KIGALI INDEPENDENT UNIVERSITY (ULK)

SCHOOL OF LAW

CRITICAL ANALYSIS OF IMPACT OF PROVISIONAL DETENTION AGAINST THE SUSPECT UNDER RWANDAN CRIMINAL LAW

A dissertation submitted to the School of Law in partial fulfillment of the academic requirements for the award of Bachelor's degree in school of Law.

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DECLARATION

I, RUSARO Sandrine, declare that the work presented in this dissertation is original. It has never been presented to any University or Institution. Where people's works have been used, references have been provided, and in some cases, quotations made. In this regard, I declare this original work is mine.

RUSARO Sandrine

Signature: .....

Date: ...../...../2024

BAHATI Vedaste

Signature: .....

Date: ...../...../2024

DEDICATION

This dissertation is dedicated to:

My parents;

My brothers;

My sisters and

My classmates.

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First of all, I offer great thanks to Almighty God who gave me all efforts to carry out this research and glory is to him for giving me the chance to reach this step. I am also anxious to present my sincere thanks to the teaching staff of Kigali Independent University (ULK) generally and particular the Faculty of Law, thanks to the colleagues, class-mates and other students who in one way or another helped me to complete this work.

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RUSARO Sandrine

LIST OF ABBREVIATIONS AND ACRONYMS

***Art*:**	*Article*
CCB III:	Civil Code Book Three
DNA:	Deoxyribonucleic acid
***Doc*:**	*Document*
ECHR:	European Convention on Human Rights
HRC:	Human Rights Committee
ICCPR:	International Covenant on Civil and Political Rights
ICJ:	International Court of Justice
ICTR:	International Criminal Tribunal for Rwanda
ICTY:	International Criminal Tribunal for former Yugoslavia
MCCP:	Model Code of Criminal Procedure
NGOs:	Non-Governmental Organizations
N°:	*Number*
***O.G*:**	*Official Gazette*
***Org*:**	Organization
***P*:**	*Page*
UN:	United Nations
US:	United States

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GENERAL INTRODUCTION

1. BACKGROUND OF THE STUDY

In Rwandan criminal justice proceedings, a provisional detention is an imprisonment inflicted to the person who has not yet been convicted but suspected of a criminal offense.[1] Generally, a suspect shall not be put under provisional detention except if there are serious motives for suspecting him/her to escape the justice, preventing the suspect from disposing of evidence, protecting him or her from the public revenge, collecting the evidences, preventing him/her from committing further offences or of maintaining public order etc.

It is important to note that the article 76 of the law nº 058/2023 of 04/12/2023 amending law nº 027/2019 of 19/09/2019 Relating to the Criminal Procedure as revised to date provides that: The responsibilities of a judge who hears a provisional detention case include the following: to verify whether he or she is competent to hear such a provisional detention case brought before him or her; to verify whether the period of detention and other rights of the suspect have been respected during investigations; to examine whether there is no prescription or termination of the criminal action which would result in the issuance of provisional detention warrant being precluded.

To examine whether there are serious grounds for provisional detention of the suspect; to examine whether there was an agreement of plea bargaining between the prosecutor and the accused person in order to take it into consideration while deciding on provisional detention; to take into consideration the accused person's living and health conditions; to analyse other arguments contained in the submissions of the parties. When the judge finds that constituent acts of the offence do not correspond to the classification assigned to the offence, he or she reclassifies the offence and orders detention or release of the suspect.[2]

However, even if the penalty provided for is less than two years but not less than six months, the investigator or prosecutor may provisionally detain the suspect if there is reason to believe that the suspect may evade justice; the identity of the suspect is unknown or doubtful; the provisional detention is the only way to prevent the suspect from disposing of evidence or exerting pressure

[1] Parker HL "*Provisional detention*" 113 University of Pennsylvania Law Review (1964), p. 38
[2] Article 76 of Law Nº 058/2023 Of 04/12/2023 Amending Law Nº 027/2019 Of 19/09/2019 Relating to the Criminal Procedure, *O.G n° Special of 05/12/2023*

on witnesses and victims or prevent collusion between the suspect and their accomplices; such detention is the only way to protect the accused, to ensure that the accused appears before judicial organs whenever required or to prevent the offence from continuing or reoccurring. The investigator or prosecutor, while taking the decision to detain, considers other circumstances related to the conduct and behaviour of the suspect, the category and the gravity of the offence or whether the objective of detaining the suspect may not be achieved through any other means.[3]

A statement of arrest and detention of the suspect is valid for five days which cannot be extended. A copy of such a statement is reserved to the suspect. A suspect who is arrested is immediately released if the organ in charge of investigation or the Public Prosecution finds in the course of investigation that there are no serious grounds for suspecting him or her of having committed or attempted to commit an offence. Such a decision is put in writing whose copy is reserved to the suspect.[4] That detention may take a long period depending on the nature of an offense for which a person is suspected and then the Court realizes that s/he did not commit that offence. Therefore, as the consequence of that victim to the provisional detention will request for compensation or reparation for being incarcerated during that whole period.[5]

This study examines the situation after provisional detention when the person was not found guilty, and has lost his/her rights (e.g. right to freedom, right to security). Here the situation of analysis regards the possibility of compensation as the article 9 (5) of the International Covenant on Civil and Political Rights (ICCPR) states that "*anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation*".[6] Referring to this provision of the international covenant on civil and political rights, the study does not only regard fundamental right of citizen on compensation after the pre-trial detention but also to show how the judicial system is built and practice that would have considered rights of the person after a long period of provisional detention.

This research carries out a wide analysis of the impact of provisional detention in Rwanda and gives motives that can constitute a legal basis of the right to compensation for an acquitted victim.

[3] *Ibidem*
[4] *Ibidem*
[5] G.D Pascal, *et al*; *Compensating acquitted pre-trial detainees*; University of Valencia Law School. 2009, p. 21
[6] Article 9 (5) of the International Covenant on Civil and Political Rights of 1969.

The study aims at showing the gaps or lacuna into the provisions of the Law Nº 058/2023 of 04/12/2023 Amending Law Nº 027/2019 of 19/09/2019 Relating to the Criminal Procedure in Rwanda for a person who has been detained and acquitted could not claim for his/her compensation.

2. SCOPE OF STUDY

This research is limited in in three delimitations. In domain, this research is in Criminal Procedure as it deals with provisional detention. In space, this research covers territory of Rwanda. In time, this research is limited since 2023, the time Law Nº 058/2023 of 04/12/2023 amending Law Nº 027/2019 of 19/09/2019 relating to the criminal procedure was officially adopted up to 2024.

3. INTEREST OF THE STUDY

The study has three interests which are: Personal interest, academic interest and legal interest.

3.1. PERSONAL INTEREST

This study offers the researcher a great opportunity to understand the right of suspect in relation with the provisional detention.

3.2 ACADEMIC INTERESTS

Academically, this study will be submitted in partial fulfillment of academic requirements for the award of bachelor's degree in law. The findings of this research will contribute to the existing protection of the right of suspect under provisional detention.

3.3 LEGAL INTEREST

Legally, this study offered the opportunity to investigators, prosecutors, judges to understand well the importance of the right of suspect under provisional detention.

4. PROBLEM STATEMENT

The provisional detention is the only way to prevent the suspect from disposing of evidence or exerting pressure on witnesses and victims or prevent collusion between the suspect and their accomplices; such detention is the only way to protect the accused, to ensure that the accused

appears before judicial organs whenever required or to prevent the offence from continuing or reoccurring.[7]

According to the article 76 of the law nº 058/2023 of 04/12/2023 amending law nº 027/2019 of 19/09/2019 Relating to the Criminal Procedure as revised to date provides that the judge who hears a provisional detention verifies whether he or she is competent to hear such a provisional detention case brought before him or her; to verify whether the period of detention and other rights of the suspect have been respected during investigations; to examine whether there is no prescription or termination of the criminal action which would result in the issuance of provisional detention warrant being precluded; to examine whether there are serious grounds for provisional detention of the suspect; to examine whether there was an agreement of plea bargaining between the prosecutor and the accused person in order to take it into consideration while deciding on provisional detention; to take into consideration the accused person's living and health conditions; to analyse other arguments contained in the submissions of the parties.

When the judge finds that constituent acts of the offence do not correspond to the classification assigned to the offence, he or she reclassifies the offence and orders detention or release of the suspect.[8] In Rwanda, criminal proceedings of the pre-trial detention come for some interests of public order and security but pose some legal issues that need also legal interventions so that people who have been victims of provisional detention and acquitted can be able to claim for their compensation. Suspects have two options including either to be released on bail or to remain in the custody awaiting trial. It is a problem since they may fail to abide with imposed money to be deposited.

The investigator or prosecutor, while taking the decision to detain, considers other circumstances related to the conduct and behavior of the suspect, the category and the gravity of the offence or whether the objective of detaining the suspect may not be achieved through any other means. The continuation of detention despite its unlawfulness raises the question about the legal consequences. Unlawful detention may affect its victims emotionally, socially, physically and economically.

[7] Law Nº 058/2023 of 04/12/2023 Amending Law Nº 027/2019 of 19/09/2019 Relating to the Criminal Procedure, *O.G n° Special of 08/11/2019*

[8] Article 76 of Law Nº 058/2023 Of 04/12/2023 Amending Law Nº 027/2019 Of 19/09/2019 Relating to the Criminal Procedure, *O.G n° Special of 05/12/2023*

Moreover, unlawful detention may also affect the detained person's family, especially when the detainee is the family breadwinner.[9] As there is no legislation providing for compensation for unlawful detention in Rwanda, it can be argued that unlawfully detained persons may seek compensation through tort law, administrative and criminal procedure law.[10] Under the law nº 058/2023 of 04/12/2023 amending law nº 027/2019 of 19/09/2019 relating to the criminal procedure, there is no legal on claiming for right to compensation. Therefore, through this study, the researcher looks at the legal rationale behind the compensation for damages caused by the provisional detention after being acquitted.

5. RESEARCH QUESTIONS

This research has two questions in order to motivate and orient the research about this topic:

i. What is the impact of provisional detention against the suspect under Rwandan criminal law?
ii. What are effective measures for addressing the impact of provisional detention against the suspect under Rwandan criminal law?

6. RESEARCH HYPOTHESES

i. The impact of provisional detention against the suspect under Rwandan criminal Law is relating to continuation of detention which is relating to unlawful detention.
ii. Legal and institutional mechanisms need to be adopted in order to curb the impact of provisional detention against the suspect under Rwandan criminal Law.

7. RESEARCH OBJECTIVES

The present study has two objectives which are: General objective and specific objectives.

[9] JRLOS, *The Republic of Rwanda Justice, Reconciliation, Law & Order Sector Strategic Plan July 2013 to June 2018*, p.8.
[10] 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*, (30 October 2014), p. 47

6.1. GENERAL OBJECTIVE

General objective of the study is to analyze the addressing the impact of provisional detention against the suspect under Rwandan criminal law.

6.2. SPECIFIC OBJECTIVES

i. To analyze the impact of provisional detention under Rwandan criminal law;
ii. To point out the negative impact of provisional detention against the suspect under Rwandan criminal law;
iii. To propose effective mechanisms for addressing the impact of provisional detention against the suspect under Rwandan criminal law.

7. RESEARCH METHODOLOGY

This part discusses the research techniques and research methodology.

7.1. TECHNIQUES

In order to achieve the objectives, the present research uses the research technique as cited below: Documentary technique: This technique helps the researcher to collect data such as national and international texts of law (legislation), books in the library, journal articles, electronic sources, reports, newspapers, etc.

7.2. RESEARCH METHODOLOGY

In order to achieve my purposes different technique and methods will be used:

7.2.1. EXEGETICAL METHOD

It enables the researcher to interpret and analyze the legal provision in the connection with the topic.

7.2.2. ANALYTICAL APPROACH

It helps to make a detailed analysis of collected information.

7.2.3. SYNTHETIC METHOD:

It helps to summarize the data collected.

7.2.4. COMPARATIVE METHOD

This method helps the research to compare provisional detention from other jurisdiction.

8. SUBDIVISION OF THE WORK

Apart from the general introduction and general conclusion the present research is subdivided into three chapters which are: Chapter one deals with conceptual and theoretical framework. Chapter two deals the negative impact of provisional detention against the suspect under Rwandan criminal law. While the third chapter proposes the effective mechanisms for addressing the negative impact of provisional detention against the suspect under Rwandan criminal law.

CHAPTER ONE: CONCEPTUAL AND THEORETICAL FRAMEWORK

This section is subdivided into two sections; the first section provides the conceptual framework and the second section is about theoretical framework.

1.1. CONCEPTUAL FRAMEWORK

This chapter is addressed to provide the definitions of key concept which are mostly connected to this topic. These terms include: detention, provisional detention, detainees, accused, pre-trial phase and many more.

1.1.1. DETENTION

Detention is the process whereby a state or private citizen lawfully holds a person by removing their freedom or liberty at that time. This can be due to (pending) criminal charges preferred against the individual pursuant to a prosecution or to protect a person or property.[11] Pursuant to the law nº 058/2023 of 04/12/2023 amending law nº 027/2019 of 19/09/2019 relating to the criminal procedure provides that: *"A suspect normally remains free during investigation. He or she may be held in provisional detention if there are sufficient grounds to believe that he or she committed an offence which is punishable with imprisonment for a term of at least two years"*.[12]

However, even if the penalty provided for is less than two years but not less than six months, the investigator or prosecutor may provisionally detain the suspect if[13]: there is reason to believe that the suspect may evade justice; the identity of the suspect is unknown or doubtful; the provisional detention is the only way to prevent the suspect from disposing of evidence or exerting pressure on witnesses and victims or prevent collusion between the suspect and their accomplices; such detention is the only way to protect the accused, to ensure that the accused appears before judicial organs whenever required or to prevent the offence from continuing or reoccurring.[14]

[11] G.D Pascal, *et alt.* Compensating acquitted pre-trial detainees; (University of Valencia Law School, 2005), p.93
[12] Article 66 of law nº 058/2023 of 04/12/2023 amending law nº 027/2019 of 19/09/2019 relating to the criminal procedure, *O.G n° Special of 05/12/2023*
[13] *Ibid*. art. 66(1-2-3&4).
[14] *Ibidem*

The investigator or prosecutor, while taking the decision to detain, considers other circumstances related to the conduct and behavior of the suspect, the category and the gravity of the offence or whether the objective of detaining the suspect may not be achieved through any other means. A statement of arrest and detention of the suspect is valid for five days which cannot be extended. A copy of such a statement is reserved to the suspect. A suspect who is arrested is immediately released if the organ in charge of investigation or the Public Prosecution finds in the course of investigation that there are no serious grounds for suspecting him or her of having committed or attempted to commit an offence. Such a decision is put in writing whose copy is reserved to the suspect.

1.1.2. PROVISIONAL DETENTION

Provisional detention refers to detaining of an accused person in a criminal case before the trial has taken place, either because of failure to post bail or due to denial of release under a pre-trial detention stature. The provisions under the code of criminal procedure allow the judge to detain a defendant if the judge determines that conditions exist that raises doubt as to whether the defendant appears at trial or whether the defendant may cause harm to the community.[15] However, in determining whether the accused constitutes a danger to the community, each case must be considered on its own merits and a court must determine whether the need to protect the community becomes do sufficiently compelling g that detention is appropriate. The pre-trial detention undermines the chance of a fair trial and the rule of law in a number of ways.[16]

The majority of people who come into contact with criminal law know little about their rights. Many countries do not have an adequate legal aid system, and many people cannot afford to pay for a lawyer. Even when they can, it is much harder to prepare well for a trial in prison cell. People in pretrial detention are particularly likely to suffer violence and abuse. As well as the risk of violence from guards and fellow prisoners, police sometimes use illegal force or torture to gain a statement or confession.

[15] Abdul Azeez, H., "Protection of Human Rights from the Police-Position in Regional Systems", *International Journal of Social Science and Humanity, Vol. 3, No. 1, January 2013*, pp.74-78

[16] Borchard, E. M., *"Pre-trial detention", 3 J. Am. Inst. Crim. L. & Criminology (May 1912 to March 1913)*, pp.684-718.

Without the protection of legal assistance, and isolated from their family and friends, it is not easy to withstand such pressure. High rates of pre-trial detention contribute to widespread prison overcrowding, exacerbating poor prison conditions and heightening the risk of torture and ill-treatment.[17]

The pretrial stage (from arrest to trial) of the criminal justice process is also particularly prone to corruption. Unhindered by scrutiny or accountability, police, prosecutors, and judges may arrest, detain, and release individuals based on their ability to pay bribes. Pretrial detention has a hugely damaging impact on defendants, their families and communities. Even if a person is acquitted and released, they may still have lost their home and job. They face the stigma of having been in prison when the return to the community. Because of its severe and often irreversible negative effects, international law states that pre-trial detention should be the exception rather than the rule and that if there is a risk, for example, of a person absconding, then the least intrusive measures possible should be applied.[18]

A range of non-custodial measures are available, including bail, confiscation of travel documents, reporting to police or other authorities, and submitting to electronic monitoring or curfews. Not only are such alternatives less expressive, but savings made could be better invested in creating a just and effective criminal justice system, with more thorough investigations, more judges, quicker procedures, and improved prison conditions.[19] However, in many countries pre-trial detention continues to be imposed systematically on those suspected of a criminal offence without considering whether or not it is necessary, proportionate, or whether less intrusive measures could be applied.

Pursuant to the law nº 027/2019 of 19/09/2019 relating to the criminal procedure; if the public prosecution decides to prosecute the suspect while in provisional detention, it prepares the case file and submits it to the competent court. The case file to be submitted to the court contains all the investigation records from the organ in charge of investigation to public prosecution as well as the public prosecution's conclusions providing the following: the file number; full particulars of

[17] *Ibidem*
[18] Bosl, A. & Diescho, J., *Human Rights in Africa: Legal Perspectives on their Protection and Promotion*, 2009, Macmillan Education Namibia, 2009. P.65
[19] *Ibidem*

the suspect; the alleged offence; brief description of the commission of offence; serious grounds for suspecting a person of an offence, separately justified and linked with the relevant penal provisions. If the offence was committed by several people, how the offence was committed in general, the role of everybody in the commission of the offence as well as serious grounds justifying the request for provisional detention for every suspect are indicated.[20]

1.1.3. PRE-TRIAL DETENTION

Pre-trial detention, preventive detention, or provisional detention, is the process of detaining a person until their trial after they have been arrested and charged with an offence. A person who is on remand is held in a prison or detention center or held under house arrest.[21] The panel can, if it considers it necessary, and after consultations with the President of the Court, confirm that the preliminary hearing precedes the trial of the case and determine the date of hearing. Preliminary hearing is conducted in camera. The court sets the agenda of the preliminary hearing. The court does this after consultations with the concerned parties. During preliminary hearing, the court can examine issues related to admission of the case and other incidental proceedings that can hinder or delay the trial on the merits.[22]

Matters that are examined in the preliminary hearing include[23]: matters related to jurisdiction, interests and capacity; matters on security of witnesses; matters on separation or merger of cases; matters based on the right to representation; the number of witnesses, their role, their location and the means of application in their communication; confirming the witnesses that require protection and to put in place security strategies for the authorized parties; confirmation of the number and identity of witnesses expected to be summoned by the public prosecution and those to be summoned by the defendant; to agree on arguments of the case, their supporting evidence and the legal provisions of both parties on each argument; to agree on the schedules of the proceedings depending on the arguments of the case.

[20] Article 75 of law nº 058/2023 of 04/12/2023 amending law nº 027/2019 of 19/09/2019 relating to the criminal procedure, *O.G n° Special of 05/12/2023*
[21] Parker HL " *Models of the Criminal Process*" 113 University of Pennsylvania Law Review (1964), p.38
[22] Article 125 of law nº 058/2023 of 04/12/2023 amending law nº 027/2019 of 19/09/2019 relating to the criminal procedure, *O.G n° Special of 05/12/2023*
[23] *Ibid*. Article 125 (1-13)

To agree on the time each party will utilize in explaining every item and to hear its witnesses; to inquire from both parties the time when hearing the case in merits would commence and end; admission of testimony from the person who will not be present during the hearing and such testimony can also be recorded through audio-visual format; and to take any other necessary decisions that are helpful in the smooth conduct of the hearing.

1.1.4. UNLAWFUL DETENTION

Unlawful detention is when law enforcement, without legal justification, restricts a person's freedom to leave. A police detention is a seizure of the person. If it is unreasonable, it violates the seized person's rights.[24] I have considered that a detention is unlawful if it contravenes any provisions of Rwandan or international law.

Unlawful detention provided includes[25]: detaining a person in an irrelevant facility; detaining a person for a period longer than the period specified in the arrest statement and in the provisional detention warrants; continued detention of a person after a decision rejecting provisional detention or its extension or granting provisional release was taken; continued detention of a person after a decision of acquittal was taken; continued detention of a person who was punished by a fine; detaining a person whose sentence was suspended; continued detention of a person who served his or her sentence; 8° being detained by an unauthorized person; and detention that does not comply with formalities of arrest and provisional detention.

1.1.5. SUSPECT

In law enforcement, a suspect is a known person accused or suspected of committing a crime. Also; a suspect is a person believed to have done something wrong, committed a crime or caused something bad to happen.[26] In criminal law a person who is under suspicion or under investigation

[24] Van Kempen, P.H.P.H.M.C., *Pre-trial Detention. Human Rights, Criminal Procedural Law, and Penitentiary Law,Comparative law* (International Penal and Penitentiary Foundation, 44, 2012, p.7.
[25] Article 143 of law nº 058/2023 of 04/12/2023 amending law nº 027/2019 of 19/09/2019 relating to the criminal procedure, *O.G n° Special of 05/12/2023*
[26] John Bell, Cambridge Yearbook of European Legal Studies, Vol 6, 2003-2004 (Oxford: Hart Publishing Ltd, 2005), p. 211

by law enforcement is considered a suspect.[27] A prime suspect is believed by police to be the suspect who most probably committed a crime.

A formal suspect may be arrested when the facts and circumstances would lead a reasonable person to believe a suspect may have committed a crime or is about to. In common law countries a suspect may have a defense attorney present while being questioned.[28] The attorney may advise his or her client (the suspect) how to answer questions. Once a suspect is charged with a crime he or she becomes a defendant.

Police and reporters in the United States often use the word suspect as a jargon when referring to the perpetrator of the offense. However, in official definition, the perpetrator is the robber, assailant, etc. the person who committed the crime. The distinction between suspect and perpetrator recognizes that the suspect is not known to have committed the offense, while the perpetrator who may not yet have been suspected of the crime, and is thus not necessarily a suspect is the one who did. The suspect may be a different person from the perpetrator, or there may have been no actual crime, which would mean there is no perpetrator.[29]

An investigator or a prosecutor notifies the suspect of his/her right to legal counsel and to have private communication with him or her. The notification is recorded in a statement. If a suspect is unable to get a legal counsel, the investigator or the prosecutor informs the President of the Bar Association for him or her to assign a legal counsel to the suspect. The suspect who is assigned a legal counsel as provided for in this paragraph cannot refuse the counsel without substantial reasons.[30] If the suspect is a child, he or she is entitled to a legal counsel. The legal counsel is allowed to consult the case file in Public Prosecution.

1.1.6. CRIME

Crime is defined as acts or omissions forbidden by law that can be punished by imprisonment or fine.

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[27] Clay Powell (17 May 2011). *"The difference between a suspect and culprit"*. *The Londoner*. *Archived from* the original on 5 July 2021

[28] *Ibidem*

[29] J.D Michels, 'The Concept of Suspect' (2010) 8 *Journal of International Criminal Justice* 407-424 at 407&8.

[30] Article 46 of law nº 058/2023 of 04/12/2023 amending law nº 027/2019 of 19/09/2019 relating to the criminal procedure, *O.G n° Special of 05/12/2023*

Murder, robbery, burglary, rape, drunken driving, child neglect and failure to pay taxes are examples of crimes. The term crime is derived from the Latin word "*crimen*" meaning offence and also a wrong-doer. Crime is considered as an anti-social behavior. Crime is an act or omission that breaches public order and which is punishable by law.[31] Penal code of Rwanda adds to that above definition that penalty must be provided before the commission of infraction. Offence is always a public wrong, it is an act of offense which violates the law of the state and is strongly disapproved by the society.[32] Each society may define crime in a different perspective. A crime may be legal or illegal.[33] Illegal and punishable crime is the violation of any rule of administration or law of the state or practice of any wrongdoing and harmful to self or against third parties, provided in criminal law. Legal and not punishable crime is all acts of self-defense.

As far as the legal angle is concerned, the criminal phenomenon is presented as the product of the will of the law (legislator), which determines its limits and the appropriate means of its repression. Considered from this angle, the criminal phenomenon merges in the whole provisions of law related to criminal matters.[34] Some authors have, however, pointed out that it is better to appreciate the reality of the criminal phenomenon not in considering the legal provisions, but through the reality of the implementation of those provisions by the justice organs.[35] This version would be true if one should not face what is called black number, which represents the difference between offenses really committed and those that are effectively prosecuted and tried. It is important to point out that omissions are part of the criminal phenomenon as well.

But still, those omissions have to be provided and punished by the law. In consequence, the criminal phenomenon would be defined as the whole facts (acts and omissions) provided for and punished by the criminal law for they cause trouble to the social order.[36] The first condition so that

[31] Article 2(1) of law nº68/2018 of 30/08/2018 determining offences and penalties in general, *O.G no. Special of 27/09/2018*
[32] Bakan, J. *Concept of crime.* Toronto: University of Toronto Press. 1997. P.54
[33] Garland, D. 1999. "Governmentality and the problem of crime." In *Governable Places,* edited by R. Smandych,pp 15-44.
[34] Haggerty, K. *Making Crime Count.* Toronto: University of Toronto Press. 2001.p.33
[35] Snider, L. 1999. "Relocating Law: Making Corporate Crime Disappear." In *Locating Law: Race/ Class/Gender Connections,* edited by E. Comack, Halifax: Fernwood Publishing. Pp. 183-206.
[36] Philipps, L. 1996. "Discursive Deficits: A Feminist Perspective on the Power of Technical Knowledge in Fiscal Law and Policy." *Canadian Journal of Law and Society* 11, 1: 141-76.

an act or an omission falls within the criminal phenomenon is to be contrary to the social order. In this sense, the social order is not to be confused with the moral order or the religious order.

Attacks on the moral order do not constitute offenses if the law does not provide for them. For example, a lie is not an offense because it is not provided for by the criminal law. On the other hand, it may happen that attacks against the social order, which constitute offenses, do not affect the moral order. For instance, the violation of rules regulating road traffic (code de la route), rules of taxation does not attack the moral order of the society.

1.1.7. HUMAN RIGHTS

Human rights are moral principles or norms that describe certain standards of human behavior and are regularly protected in national and international law. Human rights are rights we have simply because we exist as human beings they are not granted by any state. These universal rights are inherent to us all, regardless of nationality, sex, national or ethnic origin, color, religion, language, or any other status.[37]

They range from the most fundamental, the right to life, to those that make life worth living, such as the rights to food, education, work, health, and liberty. With regard to human rights, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The essential elements of a fair hearing include: equality of arms between the parties to a proceedings, whether they be administrative, civil, criminal, or military; equality of all persons before any judicial body without any distinction whatsoever as regards race, color, ethnic origin, sex, gender, age, religion, creed, language, political or other convictions, national or social origin, means, disability, birth, status or other circumstances.

Equality of access by women and men to judicial bodies and equality before the law in any legal proceedings; respect for the inherent dignity of the human persons, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused; adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to

[37] https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx. Accessed on 10, June 2024

opposing arguments or evidence; an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings.[38]

An entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the judicial body; an entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the judicial body; an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions; and an entitlement to an appeal to a higher judicial body.[39]

1.2. THEORETICAL FRAMEWORK

This section is aimed at presenting the theories which is the foundation of this topic.

1.2.1. RIGHTS OF SUSPECTS IN PROVISIONAL DETENTION

The rights are: right to have someone informed of their arrest. right to consult in private with a solicitor and that free independent legal advice is available, etc.

1.2.1.1. RIGHT TO LEGAL COUNSEL

An investigator or a prosecutor notifies the suspect of his/her right to legal counsel and to have private communication with him or her. The notification is recorded in a statement. If a suspect is unable to get a legal counsel, the investigator or the prosecutor informs the President of the Bar Association for him or her to assign a legal counsel to the suspect. The suspect who is assigned a legal counsel as provided for in this paragraph cannot refuse the counsel without substantial reasons. If the suspect is a child, he or she is entitled to a legal counsel.[40] The legal counsel is

[38] Benedek, W. (2013) '*Africa Action on Human and Fundamental Rights in 2012'*, in Nowak, M., Januszewski, K. M. and Hofstätter, T. (ed.) *All Human Rights for All. Vienna Manual on Human Rights*, Wien: NWV Verlag, pp. 185-189.

[39] *The principles and guidelines on the right to a fair trial and legal assistance in Africa*. http://www.achpr.org accessed on 13, June 2024

[40] Article 46 of law nº 058/2023 of 04/12/2023 amending law nº 027/2019 of 19/09/2019 relating to the criminal procedure, *O.G n° Special of 05/12/2023*

allowed to consult the case file in Public Prosecution. The accused in criminal law is granted with the right to defend himself alone or with the help of legal representative.[41]

The protection of that right is assured in the ICCPR[42] and other international human rights treaties[43], as well as in the national laws of many States.[44] This right has been designed to protect the accused from harm that may be done to him by 'inhumane' legal mechanisms. Typically the accused is not a lawyer, nor familiar with criminal proceedings, and is usually unable to cope with the complicated rules of national laws. Therefore, it is not uncommon that the accused is effortlessly intimidated by regulations regarding his rights and obligations.

This is due to the fact that the laws of international criminal tribunals and courts were created by taking specific rules from common and civil law systems, melting them together for the sake of assuring fair and expeditious international criminal trials. Moreover, the gravity of offences of which the person is accused brings enormous public attention and, with the media's help, creates an atmosphere in which the accused is presumed to be guilty. Therefore, the accused in international criminal trials usually demand legal assistance. The most crucial issue with regard to this right, both in human rights law and international criminal law, is if the accused has a right to the legal representative of his own choice even in a situation when, in the words of the ICCPR, 'he does not have sufficient means to pay for it.

1.2.1.2. RIGHT TO BE INFORMED ON THE CHARGES

Any person held in custody by the organ in charge of investigation or public prosecution must be notified of the charges against him or her and his or her rights including the right to inform his or her legal counsel or any other person of his or her choice. Such a notification is made in a statement signed by both the investigator and the suspect. Any person held in custody by the organ in charge of investigation or the public prosecution has the right to a legal counsel and engage in private communication with him or her. Any person held in custody has the right to seek a legal counsel of his or her choice and is allowed to have private communication with him or her. If he or she is

[41] Paweł Wiliński, '*Prawo do obrony w postępowaniu przed Międzynarodowym Trybunałem Karnym*' (2005) 1 RPEiS 109.
[42] Article 14 (3) (d) of the ICCPR
[43] Article 6 (3) (c) of the ECHR.
[44] Article 6 and Article 77- 81 of the Polish Code of Criminal Procedure and in common law ones, for example in the Sixth Amendment to the US Constitution.

unable to find a legal counsel, the investigator or the prosecutor informs the President of the Bar Association to assign a legal counsel to him or her.[45]

Any person held in custody by the organ in charge of investigation or the public prosecution who is assigned a legal counsel and cannot refuse the counsel without justified reasons. According to General Comment no. 13 of the United Nations Human Rights Committee in interpreting the International Covenant on Civil and Political Rights[46], the information given to the accused person must provide the law and the alleged facts upon which the charge is based.[47] An accused has the right to be informed promptly and in detail in a language in which he or she understands of the nature and cause of the charge against him or her. The right to be informed in detail of the charges against a person is derived from International Covenant on Civil and Political Rights[48], European Convention for the Protection of Human Rights and Fundamental Freedoms[49], and the American Convention on Human Rights.[50]

A suspect has the right to be informed at the time of arrest of the reasons for his or her arrest and the right to be informed of any charges against him or her. Once a suspect becomes an accused person by reason of the confirmation of an indictment by the court or when a suspect is charged and is proceeded against by way of expedited trial, the extent of the information required by the accused person is greater. The accused person and his or her defense counsel wishes to prepare an adequate defense and require the facilities to do so. Part of the right to facilities to prepare a defense contained in is access to information that the defense can use to defend the accused person. Thus, the right to be informed of the charges and the right to the preparation of a defense are interlinked.

[45] *Ibid*. Article 68
[46] UN Human Rights Committee (HRC), *CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 13 April 1984.
[47] Article 14(3)(a) of International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999.
[48] Article 14(3)(a) of International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999.
[49] Article 6(3)(a) of European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5
[50] Article 8(2)(b) of American Convention on Human Rights, "Pact of San Jose", *Costa Rica*, 22 November 1969.

1.2.1.3. RIGHT TO DEFENCE

Upon submission of the case file to the court, the public prosecution immediately submits it to the suspect and his or her counsel, if any. The suspect has the right to prepare the defence submissions and submit them to the Prosecution in a period of five days from the date on which the case file was served to him or her.[51]

A criminal defence lawyer's role is to prevent any unreliable police evidence from being used against their client, which could otherwise lead to an innocent person being convicted with a jail sentence. In a criminal trial, the defendant has a constitutional right to "Adequate Legal Representation". It does not, however guarantee that the lawyer will do a perfect job, or even that they will win the case. It simply means that the lawyer's representation will be enough to provide the defendant with a fair trial.

1.2.2. SIGNIFICANCE OF PRE-TRIAL PHASE

The purpose of a pretrial hearing is to resolve any simple issues before the court case actually begins in order to allow the trial itself to proceed more effectively. European Convention on Human Rights (ECHR) require that cases be heard within a reasonable time, in so providing, these acts underline the importance of rendering justice without delays which might jeopardize its effectiveness and credibility.[52]

These established constitutional and conventional standards guarantee the protection of all parties in the process from delays that can cause stress, insecurity and human rights violations. In criminal proceedings the reasonable period shall be calculated from the moment that the defendant is notified for the charges against him till the day the judgment became final.[53] The State has the obligation to organize his legal system in such a way to enable the courts to examine the case within a reasonable time, in order to create public confidence in the judicial authorities, to increase

[51] *Ibid*. Article 75

[52] *H. v. France*. (1989). Application no. 10073/82. pg. 48-59 (Online) Available: http://hudoc.echr.coe.int/eng#{%22itemid%22:(%22001-57502%22)}. Accessed on 14, June 2024

[53] *Scopellitti v. Italy*. (1993). Application no. 15511/89. (Online) Available: http://hudoc.echr.coe.int/eng#{%22itemid%22:(%22001-57859%22)} Accessed on 14, June 2024

efficiency in the protection of individual rights and consolidating the rule of law, as their ultimate goal.[54]

The legal system should be organized in such a way to ensure compliance with the requirements of Article 6.1, including that of trial within a reasonable time.[55] The panel can, if it considers it necessary, and after consultations with the President of the Court, confirm that the preliminary hearing precedes the trial of the case and determine the date of hearing.

Preliminary hearing is conducted in camera. The court sets the agenda of the preliminary hearing. The court does this after consultations with the concerned parties. During preliminary hearing, the court can examine issues related to admission of the case and other incidental proceedings that can hinder or delay the trial on the merits.

Matters that are examined in the preliminary hearing include[56]:

1. Admission of testimony from the person who will not be present during the hearing and such testimony can also be recorded through audio-visual format;
2. Confirmation of the number and identity of witnesses expected to be summoned by the public prosecution and those to be summoned by the defendant;
3. Confirming the witnesses that require protection and to put in place security strategies for the authorized parties;
4. Matters based on the right to representation;
5. Matters on security of witnesses;
6. Matters on separation or merger of cases;
7. Matters related to jurisdiction, interests and capacity;
8. The number of witnesses, their role, their location and the means of application in their communication;
9. To agree on arguments of the case, their supporting evidence and the legal provisions of both parties on each argument;
10. To agree on the schedules of the proceedings depending on the arguments of the case;

[54] *Vocaturo v. Italy*. (1991). (Online) Available: http://hudoc.echr.coe.int/eng#{%22itemid%22:(%22001-57717%22)} Accessed on 14, June 2024

[55] Zimmerman and Steiner v. Switzerland. (1983). Application no. 8737/79. p. 29

[56] Article 125 (1-13) of law nº 058/2023 of 04/12/2023 amending law nº 027/2019 of 19/09/2019 relating to the criminal procedure, *O.G n° Special of 05/12/2023*

11. To agree on the time each party will utilize in explaining every item and to hear its witnesses;
12. To inquire from both parties the time when hearing the case in merits would commence and end;
13. To take any other necessary decisions that are helpful in the smooth conduct of the hearing.

The second phase of detention in Rwanda is court ordered detention while awaiting trial. If a suspect is not released within ten days of arrest, he or she must be brought before a judge. The prosecutor must request pre-trial detention. After hearing from the Public Prosecutor and the suspect, the court has seventy-two hours to render a decision. The judge may order provisional detention or release. The Code of Criminal Procedure permits a judge to order pre-trial detention in only two circumstances. The first circumstance is where the detained persons is suspected of committing an offence carrying a minimum penalty of two years imprisonment. The second, is where there are serious grounds for suspecting that the person has committed the offence.

CHAPTER TWO: ANALYSIS OF THE RIGHTS OF SUSPECTS IN PROVISIONAL DETENTION UNDER RWANDAN LAW

This chapter is structured into two sections; the first section analyzes the legal framework of the rights of suspects in provisional detention under Rwandan law. While the second section criticizes rights protection of suspects rights in provisional detention in Rwanda.

2.1. Legal framework on the protection of rights of suspects in provisional detention under Rwandan law

The Government of Rwanda is obliged both by the Constitution of the Republic of Rwanda, international obligations, and primary Rwandan legislation to have in place effective measures to prevent the violations of detainees in provisional detention.

2.1.1. Right to due process of law under the Constitution of the Republic of Rwanda

The Constitution of the Republic of Rwanda provides that: *Everyone has the right to due process of law, which includes the right: to be informed of the nature and cause of charges and the right to defence and legal representation; to be presumed innocent until proved guilty by a competent Court; to appear before a competent Court; not to be subjected to prosecution, arrest, detention or punishment on account of any act or omission which did not constitute an offence under national or international law at the time it was committed. Offences and their penalties are determined by law; not to be held liable for an offence he or she did not commit. Criminal liability is personal; not to be punished for an offence with a penalty that is severer than the penalty provided for by the law at the time that offence was committed; not to be imprisoned merely on the ground of inability to fulfil a contractual obligation; not to be prosecuted or punished for a crime which has reached its statute of limitations.*[57] However, the crime of genocide, crimes against humanity and war crimes are not subject to statute of limitations. A law may determine other crimes which are not subject to statute of limitations.[58]

[57] Article 29 of Constitution of the Republic of Rwanda of 2023, *O.G n° Special of 04/08/2023*
[58] *Ibidem*

Due process of law is a constitutional guarantee that prevents governments from impacting citizens in an abusive way.

2.1.2. Responsibilities of a judge during hearing on provisional detention

A judge's responsibilities in a provisional detention case include assessing the suspect's competency, ensuring the detention period and rights have been respected during investigations, examining if there is no termination of criminal action that would prevent a provisional detention warrant, assessing serious grounds for detention, examining plea bargaining agreements between the prosecutor and accused person, considering the accused's living and health conditions, and analyzing other arguments in the parties' submissions.
.[59] When the judge finds that constituent acts of the offence do not correspond to the classification assigned to the offence, he or she reclassifies the offence and orders detention or release of the suspect.

2.1.3. Right to legal representative

The accused in criminal law is granted with the right to defend himself alone or with the help of legal representative.[60] The protection of that right is assured in the ICCPR[61] and other international human rights treaties[62], as well as in the national laws of many States.[63] This right has been designed to protect the accused from harm that may be done to him by 'inhumane' legal mechanisms. Typically the accused is not a lawyer, nor familiar with criminal proceedings, and is usually unable to cope with the complicated rules of national laws. Therefore, it is not uncommon that the accused is effortlessly intimidated by regulations regarding his rights and obligations.

The laws of international criminal courts and tribunals are even more problematic. This field of law is considered as one of the most incomprehensible, providing unique solutions. This is due to the fact that the laws of international criminal tribunals and courts were created by taking specific rules from common and civil law systems, melting them together for the sake of assuring fair and expeditious international criminal trials. Moreover, the gravity of offences of which the person is

[59] Article 76 of law nº 058/2023 of 04/12/2023 amending law nº 027/2019 of 19/09/2019 relating to the criminal procedure, *O.G n° Special of 05/12/2023*
[60] Paweł Wiliński, '*Prawo do obrony w postępowaniu przed Międzynarodowym Trybunałem Karnym*' (2005) 1 RPEiS 109.
[61] Article 14 (3) (d) of the ICCPR
[62] Article 6 (3) (c) of the ECHR.
[63] Article 6 and Article 77- 81 of the Polish Code of Criminal Procedure and in common law ones, for example in the Sixth Amendment to the US Constitution.

accused brings enormous public attention and, with the media's help, creates an atmosphere in which the accused is presumed to be guilty. Therefore, the accused in international criminal trials usually demand legal assistance.

The most crucial issue with regard to this right, both in human rights law and international criminal law, is if the accused has a right to the legal representative of his own choice even in a situation when, in the words of the ICCPR, 'he does not have sufficient means to pay for it. As Kay and Swart argue, although such an absolute right has not been recognized, it seems to be generally accepted that regard should be had to the wishes and preferences of the defendant unless there are relevant and sufficient reasons making it necessary to override them.[64]

The law of the historical tribunals provided the accused with the assistance of legal representative.[65] ICTY and ICTR also provide such disposition in the ICTY Statute and the ICTR Statute[66], repeating directly the provisions of the ICCPR.[67] It is worth pointing out that ICCPR regulations refer to 'everyone' in the situation when the criminal charges against such a person are established. International criminal tribunals decided to create separate provisions for the accused (as presented above) and for a suspect the ICTY Statute and the ICTR Statute. Interestingly, the right to a legal representative for the latter is limited to the situation when the suspect is questioned. Nevertheless, it seems unreasonable to limit the protection of a suspect only to such circumstances as interrogation. If the accused is to be granted a fair trial he should also be given full protection during the initial stages of proceedings when he is a suspect. Some further modifications regarding this issue should be introduced in the future.

The Rome Statute does not help in this matter. Containing general provisions on rights of persons during investigations, refers to the right to legal representative. Obviously, the authors of the Rome Statute paid more attention when drawing up the law to the situation of the suspect than of the accused. It seems that the qualifications of lawyers taking the responsibility to act as defence legal representative in international criminal proceedings are of serious importance. Nevertheless, neither human rights law nor the historical tribunals have resolved the question of the level of

[64] Steven Kay and Bert Swart, '*The Role of the Defence*' in Cassese, Gaeta and Jones 1430.
[65] Article 16 (d) IMT Charter and Article 9 (c) International Military Tribunal for the Far East (IMTFE) Charter.
[66] Article 20 (4) (d) of the ICTR Statute
[67] Article 14 (3) (d) of the ICCPR.

education and experience a lawyer ought to possess in order to practice before courts and tribunals. International criminal trials are the ones that should be regarded with particular attention.

The cases investigated and tried before the international tribunals and courts are, as was pointed out above, complex and involve great amounts of time, hundreds of witness and very complicated issues to be resolved. Therefore, clarification regarding who can represent the accused in such a trial become necessary. The ICTY and ICTR decided to address this issue in Rules of Procedure and Evidence (RPE) as well as in the Directive on the Assignment of Defence Counsel.[68] Legal representative should be considered as qualified if he or she is admitted to the practice of law in a State, or is a University professor of law, speaks one or both working languages of the Tribunal, has at least 10 years' relevant experience and has indicated willingness to be assigned by the tribunal.

The creators of the Rome Statute decided that this set of qualifications is insufficient for the protection of the accused. The ICC RPE provides that: A counsel for the defence shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings. A counsel for the defence shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court. Counsel for the defence may be assisted by other persons, including professors of law, with relevant expertise.

2.1.4. Right to be informed the charges against him/her

An accused has the right to be informed promptly and in detail in a language in which he or she understands of the nature and cause of the charge against him or her. The right to be informed in detail of the charges against a person is derived from International Covenant on Civil and Political Rights[69], European Convention for the Protection of Human Rights and Fundamental Freedoms[70], and the American Convention on Human Rights.[71] A suspect has the right to be informed at the

[68] Directive on the Assignment of Defence Counsel, Registrar of the International Criminal Tribunal for Rwanda (9 January 1996) and *Directive on the Assignment of Defence Counsel*, IT/73/REV.10, Registrar of the International Criminal Tribunal for the Former Yugoslavia (28 July 1994).
[69] Article 14(3)(a) of International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999.
[70] Article 6(3)(a) of European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5
[71] Article 8(2)(b) of American Convention on Human Rights, "Pact of San Jose", *Costa Rica*, 22 November 1969.

time of arrest of the reasons for his or her arrest and the right to be informed of any charges against him or her. Once a suspect becomes an accused person by reason of the confirmation of an indictment by the court or when a suspect is charged and is proceeded against by way of expedited trial, the extent of the information required by the accused person is greater. The accused person and his or her defense counsel wishes to prepare an adequate defense and require the facilities to do so.

Part of the right to facilities to prepare a defense contained in is access to information that the defense can use to defend the accused person. Thus, the right to be informed of the charges and the right to the preparation of a defense are interlinked. According to General Comment no. 13 of the United Nations Human Rights Committee in interpreting the International Covenant on Civil and Political Rights[72], the information given to the accused person must provide the law and the alleged facts upon which the charge is based.[73] After providing the conceptual and theoretical framework, the next chapter will analyze the legal framework of compensation for acquitted suspects and the legal problems and challenges associated with compensation for acquitted suspects in Rwanda. Fair trial rights the Constitution of the Republic of Rwanda states that that everyone has the right to due process of law, which includes the right to be informed of the nature and cause of charges.

2.1.5. Prohibition of self-incrimination on suspect

No person may be compelled to testify against himself or herself or to con-fess guilt. No negative inferences may be derived from a person's failure to testify against himself or herself or to confess guilt. The right not to be compelled to testify against oneself and the right not to confess guilt are expressed in the International Covenant on Civil and Political Rights[74], the American Convention on Human Rights, and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

[72] UN Human Rights Committee (HRC), *CCPR General Comment No. 13: Article 14 (Administration of Justice), Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law*, 13 April 1984.
[73] Article 14(3)(a) of International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999.
[74] Article 14(3)(g) of the International Covenant on Civil and Political Rights.

While these rights are not expressly provided for in the European Convention on Human Rights and Fundamental Freedoms, the European Court for the Protection of Human Rights and Fundamental Freedoms has declared that the right not to be compelled to testify against oneself and the right not to confess guilt are implicit in the right to a fair trial set out in the convention. The right not to be compelled to testify against oneself and the right not to confess guilt include two elements: the right to freedom from self-incrimination and the right to silence. These components are related and at times overlapping, but they are dis-tinct.

The right to silence encompasses only oral representations made by a person and refers to a person's right not to make oral statements to the police or any other criminal justice actor during the investigation of a criminal offense. The freedom from self-incrimination is broader in scope and refers to both oral representations and to the provision of any materials that may tend to incriminate a person. Under international human rights law, what is excluded from the freedom from self-incrimination are materials that are legally obtained from the accused under compulsory powers of criminal investigation such as breath, blood, and urine samples and bodily tissue for the purpose of DNA testing.

The right to silence is recognized as absolute in many states. In addition, under the international human rights conventions, there is no limitation placed on these rights. In some domestic jurisdictions, statutory provisions have been included to the effect that a person has the right to silence and the freedom from self-incrimination, but if the person does not provide information to the authorities or at trial, then adverse inferences may be drawn from the failure to provide information. The case law on such limitations on the right to silence and freedom from self-incrimination, mainly deriving from the European Court of Human Rights, is somewhat unclear.

Under cases such as *Funke v. France*[75], the European Court has stated that the freedom from self-incrimination is absolute. In the case of *Saunders v. United Kingdom*[76], the court stated that self-incrimination was an absolute right and even applied where the compulsion to testify resulted in the giving of exculpatory evidence. On the other hand, in the case of *Murray v. United Kingdom*, the European Court dealing with both the right to freedom from self-incrimination and the right to silence deemed that a law that drew adverse inferences from an accused person's silence did not

[75] *Funke v. France*, application no. 10828/84, (Judgment February 25, 1993), paragraph 44.
[76] *Saunders v. United Kingdom*, application no. 19187, Judgment of December 17, 1996, para 71.

violate the European Convention because the inferences were not decisive to the finding of criminal responsibility. The drafters of the Model Code of Criminal Procedure (MCCP) were firmly of the view that the right to silence and the freedom from self-incrimination should be recognized as absolute and unqualified rights under the Model Code of Criminal Procedure.

Part of the rationale for this view is the fact that where a person's right to silence is compromised, allowing adverse inferences means that the silence of a person is taken as an admission of guilt and thus the person's right to the presumption of innocence is violated. As well as being related to the presumption of innocence, the right to silence and the freedom from self-incrimination are also related to the right to freedom from coercion, torture, or cruel, inhuman, or degrading treatment because the right to freedom from self-incrimination and the right to silence prohibit the use of these techniques to compel testimony.

2.1.6. Right to equality before the law

According to Constitution of the Republic of Rwanda provides that: *All persons are equal before the law. They are entitled to equal protection of the law.*[77] The right to equality before the law and the courts derives from a number of inter-national and regional human rights treaties. It is expressed in the Inter-national Covenant on Civil and Political Rights[78], American Convention on Human Rights[79], African Charter on Human and Peoples' Rights[80], and the Arab Charter on Human Rights.[81] Equality before the law relates to the equal treatment of persons in the application and enforcement of the law. It applies to all public officials, including judges, prosecutors, and policing officials, and requires that they treat all persons equally. Equality of treatment, however, does not mean identical treatment for all persons. Instead, it means that persons in a like position should be treated in the same way.

The right to equality before the law is also related to the right to freedom from discrimination. A related but different concept to equality before the law is the right to equal protection of the law, a

[77] Article 15 of Constitution of the Republic of Rwanda of 2023, *O.G n° Special of 04/08/2023*
[78] Article 26 of UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171
[79] Article 26 of American Convention on Human Rights, "Pact of San Jose", *Costa Rica*, 22 November 1969.
[80] Article 3 of African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[81] Article 11 of the Arab Charter on Human Rights, 15 September 1994.

right which is also contained in International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, and the American Convention on Human Rights. Equal protection of the law relates to lawmaking and requires that all persons be treated equally in domestic laws.

II.1.6. Right to liberty and security of person

On April 16, 1975, Rwanda ratified the International Covenant on Civil and Political Rights (ICCPR). The International Covenant on Civil and Political Rights reads as follows: *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*[82] Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.[83] It is important to note Rwanda's additional ICCPR obligations both to provide a judicial mechanism for reviewing the lawfulness of detention, and its obligation to compensate those unlawfully held.

African Charter on Human and Peoples' Rights of 1981 provides that: *Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law.* In particular, no one may be arbitrarily

[82] Article 9 of International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999.
[83] *Ibidem*

arrested or detained.[84] It is important to note that the United Nations takes the view that a person who is lawfully detained initially can properly be described as being "arbitrarily detained" if their detention is for a duration that is unjustifiable.

Thus an individual held on perfectly proper grounds will come within the definition of being arbitrarily detained if their detention is for a period that is clearly disproportionate and is especially likely to come within the definition if there is no judicial oversight of the detention. The "Tokyo Rules" adopted by the General Assembly on the 14th of December 1990 have the topic of pre-trial detention: *Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system.* For minor cases the prosecutor may impose suitable noncustodial measures, as appropriate.[85]

Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim. Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule and shall be administered humanely and with respect for the inherent dignity of human beings. The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.[86] The individual and combined effect of these three treaty obligations is very clear: Rwanda is under a duty to have in place a system of pre-trial detention in which detainees have the right to have their detention judicially monitored, to challenge their detention before the courts, be released when their detention is no longer necessary or proportionate.

[84] Article 6 of African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[85] Part 5 of Tokyo Rules, adopted by the General Assembly on the 14th of December 1990.
[86] *Ibidem*

2.2. Critical analysis on protection of suspects rights in provisional detention in Rwanda

This part deeply criticizes protection of rights of protection of suspects in provisional detention in Rwanda. 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.

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 right, right to property also infringed by the provisional detention, while it is granted by also by the Constitution. 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. This is a problem not to the suspect who has been convicted because the period they spent in jail during provisional detention is deducted from the main imprisonment period; it is a problem on those persons who have been detained provisionary, but at the end be acquitted. In this study it important to see if these compensations are being granted in Rwanda, if they can be granted and how they can be granted.

All those issues are going to be elaborated along this study 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.

Couple of rights are alleged to be violated when a suspect is under provisional detention. This section highlights basic rights that constitute a rationale of equal compensation by the time of liberation especially when the person is declared innocent after a long period of detention.

2.2.1. Infringement of the right to freedom

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 right[87], right to property also infringed by the provisional detention, while it is granted by also by the Constitution[88], 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.

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All those issues are going to be elaborated along this study 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. Couples of rights are alleged to be violated when a suspect is under provisional detention. The basic rights that constitute a rationale of equal compensation by the time of liberation especially when the person is declared innocent after a long period of detention.

2.2.2. Deprivation of the rights to liberty and security

[87] Article 24 of Constitution of the Republic of Rwanda of 2023, *O.G n° Special of 04/08/2023*
[88] *Ibid.* Art. 34.

When a person is detained for instance, s/he 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 s/he wants, to do whatever s/he 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.[89]

In few words, when a person is provisionary detained, his 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.

2.2.3. Loss of good reputation and employment

The loss of good reputation and employment can lead to some reparable and irreparable harms to some of those harms include the loss of reputation and work. According to the judgment RPAA0048/12/CS of 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 case involves NSANZINTWALI Pascal a resident of the Nyanza district, southern province who was accused a crime of defilement to a child aged 5 years old.[90]

The alleged defilement was reported to police and prosecution and the suspect denies committing defilement. 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

[89] Constitution of the Republic of Rwanda of 2023, *O.G n° Special of 04/08/2023*, 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.
[90] *Prosecutor Vs. NSANZINTWALI Pascal,* Case RPAA0048/12/CS (Judgment of 15, March 2020).

was no evidence beyond reasonable doubt. NSANZINTWALI is the one who committed the crime. The medical report showed that defilement that has occurred but with no impact on the life of the child.[91] There was also uncertainty about the relationship between the crime and NSANZINTWALI Pascal which led the court to acquit the defendant.

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. Also, the time he spent to the prison. During the provisional detention of a suspect it is quite clear that a suspect can be affected in community with regard reputation even if in his 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.[92]

The general issue is that much 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. Having demonstrated the legal framework for compensating the acquitted suspects in Rwanda and international legal instruments and the challenges relating to absence of legal provision on compensation for acquitted suspects in Rwanda and the rights violated when the suspects is detained. The next chapter will provide the required measures for improving the compensation for acquitted suspects under Rwandan legal system.

2.2.4. Absence of legal provisions on compensations for acquitted suspects under Rwandan law

There is no legal provision under Rwandan law for acquitted suspects. Providing 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.[93] It gives a kind of moral satisfaction to the acquitted

[91] *Ibidem*
[92] H. Tiberg, "*Compensation for Wrongful Imprisonment*", Stockholm Institute for Scandinavian Law 1957-2010, pp. 486.
[93] G.D Pascual, *et al*; Compensating acquitted pre-trial detainees; University of Valencia Law School. 2005, p.43

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.

In *Prosecutor Vs. SEZIKEYE François,* The Court of Appeals acquitted him of the crimes he was charged with based on doubts about the evidence. The court found him not guilty of first degree murder and accessory after the fact of armed robbery, where he was sentenced to 25 years in prison.[94] If under Rwandan there is a legal provision, the acquitted suspect would claim the right to compensation. Also in *Prosecutor Vs. UWAYISABA Habimana,* he was prosecuted of murder, the crime stipulated by Article 107 of Law No. 68/2018 of 30/08/2018, which is punishable by life imprisonment. The Court of Appeal found him not guilty of murder instead of the life sentence he had been sentenced to at trial. The Court of Appeal acquitted him because there was doubt about the murder he was charged with.[95] The same if under Rwandan there is a legal provision, the acquitted suspect would claim the right to compensation.

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.[96]

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.[97]

[94] *Prosecutor Vs. SEZIKEYE François,* Case N° RPAA 00371/2020/C, Judgement of 15/12/2022.
[95] *Prosecutor Vs. UWAYISABA Habimana,* Case RP Nº RPAA 00737/2021/CA Judgement of 16/12/2022
[96] *Ibidem*
[97] *Armstrong v. United States*, 364 U.S. 40, 49 (1960)

CHAPTER THREE: EFFECTIVE MECHANISMS FOR ADDRESSING THE NEGATIVE IMPACT OF PROVISIONAL DETENTION AGAINST THE SUSPECT UNDER RWANDAN CRIMINAL LAW

This chapter proposes effective mechanisms for addressing the negative impact of provisional detention against the suspect under Rwandan criminal law.

3.1. Legal mechanisms for addressing the negative impact of provisional detention against the suspect under Rwandan criminal law

The present section is addressed to provide the required legal mechanisms for reviving compensation for acquitted suspects in Rwanda.

3.1.1. Enforcing compensation in case of miscarriage of justice

Anyone who is unlawfully deprived of his or her liberty has an enforceable right to compensation. When a person has by a final decision been convicted of a criminal offense, and when subsequently his or her conviction has been reversed or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction must be compensated, unless it is proven that the nondisclosure of the unknown fact at the time is wholly or partly attributable to him or her. Under Rwandan legal system; it is hard to find a case law due to the absence of legal provision relating to compensation.

The competent legislative authority must establish a mechanism for the award of compensation for unlawful deprivation of liberty or for cases in which there are conclusive evidence of a miscarriage of justice. A discussed, in Rwanda there is no legal provision on granting compensation for acquitted. The international legal should be a model, for instance the International Covenant on Civil and Political Rights[98]

[98] Article 9(5) of International Covenant on Civil and Political Rights, adopted by the General Assembly in its resolution 2200 A (XXI) of 16 December 1966, United Nations, *Treaty Series*, vol. 999, No. 14668

The European Convention for the Protection of Human Rights and Fundamental Freedoms.[99] This right applies only to persons who have been arrested or who have been unlawfully detained prior to a trial.[100]

It is distinct from the right which applies to persons who have been wrongly convicted, imprisoned, and then found to be innocent by a final verdict of the court. The right to compensation for a miscarriage of justice is contained in the International Covenant on Civil and Political Rights[101], Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms[102], and the American Convention on Human Rights.[103] The right to compensation for miscarriage of justice pertains to a person who has been tried and wrongfully convicted of a criminal offense and who has subsequently been punished for it, for example, by imprisonment.

In Spain, the state's liability for the functioning of the administration of justice is set out in Articles 292 to 297 of the LOPJ.[104] Regarding pre-trial detention, Article 294(1) of the Judiciary Act originally only provided for compensation to be awarded in the following scenarios: when a person was acquitted due to the non-existence of the alleged act and when the proceedings were dismissed before trial for the same reason. Courts and legal scholars had interpreted this as including situations where the relevant acts had not taken place at all or, if they had, they did not constitute criminal activity.[105] Another such scenario is one in which it was proven that the person was not involved in the alleged criminal activity. Conversely, the defendant was not awarded compensation in cases where acquittal or dismissal before trial took place due to insufficient evidence, either of the commission of the crime or of the person's involvement.

[99] Article 5(5) of European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
[100] BORCHARD, Edwin (1941), "State Indemnity for Errors of Criminal Justice", *Boston University Law Review*, 21, pp. 201-211.
[101] Article 14(6) of International Covenant on Civil and Political Rights, adopted by the General Assembly in its resolution 2200 A (XXI) of 16 December 1966, United Nations, *Treaty Series*, vol. 999, No. 14668
[102] Article 3 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS 9.
[103] Article 10 of American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969.
[104] *Ley Orgánica no. 6/1985, de 1 de julio, del Poder Judicial* [BOE no. 157, 3 July 1985].
[105] Article 294(1) of the LOPJ: 'those who, after having been remanded in custody, are acquitted because of the non-existence of the alleged act or for the same reason there has been a dismissal of proceedings, shall be entitled to compensation, provided that damages have been incurred'.

Constitutional Court judgment No 85/2019 of 19 June 2019[106] marked a turning point in the state's liability regime regarding pre-trial detention. It declared the wording because of the non-existence of the alleged act and for the same reason of Article 294(1) of the Judiciary Act to be unconstitutional.

The Court established that the wording of the Judiciary Act contravened the interpretation of the ECtHR in relation to the presumption of innocence. In this regard, while it is true that no article of the ECHR guarantees compensation in cases where detention was lawful but the defendant was acquitted or proceedings were discontinued, the ECtHR has firmly established that once a person has been acquitted, their presumption of innocence may not be undermined, for example, by judicial decisions that reflect the opinion that the person in question is guilty.[107]

3.1.2. Granting compensation in case of unlawful detention

As discussed in the previous part under Rwanda law there is no legal provision enabling acquitted suspect to claim for which one compensation, and this leads this research to rely on international legal instruments. For instance ICCPR stipulates that "*anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation*"[108], In few words this article 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.

Which means that this article can be used in this situation because provisional detention is lawful but when a person was detained provisionary and be acquitted at the end, it means that s/he was detained illegally (illegal detention), but being acquitted doesn't directly mean that the suspect was arrested and detained illegally. In some countries or jurisdictions, an acquitted pre-trial detainee is entitled for the compensation in the time s/he was detained illegally. For instance under European Convention of Human Rights[109], it is stipulated that: *"Everyone who has been the victim*

[106] *Sentencia del Tribunal Constitucional (Pleno) no. 85/2019, de 19 de junio* [ECLI:ES:TC:2019:85].
[107] ECtHR *Englert v Germany*, Application No 10282/83, 9 October 1985; and ECtHR *Sekanina v Austria*, Application No 13126/87, 1993.
[108] Article 9 (5) of International Covenant on Civil and Political Rights, adopted by the General Assembly in its resolution 2200 A (XXI) of 16 December 1966, United Nations, *Treaty Series*, vol. 999, No. 14668
[109] Article 5(5) of European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

of arrest or detention in contravention of the provision of this article shall have an enforceable right to compensation". This means that this right of compensation is not granted to those persons who were detained in conformity with the Convention but at the end who are acquitted even thought they were provisionary detained legally. Under Rwandan Criminal Procedure, to detain a person or a suspect illegally is prohibited, but nowhere, this Criminal Procedure says about the payment of compensation to those who were detained illegally, and liable persons are those who detained him/her illegally rather than the government.[110] In this article, a judge must criminally punish a person who detained another illegally; this means that s/he is criminally liable only without compensation and the concerned person or defendant is the detainer rather than government.

European Convention for Human Rights (ECHR) provides, "*Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation*."[111] Thus, anyone in one of the state members of the Council of Europe, victims of unlawful detention are entitled to compensation. The European Court for Human Rights (ECtHR) has stated that the European Convention of Human Rights creates a direct and enforceable right to compensation before the national courts of the state members of the Council of Europe.[112] The violation of that right gives rise to liability in proceedings before the ECtHR.[113] In other words, the right to compensation presupposes that a violation of one of the other paragraphs of Article 5 has been established by either a domestic authority or the Court itself.[114]

In its interpretation of the European Convention of Human Rights, the European Court for Human Rights recognizes the right to compensation for unlawful detention even if the arrest or detention was lawful under the domestic legislation.[115] According to the court, for a detention to be lawful, it must have a basis in national law and may not be arbitrary. It has been argued that compensation for unlawful detention is required only where the victim was arrested or detained contrary.[116]

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[110] Article 143 of law nº 027/2019 of 19/09/2019 relating to the criminal procedure, *O.G n° Special of 08/11/2019*
[111] Article 5(5) of ECHR
[112] ECtHR, *A.* and *Others* v *The United Kingdom*, 19 February 2009, no. 3455/05.
[113] Macovei, M., The right to liberty and security of the person, A *Guide to the implementation of Article 5 of the European Convention on Human Rights,* Human rights handbooks, no. 5, Council of Europe,2004, p.67.
[114] Council of Europe/ European Court of Human Rights, (2014), p.34.
[115] *James, Wells and Lee* v *The United Kingdom*, *nos.* 25119/09, 57715/09 and 57877/09 at paragraphs 192-194, (2012)
[116] *Harkman*n v *Estonia*, no. 2192/03, § 50, 2006.

However, the European Court for Human Rights has stated that effective enjoyment of the right to compensation must be ensured with a sufficient degree of certainty and must be available both in theory and practice.[117] Member states' courts vary as to the amount of compensation awarded, but the compensation must be proportionate to the duration of the detention.[118] Unlawfully detained persons in the United Kingdom are entitled to seek remedies for unlawful detention before national courts through the Human Rights Act 1998.[119] By adopting the Human Rights Act into its domestic law, the United Kingdom has taken seriously the jurisprudence of the European Court for Human Rights.

3.1.2.1. Providing compensation for unlawful detention under tort law

Under Rwandan tort law, victims of unlawful detention are entitled to file a lawsuit in court seeking damages. Rwanda's the Civil Code Book III[120] states that: *"any act of a person "which causes damages to another, shall oblige the person by whose fault it occurred to repair it. One shall be liable not only by reason of one's acts but also by reason of one's imprudence or negligence."* Thus, three elements are necessary to prove liability: fault, damages, and causation. The burden to prove each of those elements falls on the plaintiff. Hence, in order to be compensated, an unlawfully detained person must prove the fault of the detaining officer, the suffered damages and a causal link between the fault and damages. Before examining the three elements necessary for imposing tort liability.

3.1.3. Providing compensation in case of negligence

Here a negligence which can be on both side (government agents or detainees), this can be also a reason for the payment of compensation on the acquitted pretrial detainees.[121] This means that a detainee can be detained not only for violation of the law because it can happen because the lack of due care on the side of government agents, and it can also happen for example as the result of

[117] Council of Europe/ European Court of Human Rights**,** *Guide on Article 5 of the Convention: Right to Liberty and Security*, 2014, p.34.
[118] Ziegler, K.S & Huber, P. M, *Current Problems in the Protection of Human Rights, Perspectives from Germany and the UK*, Hart Publishing, 2013, p.27.
[119] *Id*., p.35.
[120] Articles 258 and 259 of Decree of 30/07/1888 relating to contracts or conventional obligations, the Civil Code Book III.
[121] BRATHOLM, Anders (1961), "Compensation of Persons Wrongfully Accused or Convicted", *University of Pennsylvania Law Review*, 109, pp. 833-846.

unclear law, but at the end the court clarifies the law, after the detention was carried out.[122] Taking the example to European Union, in which the European Union itself and its member states are liable for the breach European Union Law only if the breach is serious sufficient[123], and this expression can be understood as negligent. Basing on how European Union Courts stipulated, even though the concept of fault is different in countries[124], but the national meaning of fault must prevail in order to know if the fault committed is serious or not.[125]

When the government agents exercising ordinary care and diligent during detaining a person, the community must no bear that loss or suffer because all the required care and diligent were used during the act.[126] On the other hand also this kind of compensation can't also be granted to a person who caused his/her detention negligently, for instance a suspect who confessed the commission of the crime with the purpose of protecting the third one. This rule is obvious encourages potential suspects to act diligently in order to prevent being wrongfully detained. This rule is well established in a lot of countries.[127]

3.1.4. Compensation if proven innocent

In some legal systems, innocence has to be established for the right of compensation to arise. Acquitted detainees are entitled to be compensated only if the evidence indicating their innocence exceeds a certain threshold, which is higher than the amount of such evidence needed to avoid conviction. The existing evidence can be strong enough for the accused to be acquitted (insofar as the principle of the presumption of innocence requires that any doubt should benefit the accused[128]; i.e. they may not be convicted unless their guilt is proven beyond a reasonable doubt[129], but at the

[122] MASTER, Howard S. (2004), "Revisiting the Takings-Based Argument for Compensating the Wrongfully Convicted", *NYU Annual Survey of American Law*, 60, pp. 97-148.
[123] Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others. *European Court Reports 1996 I-01029*
ECLI identifier: ECLI:EU:C:1996:79
[124] *Ibid*. par 76.
[125] Ibid. Par 78.
[126] *Artegodan GmbH and Others v Commission of the European Communities*. - Medicinal products for human use - Community arbitration procedures - Withdrawal of marketing authorisations - Competence - Criteria for withdrawal - Anorectics: amfepramone, clobenzorex, fenproporex, norpseudoephedrine, phentermine - Directives 65/65/EEC and 75/319/EEC. - Joined cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00.
[127] Art. 294 of the Spanish Organic Act of the Judiciary Power of 1 July 1985 (Ley Organica 6/1985, del poder Judicial).
[128] *Barberà, Messegué and Jabardo v. Spain* Judgment of the European Court of Human Rights of 6 December 1988 , 10590/83, § 77.
[129] Judgment of the U.S. Supreme Court of 31 March 1970 [*In re Winship*, 397 U.S. 358 (1970)].

same time it can be not strong enough for them to receive compensation. The standard of proof in cases of State liability for provisional detention (e.g. preponderance of evidence or clear and convincing proof) differs thus from the standard of proof in criminal cases (beyond a reasonable doubt).

This rule was applied, for example, in Austria, Norway and Spain. Under Austrian Compensation Act of 1969, it provides that: *"the right to compensation arose when the accused had been placed in detention or remanded in custody by a domestic court on suspicion of having committed an offence making him liable to criminal prosecution in Austria and was subsequently acquitted of the alleged offence or otherwise freed from prosecution and the suspicion that he committed the offence had been dispelled*".[130] If the evidence produced at the trial was not sufficient to convict the accused (by virtue of the application of the principle *in dubio pro reo*), but the aforementioned suspicion had not been dispelled, there was no right to compensation. Under the Norwegian Code of Criminal Procedure Act of 1981, "*if a person charged was acquitted or the prosecution against him was discontinued, he could claim compensation from the State for any damage that he had suffered through prosecution if it was shown to be probable that he did not carry out the act that formed the basis for the charge*".[131]

For instance under the Spanish Judiciary Power Act of 1985, the State is liable for the harms caused by detention on remand if detainees have been acquitted on the grounds that the alleged offence did not exist.[132] This provision was interpreted by the Spanish Supreme Court as meaning that the State was liable if detainees managed to prove either that the alleged crime did not exist or that they had not committed it.[133] The State was not deemed liable, by contrast, when detainees had been acquitted by virtue of the principle of the presumption of innocence but there was actually no certainty about their innocence.

An arguably similar rule has been applied in Germany and the Netherlands. In both countries, the law confers a broad discretion on the Courts to award compensation in some cases. Under the Dutch Code of Criminal Procedure provides that: "*compensation shall be awarded in each case if*

[130] Paragraph 2 (1) (b) of Criminal Proceedings) Act of 1969
[131] Article 444 of the Norwegian Code of Criminal Procedure Act of 1981.
[132] Article 294 of the Spanish Judiciary Power Act of 1985.
[133] Judgments of the Spanish Supreme Court of 28 September 1999 (rec. 4712/1995) and 27 January 2003 (rec. 7928/1998).

and to the extent that the court, taking all circumstances into account, is of the opinion that there are reasons in equity to do so". Under the German Criminal Proceeding Act of 8 March 1971, any person who has suffered harm by reason of having been detained on remand shall be indemnified by the Treasury in the event of one being acquitted or if the proceedings brought against one are discontinued.[134] Nevertheless, this rule is subject to certain exceptions. For example, compensation may be discretionarily refused wholly or in part where the defendant is not convicted of an offence or proceedings are discontinued solely on account of a technical bar". Within these legal frameworks, the existence of reasonable suspicions about the defendant's guilt might and has been taken into account by German and Dutch Courts in order to discretionarily refuse compensation.

The European Court of Human Rights case law on these rules is still not very clear. the Convention (which provides that "*everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law*"[135] does not guarantee a person charged with a criminal offence a right to compensation for detention on remand imposed in conformity with the requirements of the Convention. In spite of this, the Court considers that a decision whereby such compensation is refused may raise an issue under the aforementioned Article if supporting reasoning amounts in substance to a determination of the accused's guilt without one having previously been proven guilty according to the law. In this respect, the Court has used two criteria.

On the one hand, it has made a distinction between "statements which reflect the opinion that the person concerned is guilty and statements which merely describe a state of suspicion. The former infringe the presumption of innocence, whereas the latter have been regarded as unobjectionable in various situations examined by the Court.[136] On the other hand, the Court has stated that "the voicing of suspicions regarding an accused's innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final.[137] The Court has applied both criteria inconsistently.

[134] Article 2(1) of the German Criminal Proceeding (Compensation) Act of 8 March 1971.
[135] Article 6 § 2 of European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
[136] *Hibbert v. the Netherlands* ECHR, Decision of 26 January 1999 , 38087/97.
[137] *Sekanina v. Austria*, Judgments of European Court of Human Rights of 25 August 1993 , 13126/87, § 30) and 21 March 2000 (*Asan Rushiti v. Austria*, 28389/95, § 31).

In *Hibbert v. the Netherlands* decision, for example, found no violation of Convention in a case where the accused had been finally acquitted as a result of doubts concerning his role in the crime, and the compensation was refused because "there were witnesses having made incriminating statements as to the applicant's involvement in the punishable facts as charged, which fully justified his detention and it had not been established that he had not committed the fact, so that, all circumstances having been taken into account, there were no reasons in equity for any compensation. Furthermore, the Court accepts a quite hypocritical solution. Indeed, once the accused has been acquitted because there were reasonable doubts about his or her guilt, the State may take them into account in order to refuse to compensate him or her, but only if it does not express such doubts being the reason for the refusal.[138] It suffices instead to declare, for example, that there are no reasons in equity to award the applicants compensation.

3.1.5. Enforcing compensation if acquitted

A verdict of not guilty constitutes an acquittal. In other words, to find a defendant not guilty is to acquit. At trial, an acquittal occurs when the jury or the judge if it's a judge trial determines that the prosecution hasn't proved the defendant guilty beyond a reasonable doubt.[139] This part relies on applicability of compensation if suspects found no guilt. Under Swedish law, detainees are entitled to compensation if they are not proven guilty of the crimes as charged, i.e. in the event of: acquittal; non-indictment.

Dropped charges; partially dropped charges if the detention would clearly not have been imposed for the remaining criminality; sentence under a more lenient provision than the indictment; and quashing or stay of the detention. Compensation is excluded if detainees have intentionally or negligently caused their detention or if for other reasons it would be unreasonable to compensate. It is specifically stated, however, that remaining suspicion after acquittal is not such a reason.[140] Similar rules have been laid down in Austria and Norway.

[138] *Masson and van Zon v. the Netherlands,* Judgment of European Court of Human Rights of 28 September 1995, 15346/89 and 15379/89, § 23).
[139] ROSENN, Keith S. (1976), "Compensating the Innocent Accused", *Ohio State Journal*, 37, pp. 705-726.
[140] TIBERG, Hugo (2005), "Compensation for Wrongful Imprisonment", *Scandinavian Studies in Law*, 38, pp. 479-487.

After the European Court of Human Rights had repeatedly ruled against these countries for violating the principle of the presumption of innocence[141], they tried to adapt their legal systems to the case law of the Court, granting the acquitted individuals the right to compensation for the time spent on remand even in the case that there were reasonable suspicions about such persons having committed the crime as charged. Some exceptions are certainly provided. In both systems, compensation is in principle not to be paid if the detainee caused his or her detention negligently. In Austrian law, compensation may also be reduced or even refused if it is inappropriate, taking into account: suspicions existing at the time of arrest or detention; the grounds for detention; and the grounds which led to acquittal or to discontinuing of the criminal proceedings. It is stated, however, that such suspicions may not be considered if the accused has been acquitted by a final decision on the merits.[142]

Similarly, the Norwegian legislator has expressly established that "compensation cannot be reduced or cease to be payable because the person charged is suspected of having manifested signs of guilt.[143] Spanish law, by contrast, has moved in the opposite direction. After two judgments of the European Court of Human Rights condemned the Iberian State for violating the abovementioned principle[144], and in the absence of any new legislation on the subject, the Spanish Supreme Court has changed its case law. Now it interprets of the Judiciary Power Act of 1985 literally, i.e. as meaning that the State is liable for the harms caused by detention on remand only if detainees have been acquitted on the ground that the alleged offence did not exist. Compensation is therefore excluded if the crime existed, even though the accused has been found not guilty.[145] Such interpretation drastically reduces the number of cases in which the State has to compensate detainees.

[141] *Sekanina v. Austria*, 13126/87, judgments of the European Court of Human Rights of 25 August 1993, 21 March 2000
[142] Section 3(2) of Austrian Compensation in Criminal Cases Act of 2005
[143] Section 446 paragraph 2 of Austrian Criminal Procedure Act of 1981.
[144] *Puig Panella v. Spain*, judgments of the European Court of Human Rights of 25 April 2006, 1483/02) and 13 July 2010.
[145] Judgments of the Spanish Supreme Court of 23 November 2010 (rec. 1908/2006) and 24 May 2011 (rec. 1315/2007).

3.2. Institutional mechanisms for addressing the impact of provisional detention against the suspect under Rwandan criminal law

This section proposes institutional mechanisms for addressing the impact of provisional detention against the suspect under Rwandan criminal law.

3.2.1. Enhancing judicial accountability in Rwanda

Accountability is generally refers as an obligation or willingness to accept responsibility or to account for one's actions.[146] That means that the professionals or institutions being held accountable accept responsibility for acting or functioning in ways that are consistent with accepted standards of behavior and conduct, and face sanctions for failures to do so. In that regard, accountability is a concept inherent to the rule of law, which is at the heart of the principles promoted by the United Nations.[147]

The notion of accountability is intrinsic to the rule of law and is often used in international and regional instruments to encompass the concepts of responsiveness, responsibility, liability, controllability and transparency in the justice system. Owing to its comprehensiveness, the term "accountability" is used generically in the title of any mechanism that aims to make institutions responsive to their respective public. In its practical sense, accountability is, in essence, a mechanism to secure the control of public power.

Based on that understanding, the implementation of judicial accountability mechanisms implies that certain parties can and should exercise power of supervision and control over others.[148] Thus, in order to prevent abuses of power and improper influence by the supervising parties, a clear set of standards must be established so that justice operators and institutions are not held to account in an arbitrary way. Accountability presupposes the recognition of the legitimacy of established standards, clear mechanisms and procedures established by law, and clear rules on the authority of the supervising parties.

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[146] Merriam-Webster dictionary online. Available from www.merriam- ebster.com/dictionary/accountability. Accessed on 21, June 2024

[147] United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

[148] G.D Pascual, et al; Compensating acquitted pre-trial detainees; University of Valencia Law School. P.43

In order for judicial accountability mechanisms to be put into practice, the relationship between the justice operator to be held accountable and the forum, body or institution to which he or she must respond also needs to be clearly defined. The justice operator to be held accountable must have the means to properly explain and justify any conduct or action deemed inadequate, inappropriate or illegal through due process. The forum, body or institution exercising judicial accountability must be entitled to pose questions and assess whether the justice operator should face sanctions or not.[149]

There is therefore a close connection between accountability, which involves the possibility of imposing sanctions, and the concept of answerability, which entails non-committal provision of information. In that regard, it is paramount that States undertake efforts to enact specific legislation establishing a comprehensive system of judicial accountability that is effective, objective and transparent with a view to strengthening the rule of law and improving the administration of justice.[150]

3.2.2. State responsibility and the right to compensation for acquitted suspect

International and regional standards recognize the civil responsibility of the State by ensuring effective remedies for persons whose human rights have been violated owing to wrongful conviction or miscarriage of justice.[151] That means that the civil responsibility of the State could be engaged through both individual and institutional accountability mechanisms. As a result, compensation could imply some form of reparation for damage caused following a personal error made by a judge when exercising his or her jurisdictional function or of the justice system as a whole.

In that regard, effective remedies could encompass the effective recourse to a competent court or tribunal, the right to judicial protection, access to court and compensation for wrongful judicial acts. In its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, Human Rights Committee has emphasized that States should enact legislation ensuring that compensation can in fact be paid and that the payment is made within a reasonable

[149] J.D Michels, "Compensating Acquitted Defendants for Detention before International Criminal Courts" (2010) 8 Journal of International Criminal Justice 407-424 at 407&8.
[150] *Ibidem*
[151] Article 8 of the Universal Declaration of Human Rights and articles 2 and 14 of the International Covenant on Civil and Political Rights.

period of time. In the case of *Dumont v. Canada,* for instance, the Committee considered that delays of nine years in civil proceedings had deprived the victim of an effective remedy.[152] The Committee has also recalled on many occasions that the supervisory review procedure against court decisions which have entered into force constitutes an extraordinary means of appeal which is dependent on the discretionary power of a judge or prosecutors and is limited to issues of law and does not permit any review of facts and evidence.[153]

The Committee has consistently emphasized that the requirement to exhaust domestic remedies applies only to the extent that those remedies are effective and available.[154] The State must give details of the remedies available to the victim, together with evidence that there would be a reasonable prospect that such remedies would be effective.[155] Similarly, in its General Comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, the Human Rights Committee emphasized that all branches of the State (executive, legislative and judicial), and other public or governmental authorities, at whatever level national, regional or local are in a position to engage the responsibility of the State party to the Covenant.

State parties should award reparation and appropriate compensation to individuals and noted that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices[156], as well as bringing to justice the perpetrators of human rights violations and taking measures to prevent a recurrence of the type of violation in question. The right to a remedy is also enshrined in non-binding instruments, such as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which stipulates that compensation could include an effective judicial remedy, access to court or access to administrative and other bodies.

It could also encompass payment for the harm or loss suffered, reimbursement of expenses incurred as a result of victimization, the provision of services and the restorations of rights. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International

[152] *Dumont v. Canada,* communication No. 1467/2006, para. 23.6
[153] *Sudalenko v. Belarus,* Communication No. 1750/2008, para. 8.3; and *Kovaleva et al. v. Belarus*, Communication No. 2120/2011, para. 10.4.
[154] Report of the Human Rights Committee, A/68/40 (Vol. I), para. 163.
[155] *Ibidem*
[156] *Ibid.* paras. 16–17

Humanitarian Law go further by explaining that restitution should, whenever possible, restore the victim to their original situation before the gross violation of his or her rights took place. The Principles stipulate that compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, such as: physical or mental harm; lost opportunities, including employment, education and social benefits; moral damage; and costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

Satisfaction could include judicial and administrative sanctions against the persons liable for the violation, and guarantees of non-repetition, which involve, for instance, strengthening the independence of the judiciary as a means of prevention. The European Convention for the Protection of Human Rights and Fundamental Freedoms includes the right to access to court[157] as an important element in remedying violations, and the rights to an effective remedy[158] and reparation.[159] In addition, Protocol No. 7 to the Convention explicitly refers to the right to compensation for wrongful conviction.[160]

3.2.3. Role of institutions and bodies in charge of overseeing the accountability of the justice system

The independence of justice operators and of the judiciary itself exists in order to guarantee equality and fairness to court users. For that reason, the accountability of the justice system's operators must be ensured by the State and specific and clear accountability mechanisms and proceedings must be established to deal with formal complaints or even public criticism of justice operators' actions and conduct. Such instruments should also enable judges, prosecutors and lawyers to explain their actions. The proceedings should be transparent, impartial, fair, objective, and should not undermine the credibility of the justice system as a whole; justice operators should not fear arbitrary removal from office or sanctions.

[157] Article 6 of European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.
[158] *Ibid*. article 13
[159] *Ibid*. article 41
[160] Article 3 Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS 9.

Precisely because the judiciary exists to answer to public interest, it must be subject to public scrutiny. It is imperative that the beneficiaries of the justice system can assess whether judges, prosecutors and lawyers are duly exercising their functions and responsibilities and whether the system itself is functioning independently and impartially. In that context, civil society has an invaluable role to play. By monitoring the proper functioning of the justice system, it encourages engagement through a substantive and transparent dialogue between justice operators, the other powers of the State and the general public.

Besides public scrutiny, there should be an independent body in charge of holding judges and prosecutors accountable at the same time as it protects their independence. That body should foster transparency in all disciplinary proceedings and provide defendants with procedural safeguards, including the right to present a defence and to appeal to a competent higher court.[161] Indeed, the Human Rights Committee has indicated that, in order to ensure the independence of the judiciary. States should establish an independent body responsible for the appointment and promotion of judges, as well as for the application of disciplinary regulations.[162]

The Committee has also recommended that States parties should strengthen the independence of the judiciary by providing for judicial, rather than parliamentary, supervision and discipline of judicial conduct.[163] The composition, structure and mandate of those independent bodies vary from one judicial system to another, but some general guidelines should be taken into account for their functioning in order to ensure that they act in accordance with international standards. In order to perform its tasks with propriety, a commission or council for the judiciary should preferably be composed entirely of members of the judiciary, retired or sitting, although some representation of the legal profession or academics could be advisable.

No political representation should be permitted, in order to prevent politicization and avoid external influences that can compromise the implementation of measures to ensure the independence, impartiality, integrity and accountability of the judiciary. In addition, the independent body should manage its own budget and have enough human and financial resources to properly function with independence.

[161] *Ibid*., para. 26.
[162] UN Human Right Committee, ICCPR/C/ARM/CO/2-3, para. 21.
[163] UN Human Right Committee, ICCPR/CO/79/LKA, para.16.

It should also be accountable for its activities, in order to avoid the possible public perception that it works only for the self-interest and self-protection of the profession. Independent bodies in charge of the accountability of prosecutors could follow a similar structure, while their composition should be adapted.

With regard to the legal profession, an independent professional organization or bar association should be established to represent the interests of lawyers, regulate their entry to the profession, protect their professional integrity and apply disciplinary proceedings. As mentioned above, the regulation, monitoring and accountability of the legal profession is usually exercised by the executive, the judiciary or Bar Associations. The Special Rapporteur underlines that it is contrary to the Basic Principles on the Role of Lawyers that licenses to practicee law, as well as disciplinary measures, be controlled by the executive.

The Special Rapporteur has consistently and strongly supported the establishment of an independent, self-regulating bar association or council to oversee the process of admitting candidates to the legal profession, provide for a uniform code of ethics and conduct, and enforce disciplinary measures, including disbarment.[164] Such an association would not only provide a mechanism to protect its members against undue interference in their legal work, but also monitor and report on the members' conduct, ensuring their accountability and applying disciplinary measures in a fair and consistent manner.

3.2.4. Enhancing individual accountability

Individual accountability is directly related to the responsibility incumbent on justice operators to uphold high standards of conduct. Accountability mechanisms specific to judges include, but are not limited to, the requirements to write reasoned individual judgments in a language that is understandable to the beneficiaries of justice, explain personal views on the law and the constitution to the general public, and comply with a registration system of pecuniary and other interests. Individual accountability should also encompass extrajudicial conduct, other permitted professional activities and the private lives of justice operators. While those individuals also enjoy fundamental rights and freedoms and are free to engage in non-judicial activities, certain activities such as membership of a political party or public engagement in political activities may jeopardize

[164] UN Human Right committee, A/HRC/23/43/Add.3, paras. 87 and 88

the impartiality and independence of their professional functions.[165] In some instances, national jurisprudence has considered that political activities are incompatible with judges' duties;[166] such incompatibility is included in the codes of conduct of some States. The Special Rapporteur strongly believes that justice operators should refrain from taking part in any activity which could compromise the dignity of their office or cause conflicts of interest that could hamper public confidence in the justice system.[167]

3.2.4.1. Role of judges

The principle of the independence of the judiciary is not aimed at benefitting judges themselves, but at protecting individuals from abuses of power and ensuring that court users are given a fair and impartial hearing. As a consequence, judges cannot act arbitrarily by deciding cases according to their own personal preferences. Their duty is the fair and impartial application of the law. Judges must therefore be accountable for their actions and conduct, so that the public can have full confidence in the ability of the judiciary to carry out its functions independently and impartially.

Clear rules of conduct and ethics must be established for judges so that they can behave according to standards that are appropriate to their judicial functions. The Basic Principles on the Independence of the Judiciary and the Bangalore Principles of Judicial Conduct provide useful guidelines for appropriate and adequate judicial behavior and indicate conduct and activities that should be avoided by judges if they are to preserve their propriety as an essential element of their activities.[168] Judges, however, should also be provided with some privileges that can guarantee their independence and impartiality, such as personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions, which aim to prevent sanctions in relation to the content of decisions.

[165] Opinion No. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behavior and impartiality, paras. 27–28.
[166] *Caso sobre la inconstitucionalidad del Presidente de la Corte Suprema de Justicia*, Supreme Court of El Salvador, 14 October 2013.
[167] Opinion No. 4 of the Consultative Council of European Judges (CCJE), para. 39.
[168] Principles 4 of Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002

3.2.4.2. Role of prosecutors

Prosecutors play a crucial role in the administration of justice and must, therefore, be able to perform their professional functions without intimidation[169], hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.[170] Prosecutors are also essential for upholding the rule of law and ensuring that the law applies equally to everyone, as they have a duty to "*give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law*".[171]

In a previous report, the Special Rapporteur emphasized that the autonomy of prosecutors should not exist to the detriment of accountability.[172] Prosecutors can be held accountable through the submission of public reports by the Prosecutor General, the implementation of public audits for financial or organizational issues, the submission of prosecutorial activities to judicial scrutiny, the establishment of a prosecutorial council or similar independent body, monitoring by the executive or parliamentary accountability.

3.2.4.3. Role of lawyers

Lawyers are also indispensable for the protection and promotion of human rights and for guaranteeing fair trial and due process. While lawyers are not expected to be impartial in the same way as judges[173], they must be as free as judges from external pressure and interference.[174] When guarantees are not in place to enable lawyers to discharge their duties in an independent manner, the door is open to all sorts of pressure and interference aimed at influencing or controlling judicial proceedings. Nevertheless, lawyers must be accountable with regard to their professional functions. They must conduct themselves according to ethical standards and clearly established norms of behavior.[175]

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[169] Organic law n° 04/2011/ol of 03/10/2011 determining the organisation, functioning and competence of the national public prosecution authority and the military prosecution department, *O.G nº 46 of 14/11/2011*
[170] Guidelines on the Role of Prosecutors, guideline 4.
[171] *Idem*, guideline 15.
[172] Human Right Committee, A/HRC/20/19, para. 82
[173] Article 126 (2) of law nº 058/2023 of 04/12/2023 amending law nº 027/2019 of 19/09/2019 relating to the criminal procedure, *O.G n° Special of 05/12/2023*
[174] Human Right Committee, A/HRC/23/43/Add.3, para. 86
[175]International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide No.1*, 2nd ed. (Geneva, 2007), p. 68.

The Basic Principles on the Role of Lawyers state that "*lawyers shall at all times maintain the honor and dignity of their profession*"[176] and that "*lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession*".[177] Those provisions, however, must be interpreted without prejudice to the application of administrative, criminal or civil liability in cases of violations of established standards of conduct and ethics. The Special Rapporteur has expressed concern at cases in which lawyers have been sanctioned because of political activities, advocacy work, confusion between the lawyer's cause and his/her client's cause, and involvement in the legal representation of clients in sensitive cases. In that context, she has urged States to refrain from criminally convicting or disbarring lawyers for the purposes of silencing them, preventing them from criticizing public policies or obstructing them in their legal representation of specific clients.

As I conclude; accountability, as a component of the rule of law, implies that nobody is above the law, including judges, prosecutors and lawyers. Judicial accountability exists to avoid the improper, inadequate or unethical behaviour of justice operators and, as such, it is closely related to judicial independence. Judicial independence is not absolute, but limited by the framework set by judicial accountability which, in turn, must respect the fundamental principles of the independence of the judiciary and the separation of powers, and its proceedings must be in line with international standards of due process and fair trial.

[176] Principle 12 of United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985
[177] *Ibid*. Principle 13

GENERAL CONCLUSION

This research analyses the impact of provisional detention against the suspect under Rwandan criminal law. It aims to analyse legal basis governing the right of suspect under provisional detention under Rwandan Criminal Law; to highlight the negative impact of provisional detention against the suspect under Rwandan Criminal Law and to propose effective mechanisms for addressing the impact of provisional detention against the suspect under Rwandan Criminal Law. Provisional detention refers to detaining of an accused person in a criminal case before the trial has taken place, either because of failure to post bail or due to denial of release under a pre-trial detention stature. The provisions under the code of criminal procedure allow the judge to detain a defendant if the judge determines that conditions exist that raises doubt as to whether the defendant appears at trial or whether the defendant may cause harm to the community.

The judge who hears a provisional detention verifies whether he or she is competent to hear such a provisional detention case brought before him or her; to verify whether the period of detention and other rights of the suspect have been respected during investigations; to examine whether there is no prescription or termination of the criminal action which would result in the issuance of provisional detention warrant being precluded; to examine whether there are serious grounds for provisional detention of the suspect; to take into consideration the accused person's living and health conditions; to analyse other arguments contained in the submissions of the parties. When the judge finds that constituent acts of the offence do not correspond to the classification assigned to the offence, he or she reclassifies the offence and orders detention or release of the suspect.

This research finds the problems associated with protection of suspect's rights in provisional detention under Rwandan Criminal Law such as infringement of the right to freedom, deprivation of the rights to liberty and security, loss of good reputation and employment and absence of legal provisions on compensations for acquitted suspects under Rwandan law. International and regional standards recognize the civil responsibility of the State by ensuring effective remedies for persons whose human rights have been violated owing to wrongful conviction or miscarriage of justice particularly in provisional detention.

RECOMMENDATIONS

It is recommended that:

i. The Government of Rwanda through its law enforcement agencies should respect the rights of suspect in relation with provisional detention;
ii. To ensure that the suspect has access to legal counsel, it is crucial to address that some of the suspects lack of financial ability that may stop their ability to secure adequate representation. This access is essential for upholding the principles of justice and ensuring that every individual, regardless of their financial situation, can have legal council effectively within the legal system.
iii. The Government of Rwanda needs to amend criminal procedural law in order to provide the right to compensation in case of unlawful detention.

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