they should consequently have a right to compensation for this exceptional harm suffered for the benefit of the whole society.[200]

In this part, it important to see if these compensations are being granted in Rwanda, how they can be granted. All those issues are going to be elaborated especially about under what conditions the payment of compensation of the wrongfully pretrial detainees can deter the commission of crimes, what is the standard evidence required for compensating those concerned detainees.

III.3.1. Compensation of international criminal justice

The payment of compensation to persons who were provisionary detained and acquitted enhances the credibility and legitimacy of the criminal system by showing a willingness to admit mistakes and take the consequences of the application of forceful measures seriously. It gives a

[199] Armstrong v. United States, 364 U.S. 40, 49 (1960), BRATHOLM (1961), at p. 834; ROSSEN (1976), at. pp. 715 and 716; MANNS (2005), at pp. 1947 et seq.; MICHELS (2010), at p. 406

[200] idem, at p. 416.

kind of moral satisfaction to the acquitted defendants, and try to shift the bearer of wrongful provisional detention to the better party suited to bear it not the wrongfully detained suspect, but the community.[201]

Article 9 (5) of ICCPR stipulates that "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation"[202], In few words this part of this chapter says that, when a person is illegally detained or arrested, he/she is entitled of the compensation, but as it has been mentioned above, provisional detention is lawful but at the end the suspect becomes acquitted. This means that when a person was detained provisionary and be acquitted at the end, it means that he/she was detained illegally (illegal detention), but being acquitted doesn't directly mean that the suspect was arrested and detained illegally, the court has to sit and analyze about the illegality of the arrest and detention as it was mentioned by the ICC in the case of Prosecution v. MATHIEU NGUDJOLO.[203] There are many consequences for a person who has been detained illegally that can be waived by to be compensated.

III.3.1.1. Alleged violated rights during the provisional detention

In order to understand very well the applicability of the provisional detention period and its related compensation, it is important to note that, when the case was submitted in court before the expiry of the period he/she remains detained during the court trial. Therefore, even if the law states that the maximum period of provisionary detention is one 30 days for minor offenses, six months for misdemeanor and one year for felonies; a suspect can be detained up to five years due to the length of the court because a suspect who was under provisional detention continues to be detained during court hearing.[204] When a person is being provisionary detained some of his/her basic human rights are being infringed, those rights which can be infringed some are these which follow, but the list is not an exhaustive list because depends on the case and the concerned suspects. Some of those rights are: the infringement of the right to be free as enshrined in the international instruments and over all the Constitution of Rwanda also stipulate this kind of

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[201] G.D Pascual, et al; Compensating acquitted pre-trial detainees; University of Valencia Law School.

[202] See ICCPR Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49. Art. 9(5)

[203] *The Prosecution v. MATHIEU NGUDJOLO*, ICC-01/04-02/12, (16 December 2015). Para. 16.

[204] Law nº 30/2013 of 24/5/2013 relating to the code of criminal procedure, O.G nº 27 of 08/07/2013. Art. 89 par.

right,[205] right to property also infringed by the provisional detention, while it is granted by also by the Constitution,[206]

For example a suspect can have a business when he/she is provisionary detained, the business can be bankrupted, and also the detained suspect meet with mental problem or mental suffering, and it comes with moral damages, because some people lost confidence in them because of being imprisoned and also in some cases a detained person loses a job. This means that from all the above, a person suffers a lot, are they needed to be compensated for all those losses, in few words, the acquitted person must be compensated for the whole above harm we've seen in the above.

III.3.1.2. Deprivation of the rights to liberty and security

When a person is detained for instance, he/she committed a misdemeanor which its provisional detention can be at maximum six months of detention, he/she has no rights to liberty (to be wherever he/she wants at the time he/she wants, to do whatever he/she wants, etc.). This is the first rights which are deprived by the provisional detention, and which are granted and prohibited by different human rights instruments.[207] In few words, when a person is provisionary detained, his/her right to liberty is being infringed, and the all instruments accept that this kind of infringement is allowed when it is done in the line of laws (principal of legality), which means that in the time it is done within the limit of the law, it is not prohibited, but in addition to this kind of right to liberty also others rights which are attached to it are deprived such as: right to work, moral respect in the society, etc. This is good when the law says it and the one who is provisionary detained is the one who did wrong (convicted person), but it becomes another issue when a person who provisionary detained is innocent. Therefore a person who has been innocent deserves compensation.

III.3.1.3. Loss of Good Reputation and Work

This detention can lead to some reparable and irreparable harms to the suspect. Some of those harms include the loss of reputation and work. According to the judgment RPAA0048/12/CS of

[205] The Constitution of the Republic of Rwanda of 2003 revised in 2015, O.G n° Special of 24/12/2015. Art. 24.

[206] Ibid. Art. 34.

[207] Rwandan Constitution of 2003 as revised in 2015, article 24; UDHR, art. 10, ICCPR, art. 9(1); African (BANJUR) Charter on Human and People's Rights, (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986), art. 6.

6th May 2016 by the Supreme Court of Rwanda, it is quite clear that a provisional detention can affect a person in different ways including reputation in the community. For example, the judgment talks about the case of someone called Nsanzintwali Pascal a resident of the Nyanza district, southern province who was accused a crime of rape to a child under 5 years of age. The alleged rape was reported to police and prosecution and the suspect did not admit to have committed that crime.

The high court of Nyanza sentenced him with 20 years of imprisonment due to the fact that the suspect in prosecution admitted to be the perpetrator in that alleged crime but the suspect said that he admitted because of fear and for the purpose of seeking less sanctions but he convinced that he's not guilty of that crime as he said. He decided to appeal the Supreme Court against the decision of the high court that had confirmed 20 years of imprisonment.

The Supreme Court examined the case and found that there has been a big error to condemn a suspect when there was no convincing evidence (doubt benefit to defendant) Nsanzintwali is the one who committed the crime. The medical report was also showing a rape that has occurred but with no impact on the life of the child. There was also uncertainty about the relationship between the crime and Nsanzintwali Pascal which led the court to decide that the defendant is innocent and has to be released. Taking the example to the above said case, it is important to note that Nsanzintwali Pascal lost a reputation with the community where he lives. In addition, the time he spent to the prison would be compensated.

During the provisional detention of a suspect, it is quite clear that a suspect can be affected in his/her community reputation even if in his/her relatives, the severing of family ties or end of family relationships suddenly or completely. Also, the loss of work can led to his/her company insolvency or the jeopardizing of a career and it undermines the prisoner's health and mental balance.[208] The general issue is that many legal system including the current legal system in Rwanda does not recognize that kind of lost rights and opportunities while in jail paying a period of provisional detention and they no compensations that are granted to those who are convicted while they provisionary detained during investigations and during the court hearing. The failure

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[208] Doc. 7094, 1403-30/5/94-1-E, report of Rapporteur Mr ROKOFYLLOS, Greece Socialist Group on the detention of persons pending trial. Available at: http://assembly.coe.int/nw/xml/XRef/X2H-XrefViewHTML.asp?FileID=8093&lang=EN. Accessed on 5th/May/2024

to apply the rule of law and a failure to satisfactorily for protecting these practices can result the grave human rights abuses. If the Human Rights have been violated, it must be compensated.

III.3.2. Compensation after provisional detention in some countries as an example Rwanda can refer to

It is quite important to look at practices in other countries' legal systems. This section concerns the different countries cases where similarities and differences with Rwandan system are observed.

III.3.2.1. Case of Sweden

The compensation is given not as the violation of International Instrument, because the courts only compensate, those persons who were detained illegally, while in our case a person was detained provisionary and at the end, he/she is acquitted,[209] in Sweden, in order to fight against those detentions, especially in our case provisional detention of innocent accused; it established a Compensation Act which is called Act (1998:714) on Compensation for Deprivation of freedom and other restraints. This Act replaced the previous one which was Act (1974:515) on Compensation for Freedom Restrictions and the replaced one, it was also the replaced the early Act (1945:118) on Compensation to Innocently Detained or Condemned Persons. This means that from 1940's in Sweden the imprisonment of innocent accused was being compensated by the Government. In section 2 of the Act is where we found that "a person detained on account of suspicion of a crime is entitled to compensation:[210]

- In the event of acquittal, non-indictment or dropped charges,
- For partially dropped charges if the detention would clearly not have been imposed for the remaining criminality,
- If the defendant was sentenced under a more lenient provision than the indictment,
- If the detention decision was quashed,
- If the detention was otherwise stayed".

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[209] H. Tiberg, *'Compensation for Wrongful Imprisonment'*, Stockholm Institute for Scandianvian Law 1957-2010, pp. 486. Available at: http://www.scandinavianlaw.se/pdf/48-28.pdf, Accessed on 15th/November/2018

[210] Art. 2 of the Swedish Act (1998:714) on Compensation for Deprivation of freedom and other restraints.

In Sweden it doesn't used, this term what to say that even if a person is acquitted, it doesn't mean he/she is innocent that's why in order to receive a compensation, he/she must prove beyond a reasonable doubt that he/she is innocent, because a person can be acquitted due to the lack of evidence giving compensation to everyone who is acquitted, it can be like giving compensation to criminals. This is reason why compensation must be given only to innocent accused rather that acquitted accused. The essential thing is not being guilty, you are entitled for compensation.

III.3.2.2. Case of SPAIN

In article 294 of the Spanish Judiciary Power Act of 1985, the state is liable when a person was provisionary detained and at the end the court found that, the crime did not exist. The above mentioned article was interpreted by the Spanish Supreme Court, it broadened the meaning to those persons who were accused but at the end managed to prove that they did not commit the crime. But here when a person was acquitted due to the lack of evidence beyond a reasonable doubt, the State is not liable because they are acquitted but not innocent in nature, they are innocent due to the lack of evidence.

III.3.2.2.1. Compensation if proven innocent

In some legal systems, is the only reason for the payment of compensation to the acquitted person in the pre-trial detention is when he/she proves his/her innocence at a certain level, which is different from the evidence of being acquitted basing on the principle of any doubt should profits a suspect;[211] otherwise in criminal matters in order a person be convicted the prosecution must prove beyond a reasonable doubt that the accused is the one who committed the crime,14 which is differ from the principal of presumption of innocence because the pre-trial detained suspect must prove beyond a reasonable doubt that he is innocent.

The evidence must be clear and convincing towards the innocence of the pretrial detained suspect who wants to be compensated. The right to compensation arose when a person is being suspected and be detained provisionary domestically for the purpose of being prosecuted but at

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[211] *Barbera, Messegue and Jabardo v. Spain*, 10590/83, par 77. The Judgment of European Court of Human Rights of 6 December 1988

the end be acquitted by court or be released by the prosecution itself, when he/she manages to prove beyond a reasonable doubt that he/she didn't commit the alleged crime, he/she entitled of compensation but when he/she was acquitted because the prosecution failed to prove beyond a reasonable doubt that he/she commit a crime, he/she can't be compensated.

III.3.2.3. Case of Norway

The situation above explained in the case of Spain shows similarities compared to the situation of Norway where the Code of Criminal Procedure Act of 1981, because under article 444, it is stipulated that, in the time a detained suspect is acquitted or the prosecution discontinued the case he/she is entitled for the compensation on the loss occurred due to pre-trial detention, after he/she proves that he/she didn't commit act which is the basis of the crime. There is no difference also in the Spanish Judiciary Power Act of 1985, within this article is where the liability of the state on the harms occurred on the pre-trial detained suspect in the time, the alleged crime didn't exist vested. This article was interpreted by the Spanish Supreme Court, which stipulated that, compensation is granted in both when it is found that the crime didn't exist and when he detained is acquitted because he/she didn't commit the crime. But when he/she is acquitted due to the lack of evidence rather than being innocent, the compensation can't be granted.[212]

III.3.2.4. Case of Germany

According to the Compensation Act of the Germany Criminal Proceedings, anyone who suffers because of being detained provisionary, he/she must be compensated basing on the discretion of the court,[213] and this compensation can be ignored wholly or partially due to some circumstances, for instance when a suspect is not convicted or the case didn't continue due to technical barrier, paragraph 6 (1) (2). In Dutch also it is the same as Germany, because the court may grant compensation on its own discretion depends on the available circumstance of the case.[214]

[212] See, the Judgment of the Spanish Supreme Court of 28 September 1999 (rec. 4712/1995) and 27 January 2003 (rec. 9728/1998).
[213] Paragraph 2 (1) of the compensation Act (8 March 1971) of the Germany Criminal Proceedings
[214] Article 90 (1) of the Dutch Code of Criminal Procedure

In all the jurisdictions, the compensation can't be granted in the time, the suspects are not convicted but who are acquitted due to the principal on when there is any doubt the benefits should go to the suspect. Basing on Article 6 of European Convention of Human rights a suspect must be taken as innocent until the court proves otherwise, in this article, there is no where it is mentioned that when some one's innocence rights has violated for instance by provisional detention is entitled for compensation[215], and the European court of Human Rights doesn't have clear case laws on this issue. But this not only way of paying compensation on the pre-trial detained suspect who are acquitted, the next one is the compensation when proven not guilty.

According to all of these countries, Rwanda can apply this principle and compensate a person detained illegally. This will facilitate in applying procedure well and to recover a whole interest that lost during detention to the suspect.

III.3.3. The liable person to pay compensation

III.3.3.1. State

In general, crime can affect two different people. One is Society in general and the other is Victim of the crime. The government on its own motion can arrest a person who is being prosecuted for a crime or even when it is sued. For example, it takes a drug dealer in a public search. When on its own motion arrest someone then after the suspect become innocent, it must be Liable in providing compensation to that person.

III.3.3.2. Victim

Another way is that a person on his/her own motion can plan to harm his fellow person due to his/her interests or jealousy and sue the claim to the RIB then the investigation start with provisional detention that can get a long time to the suspect in the prison. If the suspect become innocent or acquittal, the person who played the Role as a Victim and claim to the RIB, he/she is the one who has to pay the compensation. For Example, *Ishimwe Thierry, a professional modern dancer known as Titi Brown spent two years in prison then after acquitted by the Court.*[216]

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[215] Article 6 (2) of European Convention of Human rights

[216] MUGIRANEZA Thierry, Titi Brown acquitted, Rwanda Sun, [online] Available at: https://rwandasun.com/titi-brown-acquitted/#:~:text=Ishimwe%20Thierry%2C%20a%20professional%20modern,a%2017%2Dyear%2Dold. Accessed on 27 June 2024

Ishimwe has been detained since 2021, after being accused of sexually assaulting and impregnating a 17-year-old. However, it was later revealed that she underwent an abortion because she was a minor. In previous hearings, the prosecution emphasized that a DNA sample was obtained prior to the abortion in order to compare it with Ishimwe's DNA. However, during the substantive trial, it was shown in the medical report that the DNA samples did not match.

Since the trial began, Ishimwe has consistently pleaded not guilty, asserting that the girl came to his place to inspect the dance studio he was getting ready to open, but did not actually enter his house. Consequently, he emphasized that he neither sexually assaulted her nor got her pregnant. The Intermediate court of Nyarugenge confirmed that the prosecution's case is groundless, affirming that Titi Brown is acquitted of the crime of sexually assaulting.

It confirmed that compensation is not awarded in this case and ordered that Thierry Ishimwe be released immediately after the trial. Titi Brown had been imprisoned in Nyarugenge prison known as Mageragere for 2 years. The verdict was read on Friday, November 10, 2023.

According to this case of ISHIMWE Thierry, the girl knew exactly who got her pregnant but decided to lie to ISHIMWE Thierry that he was the one who made her to pregnant. Regardless of the fact that she has not yet reached the age of majority, she could be responsible for all the losses that ISHIMWE faced when he was imprisoned. It might also be that there was a well-planned plot between that girl and the real man who impregnated her to lie to ISHIMWE Thierry in order to hide his identification, jealous between ISHIMWE Thierry and that man and others reasons. Therefore, if there is punishment for someone who intends to imprison another person and knows for sure that he is lying to him/her, people can afraid to commit that crime. The suspect could be paid the compensation equal to the all things he/she lost when he/she was in prison.

III.3.3.3. Witness

Another person who deserves to be held accountable to the compensation is a witness. There are witnesses who testify and lie. Even though the law provides for oaths, they must swear saying that they are going to tell the truth that if they lie, they will be punished, but whoever asks how

many witnesses were punished for lying in all cases the defendant was acquitted, no one will be found. That Oath looks like the ceremony. So when a witness comes to testify knowing for sure that if he/she lies must be punished by paying compensation to the acquitted person, he/she can be afraid to lie and tell the truth.

GENERAL CONCLUSION

The course of unfair justice are many but in this study there are only two important cause mentioned. One is illegal detention and the second is publication of suspect before to be convicted by the court. In order to solve these issues, the relevant institutions must find a sustainable solution to them. Illegal detention is more common on the provisional detention that takes the longer period than those prescribed by law. The question that causes it does not require significant research because even any interviewer who has a connection to the court says that the courts have the few employees according to the cases are there. This makes it impossible to go to trial for renew provision detention while there are other cases. Therefore, the long-term solution is to increase the number of employees working in justice especially in the courts.

When it comes to the publication of the suspects before they are convicted, there is no other solution except to know it is violation of Human Rights and It has different negative consequences for the suspect and then the institution (Rwanda Investigation Bureau) Like to publish them to the social media, stop it. However, because that action can provides a lesson on society, it can be done about a person who has already been convicted of a crime instead of being done before the preliminary investigation.

According to the compensation, it is important and legally justified for person who has spent time in pretrial detention due to loss occurred to that person during the provisional detention such as the violation of the right to be free, financial loss, psychological/moral loss, community perception, etc… Furthermore, the Rwandan legal system does not recognize the fact of compensating acquitted suspect who has spent a time in jail for criminal charges.

However, the perceived legitimacy of international criminal courts is essential to their ability to strengthen a sense of accountability for international crimes by exposure and stigmatization of such crimes through their judgments. Compensation may provide a sense of moral satisfaction to the acquitted accused who has lost many of its advantages relating to job/business, liberty, and financial means during the process

RECOMMENDATIONS

In light with achieved findings in this study, the following recommendations can improve the legal and institution framework on the protection of suspects against unfair trial under Rwandan criminal law.

The Government of Rwanda should put effort into enforcing the laws that exist in the institutions responsible for implementing them. Those are Rwanda investigation Bureau (RIB), Rwanda National Public Prosecution Authority (NPPA), Judges and other court employees, and others. This means that if a person has detained in provision detention, cannot be detained over a period provided by the law.

Also, the Rwandan government should increase the number of employees in the justice system. The problem that makes unfair trial in Rwandan is caused by the high number of cases in the courts that outweigh the number of employees required to act on those cases. So if the number of court employees increased, the judgment will be heard without many adjournment then those are waiting date to be heard on provision detention, be heard. But if the judges are still not more, but case more, this issue will continue to be excited.

Another thing is that the government should quickly stop announcing a person who is prosecuted before he is convicted by the court because it affects him differently as explained above. This recommendation is belongs to Rwanda investigation Bureau (RIB) especially.

Beyond all of this, a convicted person loses more things. The government should impose punitive compensation on a person who is imprisoned for nothing and later becomes innocent. This would allow the investigators to work together investigation carefully before imprisoning the innocent person.

If these recommendations being implemented, the suspects will get the fair justice in Rwanda.

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