RIGHT TO A FAIR TRIAL IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN RWANDA

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CERTIFICATION

The undersigned certify that they have read and hereby recommend for acceptance by the Open University of Tanzania, a thesis entitled: "***Right to a Fair Trial in the Administration of Criminal Justice in Rwanda"*** in fulfilment of the requirements for a Degree of Doctor of Philosophy of The Open University of Tanzania.

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DECLARATION

I, Didace Nshimiyimana, do hereby declare that, the work presented in this thesis is my original work. It has never been nor will it be presented to any other University or Institution for the same or similar award.

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Signature

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Date

DEDICATION

To my mother's memory, beloved family and friends for always supporting, helping, and standing by me.

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ABSTRACT

The judicial system in a democratic society must comply with certain minimum standards for the administration of criminal justice. In international law, these standards are embedded in the right to a fair trial, which is absolutely the most important prerequisite for ensuring justice in the settlement of cases. This thesis critically analyses the extent to which Rwandan criminal judicial system complies with the right to a fair trial. The study focuses on the risk of failure of Rwandan legislator, government and judiciary to properly address the increasing potential risk of losing effective justice in a way provided by fair trial standards. It examines fair trial theories; the examination of the right to a fair trial under Rwandan law; the compliance of Rwanda's criminal justice legal framework and the administration of criminal justice with the international standards of the right to a fair trial. The thesis used doctrinal method supplemented by empirical methods to collect primary and secondary data. Data analysis was guided by the stated research questions. Findings showed that despite attempts to reform and domesticate international conventions and agreements, Rwandan criminal judicial system still largely falls far too short of complying with the international human rights obligations related to the right to a fair trial. The thesis highlights the areas that need reform and provides recommendations which can help to make Rwandan judicial system, particularly criminal justice, compliant with the country's international human rights obligations concerning the right to a fair trial. This study recommends that the current legal framework should be reformed and different policies and legal measures should be considered for improvement of the Rwanda's criminal justice system.

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LIST OF ABBREVIATIONS AND ACRONYMS

$	American dollars
€	Euro
AU	African Union
ACHPR	African Commission of Human and Peoples' Rights
ACHR	American Convention on Human Rights
AfCHPR	African Charter of Human and Peoples' Rights of 1981
AJS	American Judicature Society
Art.	Article
B.C	Before Christ
BHR	Rwanda Housing Bank
CAT	Convention Against Torture
CERD	Convention on the Elimination of All forms of Racial Discrimination
CIA	The World Factbook
CODESRIA	Council for the Development of Social Science Research in Africa
CSCE	Conference on Security and Cooperation in Europe
CREDDA	Centre de Recherche sur la Démocratie et le Développement en Afrique
doc.	Document
e.g.	For example
EAMJA	East African Magistrates' and Judges' Association

ECHR	European Convention on Human Rights
Ed.	Edition
Et al.	et alia: and others
EU	European Union
Frw	Rwandan Francs
GAOR	The General Assembly Official Records
GATT/WTO	World Trade Organization
HC	High Court
HCJ	High Council of the Judiciary
HIV/AIDS	Human immunodeficiency virus infection and acquired immune deficiency syndrome
IACHR:	Inter American Court of Human Rights
IBAHRI	International Bar Association's Human Rights Institute
IC (TGI)	Intermediate Court
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICT	Information and communications technology
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILPD	Institute of Legal Practice and Development
JMAT	Judges' and Magistrates' Association of Tanzania
JNC	Judicial Nominating Commission

JAC	Judicial Appointments Commission
KMJA	Kenya Magistrates' and Judges' Association,
MINIJUST	Ministry of Justice
MTEF	Medium Term Expenditure Framework
NATO	North Atlantic Treaty Organization
NCC	The National Commission for Children
NGO	Non-Governmental Organisation
No.	Number
OG	Official Gazette
OHCHR	Office of the United Nations High Commissioner for Human Rights
OP	Prosecutor Office
OSCE	Organization for Security and Cooperation in Europe
P.	Page
Para.	Paragraph
PC (TB)	Primary Court
pp.	pages
PUF	Presses Universitaires de France
Rev.	Revision
SADC	Southern Africa Development Community
TPI Kigali	Tribunal de Première Instance de Kigali
UCB-CERDHO	Université Catholique de Bukavu - Centre Régional de recherche en droit international humanitaire et droits humains
UDHR	Universal Declaration of Human Rights

UEDH	Universités d'Eté des Droits Humains
UJOA	Uganda Judicial Officers' Association,
UK	United Kingdom
ULK	Kigali Independent University (Université Libre de Kigali)
ULPGL	Université Libre des Pays des Grands Lacs
UN	United Nations
UNHRC	United Nations Human Rights Committee
UNDP	United Nations Development Program
UNESCO	United Nations Educational, Scientific and Cultural Organization
URL	Uniform Resource Locator
USA	United States of America
USAID	United States Agency for International Development
v.	Versus
Vol.	Volume
WWII	World War II
ICTR	International Criminal Court of Rwanda

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Law nº012/2018 of 04/04/2018 determining the organization and functioning of the Judiciary

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The Constitution of the Republic of South Africa of 1996.

The constitution of Uganda.

The Federal constitution of Egypt (FDRE Constitution).

The Constitution of Namibia.

United Kingdom, Constitutional Reform Act 2005.

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American Convention of Human Rights of 1967.

Bangalore Principles, endorsed through ECOSOC Resolution 2006/23.

Basic Principles on the Independence of the Judiciary, 1985.

Charter of the United Nations of the June 26, 1945.

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

Convention on the Rights of the Child, 1989.

Declaration of Scottish Independence of 1320.

Declaration of the Rights of Man and of the Citizen in France of 1789.

European Convention of Human rights of 1950.

International Covenant on Civil and Political Rights of 1976.

Limburg Principles, the Maastricht Guidelines on violations of Economic, Social and cultural rights of 1997.

Universal Declaration Human Rights of 10 December 1948.

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

Generally, all human beings are born equal and deserve to have their interests considered equally with the like interests of others. The desire to protect human beings by a serious regulation is a result of an observation like that made by Hume that in all animate beings that populate the globe, there is none against which the nature has exercised more cruelty like human beings, by considering the quantity of infinite needs and necessities which she has bestowed on him and by the weakness of the means that she gives him to meet these needs.[1] Among creatures extremely vulnerable, human beings deserve to have a certain protection by everyone, every state and all organs of states.

The modern acceptation of this assumption would postulate an equal claim that all human beings should be protected through the administration of justice as one of the most important functions of a State and as a crucial factor in assessing the level of development of a nation when its quality remains effective and perfect.[2] Okene presents the administration of justice as one of the vital functions of every government since the aim of a state and a government is the welfare and happiness of the citizens - a good which is never achieved in any community without ensuring that justice is properly and efficiently administered.[3]

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[1] Ligue Congolaise des Electeurs (1999). *Bonne gouvernance et Droits de l'homme (good governance and human rights),* with the support of UNDP, Kinshasa, LWNL Publication, at p. 3.

[2] Irwin, D. A, Adam smith's tolerable administration of justice and the wealth of nations, working paper, National Bureau of Economic Research, Cambridge, October 2014, at pp.3-5.

[3] Okene, O.V.C, Effective administration of justice in Nigeria, *Journal of Criminal Justice Affairs*, 1998, Vol.1, No 1, pp.47 - 59 at p.46.

According to Ellen, the administration of justice refers to the application of moral principle of justice to existing laws when rights and duties have been disputed by rival claims.[4] Without an institutionalized legal system or law enforcement agencies, man redresses his wrongs by his hand. The modern states' machinery of administration of justice has gone a long way into being a more civilized substitute for primitive or anarchic justice.

The administration of justice may include the evaluation of the substantive rules, principles and standards. It examines the fairness and reasonableness of these rules, principles and standards, their application and effect upon parties to a claim or dispute.[5] The administration of justice cannot be without the existence of some other elements or factors such as those of proper legal structure and personnel. In this perspective, as pointed out by Gribnau, the judiciary which is the organ of goverment committed to protect citizens' constitutional rights has to honour legal values and principles like consistency, legal certainty, coherence, predictability, and not the least justice and objectivity. Respect for the more general principles of proper administration of justice attributes to the legitimacy of the judiciary. Therefore, the legitimacy of the judiciary is closely connected to the legitimacy of the law.[6] In as far as Rwandan legal framework on judicial system is concerned, citizens are not judicially protected as they are supposed to be. In this, one wonders whether there must be a loophole in Rwandan legal framework on the administration of justice by judicial system.

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[4] Allen, C. K, Aspects of Justice, Q.C., at p. 65, [http://www.livelaw.in/mischief-likely-caused-section-436-a-code-criminal-procedure-1973/] accessed 13 October 2017.
[5] Ibid.
[6] Gribnau, J. L.M., Legitimacy of the Judiciary, *Electronic Journal of Comparative Law*, 2002, Vol.6, No.4, at p.27.

In fact, *Ubi jus, ibi remedium or w*here there is right, there is remedy. "There is no liberty, if the power of judging is not separated from the legislative and executive powers".[7] It is widely accepted that the judiciary has a stronger constitutional responsibility to secure the integrity of social equality, especially through the protection of fundamental rights of citizens and the resolution of disputes over different legal issues.[8] In this regard, as described by Harry and Cole Goodrich, the judicial system must be committed to upholding substantive rule-of-law principles.[9]

The concept of justice is closely related to the strict application of law. Among the most basic and commonly understood meanings of justice is fairness or reasonableness, especially in the way people are treated, decisions are made and law enforced.[10] Thus, justice encourages the maintenance and administration of fairness. For achieving this goal, the judiciary, as the third arm of the State, has a very important role to play in upholding the law and dispensing justice within the society.

Therefore, characteristics of judicial independence and impartiality must be preserved and upheld if the judiciary carry out its functions and duties impeccably without fear or favour.[11] Without public confidence in the judicial system, the public confidence in the law erodes and courts become ineffective means of dispute settlement.

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[7] Montesquieu, C, *The Spirit of Laws, Legal Classics Library*, Book XI, 1949185; Mojapelo, P.M, *The doctrine of separation of powers, a South African perspective*, Digital Journal Library Advocate, 2013, Vol. 26, No.1, at p.38.

[8] Twinomugisha, B.K, *The role of the judiciary in the promotion of democracy in Uganda*, African Human Rights Law Journal, 2009, Vol.9, at p.3.

[9] Harry, W., Goodrich, B. A, Jail by Any Other Name: Labour Camp Abolition in the Context of Arbitrary Detention in China, *Human Rights Brief*, 2014, Vol.21, No.1, pp.2 -8.

[10] Rawls, J, A Theory of Justice, Cambridge: Harvard University Press, 1971; Gostin, L.O, *What does social justice require for the public's health? Public health ethics and policy imperatives*, Health Affairs, 2006, Vol. 25, No. 4, pp.1053–1060, at p.1054.

[11] Sivasubramaniam, B., the right of an accused to a fair trial: the independence and the impartiality of the international criminal courts. PhD thesis of the University of Durham, England, 2008, at p.12.

Inappropriate behavior makes the justice system ineffective because it tarnishes justice in the public eye.[12] The fairness and effectiveness of the judicial system could be observed in two aspects of the administration of justice. Firstly, in the institutional aspect which comprises an impartial and independent court or tribunal; secondly, in legal procedure which focuses on a public and fair hearing.

By effectiveness of judicial system, a normative system constituted by a set of international rules of conventional or customary nature has been implemented. Thus, one is tempted to affirm with Frederic Sudre that "the justifiability of the rule determines the effectiveness of the guarantee and its sanction. The international protection of individual rights cannot be seriously implemented if it is not accompanied by the appropriate jurisdictional mechanisms".[13] That is the system of protection which offers individuals effective safeguard for the defense and the enjoyment of their rights. In the context of effectiveness of justice systems all persons are equal before the tribunals and courts.[14] Thus, in determining rights and obligations or any criminal charge against the accused in a lawsuit, everyone has the right to have a public and fair hearing by an impartial, independent and competent court established by law.[15] Likewise, the Human Rights Committee has clearly held that "the right to be tried by an independent and impartial court is an absolute right that may suffer no exception".[16] On top of that a person is entitled to be tried within a reasonable time.[17]

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[12] Conser, J, *Achievement of Judicial Effectiveness through Limits on Judicial Independence: A Comparative Approach*, North Carolina Journal of International Law and Commercial Regulation, 2005, Vol.31, No. 1, pp.256-332, at p.256.
[13]Sudre, F, *Droit international et européen des droits de l'homme*, 3e Edition, Paris, 1989, p.13.
[14] Article 14(1) of the International Convention on Civil and Political Rights.
[15] Ibid.
[16] Communication nº 263/1987, *M. Gonzalez del Río v Peru* (Views adopted on 28 October 1992), in UN doc. *GAOR*, A/48/40 (vol. II), p. 20, para. 5.2.

This principle offers a minimum level of protection to citizens, where its quality to be considered as not subject to any derogation.[18] This right is applicable to ordinary and special courts, and in all circumstances. To achieve this, states are required to guarantee the independence of the judicial system.[19]

The African human rights commission[20] stated that the rights to impartial and independent court as well as the fair trial rights in Africa have been inadequate and limited yet; it considers also that the right to a fair trial for any citizen in any country that follows the practices of rule of law is a necessary right. In this case, the Republic of Rwanda is not an exception. In fact, the constitution of Rwanda affirms the principles of separation of powers[21] and the rule of law. It provides three branches of government, which are legislature, executive, and judiciary as independent and separate from each other but they are complementary. The constitution further states that the Judiciary is guardian of individual rights and freedoms and exercise this duty in accordance with the Constitution and other laws.[22] However, despite those proclaimed constitutional guarantees, the independence of the judiciary and fair trials are one of the biggest challenges in judicial making in Rwanda. This has been demonstrated by the Rwandan Office of Ombudsman in different reports. Different annual reports of Rwandan Office of Ombudsman demonstrated the challenges stated

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[17] Article 7 (1) (d) of the African Charter on Human and Peoples' Rights.
[18] ACHPR, Civil Liberties Organisation, Legal Defense Centre, *Legal Defense and Assistance Project v Nigeria*, Communication No. 218/98, decision adopted during the 29th Ordinary session, 23 April - 7 May 2001, p. 3 of the text published on [http://www1.umn.edu/humanrts/africa/comcases/218-98.html], accessed 25 July 2016.
[19] Ibid, Article 26.
[20] African Commission on Human and Peoples' Rights, [www.achpr.org/files/instruments/achpr/banjul_charter.pdf], accessed 25 July 2016.
[21] Constitution of the Republic of Rwanda of 2003, Article 61.
[22] Ibid, Article 43.

above. Every year at least one thousand and two hundred (1,200) applications for review are received by this office. The main reason is injustice caused by the lack of fair, just and reasonable trial in the judgments rendered at last instance by Rwandan courts and tribunals.[23] Statistics show that in 2013-2014, 2,572 complaints regarding court judgment review due to injustice were received;[24] in 2014-2015, 1550 applications for review of judgments have been received by Office of Ombudsman;[25] in 2015/2016, the Office of Ombudsman received 1267 applications for review.[26]

The above considerations indicate the absence of effective administration of justice in Rwanda, which could lead to injustice. Consequently, people may lose confidence in the administration of justice or driven to self-help to rectify their grievances and this may create possible outbreaks of violence and the civic capital shall be destroyed. Papaioannou posits that the negative effect of injustice goes beyond economic efficiency.[27] He further points out that the legal inefficiency is associated with increased inequality and that loopholes, legal uncertainty, and the poor justice allow the elite and their political cronies to escape the law.[28] Unlike Rwanda, countries like South Africa and Canada have guaranteed the independence of judicial system and have highlighted the individual independence of judges with the purpose to give more

[23]Review a judgement due to injustice. Office ombudsman, [http://ombudsman.gov.rw/?GUSUBIRISHAMO-KU-MPAMVU-Z#sthash.9LPEPWFx.dpbs], accessed 12 July 2017.
[24] Republic of Rwanda, Annual report of the Office of the Ombudsman of July 2013 – June 2014, Kigali, Rwanda, at p.15.
[25] Republic of Rwanda, Annual report of the Office of the Ombudsman of July 2014 – June 2015, Kigali, Rwanda, at p.15.
[26] Republic of Rwanda, Annual report of the Office of the Ombudsman of July 2015 – June 2016 Kigali, Rwanda, at p.4.
[27] Papaioannou, E, *The Injustice of the Justice System*, Dartmouth College, Harvard University, 2011.
[28] Ibid.

strength to the action of judges within the judicial system.[29] In Canada, for example, it has been underlined within the Canadian Supreme Court that:

"It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides as reflected in its institutional or administrative relationships to the executive or legislative branches of government … the relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal".[30] Thus, the fight against the abuse of law and injustice within the judicial system depends widely on the independence of the judiciary as an institution and judges who have the responsibility of their protection, without forgetting the respect of fair trial which is a human rights charity that helps people to protect their basic rights. Despite the fact that different legal and judicial approaches were put in place in Rwanda with the desire for fair and just trial, the practice of

[29] See for example Article 1 (c) and Article 165 of the Constitution of the Republic of South Africa of 1996 The South African judicial system reveals that the organization and the structure of the judicial system in this country is based on the Constitution which is the supreme law of the country and the rule of the law. In terms of section 165 of this Constitution, the judicial authority is vested in the courts. The courts are independent and subject only to the constitution and the law, which they are obliged to apply impartially and without fear, favour or prejudice. All organs of the state are required to assist and to protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. See also Nicholson, R.D, Judicial independence and accountability: Can they coexist? *Australian Law Journal*, 1993, Vol.67, No.6, pp.404-426, at p.405.

[30] Kihangi, B.K. Environmental and developmental rights in the SADC: Specific reference to the Democratic Republic of Congo and the Republic of South Africa, Lambert Academic Pushing, LAP, Germany, 2011, pp. 272-273.

courts and tribunals reveals that laws are still lagging behind and do not correspond with requirement of having good justice administration, judicial impartiality and independence; and as reported by the Office of Ombudsman and Transparency International in Rwanda,[31] great number of judgments are rendered without observation of fairness, justice and fair trial.

1.2 Research Problem

The problem which the study seeks to address is increasing potential risk of losing effective justice through poor administration of justice by judicial system of Rwanda. Firstly, the risk concerns are failure by legislator to identify the legal challenges that are caused by conflict of provisions of law in administering justice. Secondly, failure by the government to see danger that national security may be eroded by the absence of fair and just trial by judicial system. Thirdly, failure by the judicial system to administer justice as one of the state organs. In fact, Rwanda has adhered to diverse international legal instruments including those relating to the good administration of justice.[32] Importantly, according to the obligation to respect the right to a fair trial, states must organize their tribunals and courts so that they conform to its requirements.[33] This includes complying with the right to a public and fair hearing by an impartial, independent and competent court. As obliged by these instruments,

[31] Transparency International-Rwanda, Analysis of professionalism and accountability of courts for a sound rule of law in Rwanda (year ii), July 2015, at p.35-39.
[32] International Covenant on Civil and Political Rights (ICCPR), ratified on 12 February 1975 by the Decree Law no 8/75 of 12 February 1975; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ratified on 15/12/2008. African Charter on Human and Peoples' Rights ratified on 15 July 1983.
[33] *Gunes v. Turkey*, Application No. 31893/96, ECHR para.31. See also *Pelissier and Sassi v. France*, (2000) 30 EHRR 715, para.74.

Rwanda, in accordance with the principle of *pacta sunt servanda*[34] should fulfil its obligations in good faith. The constitution of Rwanda is committed to building a State governed by the rule of law, founded on the respect for human rights, freedom and on the principle of equality of all Rwandans before the law.[35] However, there are enormous legal challenges caused by conflict of provisions of law in administering justice and a failure of the judiciary in rendering justice. The Rwanda's constitution provides that the judiciary is independent and separate from the legislative and executive power, and that it enjoys the autonomy of administrative and financial management.[36]

The constitution also establishes high council of the judiciary (HCJ) responsible for the appointment, discipline and removal of judges.[37] Its main function is to ensure the observance of rules of operation of the public service of justice and the protection of judges against the pressures of political power.[38] It is in this spirit that the independence of judges and their irremovability constitute principles, which have been recognized as a guarantee for a good administration of justice. However, in the Organic Law relating to the High Council of the judiciary is provided, as ex-officio members of HCJ, officials of the Executive Power notably a representative of the Ministry of Justice and the Ombudsman.[39] Therefore, the presence of those officials of executive in the highest organ of the judiciary can jeopardise the doctrine of

[34] The principle of *pacta sunt servanda* provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith. This doctrine which is a principle of customary international law is codified in Article 26 of the Vienna Convention on the Law of Treaties, 1969.
[35] Preamble of the 2003 Constitution of the Republic of Rwanda.
[36] Constitution of the Republic of Rwanda of 2003, Article 140.
[37] Ibid, Article 157 and 158.
[38] Organic Law n°07/2012/OL of 19/09/2012 determining the organization, powers and functioning of the High Council of the Judiciary, Article 14 -17.
[39] Ibid, Article 2, point 15 and 18.

separation of powers. In this vein, the hierarchical subordination, the independence of the Rwandan judiciary and independence of judges could be questionable due to those members from the executive. The presence of executive in high councils of the judiciary in their composition does not promote the principles of independence and irremovability of judges solemnly inscribed in the legal texts.[40]

The significant challenge of Judiciary as state organ to administer justice is that results of the legislation and legal procedure undermine or violate the fair trial principles in the administration of justice. Certainly, the rule of law is the foundation for liberty and order in society. It emphasizes the supremacy of due process of law for everyone.[41] One of the tenets of the rule of law is that a man must not be punished without due trial. However, the legislation and legal proceedings contradict in one way or another, the tenet of fair trial. For instance, on the right to be present in court audience in criminal matter, in case of misdemeanour and petty offence, the criminal procedure does not provide in which circumstances one can speak of serious reasons preventing the personal appearance of an accused.[42] The law does not also provide the appearance in court audience of the witnesses of the prosecution even in the trial in which the evidence of witness is a direct element for the result. This situation is a great threat to the equality of arms. Furthermore, Article 176 of Organic Law determining the organisation, functioning and jurisdiction of courts prohibit the party to challenge for any reason whatsoever, whole court. In this case, party to the proceedings are

[40] Fall, A.B, The independence of justice, internal threats, acts of the second congress of the Association of High Courts of Cassation of the country having in sharing the use of French (AHJUCAF), Dakar, 7 and 8 November 2007, p.60.
[41] Constitution of Rwanda of 2003, Article 29.
[42] Law nº 30/2013 of 24/5/2013 relating to the code of criminal procedure, Article 147.

constraint to be tried by a judge or court even if there are suspicions of impartiality. In this context the impartiality of Rwandan courts and tribunals from an objective viewpoint may be debateable whether it offers sufficient guarantee of impartiality to exclude any doubt to the public and especially in the parties to the proceedings. Notably, these legal contradictions and weaknesses that exist in the legal system lead to great injustice to the citizens of Rwanda.

Thus, this study is assessing the administration of justice in Rwanda and reflecting the need to have the judicial system in Rwanda with utmost independence and impartiality and committed to assure to the citizens a fair and just trial, because if these legal concerns are not addressed the Judiciary could not effectively carry out its roles, Rwanda is likely to suffer different consequences. In this vein, if rule of law and public faith in justice system collapse; the injustice, inequality and legal uncertainty could increase. Accordingly, civic capital will be destroyed and social and political stability of Rwanda can be affected.

1.3 Literature Review

The available literature on international judicial law indicates that extensive studies have emphasized the importance of independent judiciary.[43] Recently literature is differentiating between formal judiciary independence (in law) and positive judicial independence (in practice)[44] impartiality of tribunal[45] and fair trial.[46] However, not

[43] Geyh, C. G, *Judicial Independence as an Organizing Principle*. Annual Review of Law and Social Science, 2014, Vol.10, pp.185-200.
[44] Anderson, G. B, *Preserving the independence of the judiciary*, Litigation, 2009, Vol.35 No.2, pp. 3 - 59; Anderson, J. J, *Judicial lobbying*, Washington Law Review, 2016, Vol.91, No.2, pp.401-461; Beatson, J. *Judicial independence and accountability: pressures and opportunities*. Nottingham Law Journal, 2008, Vol.17, No.2, pp.1- 12; Gelinas, F., Brosseau, J, *Judicial justices of the peace and judicial independence in Canada*, Review of Constitutional Studies, 2016, Vol.20, No. 2, pp.213 - 252; Gilbert, M. D. *Judicial independence and social welfare*, Michigan Law Review, 2014, Vol.112, No.4,

many scholars in Rwanda have attempted to discuss the challenges facing the national ordinary judicial system. It is necessary to note that great amount of available literature[47] are related to Gacaca[48] courts, officially closed on 4 May 2012. It is not necessary to reflect these studies here because they were written or prepared in the context of Gacaca jurisdictions and cannot be regarded as significant for purposes of literature review in this thesis because the special courts are not subject to this study.

At the international level, Dugard gives a description of the effective and accountable judicial system in international law. He discusses various principals of international covenant on civil and political rights (ICCPR), materials and other international instruments related to the administration of justice and individual rights. He points out that the human right commission (HRC) has highlighted that a competent, impartial and independent court is required under the ICCPR. He observes that the requirement of an independent judiciary has both institutional and decisional dimensions. On one hand, the safeguard of institutional judicial independence requires constitutional

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pp.575-624; Kirby, M. *Judicial recusal: differentiating judicial impartiality and judicial independence*. British Journal of American Legal Studies, 2015, Vo. 4, pp.1 - 18; Mayes, T. A, *Protecting the administrative judiciary from external pressures: a call for vigilance*, Drake Law Review, 2012, Vol.60, No.3, pp.827 - 842; Papayannis, D. M, *Independence, impartiality and neutrality in legal adjudication*, Journal for Constitutional Theory and Philosophy of Law, 2016, Vol. 28, pp.33 – 52.

[45] Abramson, L.W, *Deciding recusal motions: Who judges the judges? Symposium on Civility and Judicial Ethics in the 1990s: Professionalism in the Practice of Law*, Valparaiso University Law Review, 2011, Vol.28, No.2, pp.543-561.

[46]Robinson, P, *The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY*, Berkeley Journal of International Law Publicist, 2009, Vol.3, No.98, pp.1-11; Damaska, M.R, *The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals*, North Carolina Journal of International Law and Commercial Regulation, 2011, Vol.36, pp.365-387.

[47] Thomson, S., Nagy R, *Law, Power and Justice: What Legalism Fails to Address in the Functioning of Rwanda's Gacaca Courts?* International Journal of Transit Justice, 2011, Vol.5, No.1, pp.11-30; Brehm, H. N., Uggen, C., Gasanabo, J. D, *Genocide, Justice, and Rwanda's Gacaca Courts*, Journal of Contemporary Criminal Justice, 2014, Vol. 30, No.3, pp.333 - 352; Ingelaere, B, *Does the truth pass across the fire without burning? Locating the short circuit in Rwanda's Gacaca courts*. The Journal of Modern African Studies, 2009, Vol.47, pp.507-528; Schabas, W. A, *Genocide trials and Gacaca courts*, Journal of International Criminal Justice, 2005, Vol.3, pp.879 - 895.

[48] Special Courts instituted by Rwanda as a way to process the criminal cases that arose following the 1994 Genocide against the Tutsi.

recognition of the separation of powers between the executive and the judiciary. On the other hand, the decisional independence of judicial officers requires statutory protection.[49] He also underlines that the significance of public trials in ensuring transparent proceedings in the interest of a fair trial of the defendant, as well as informing the society's perception of the efficacy of the justice system. He argues that only specific grounds of public order, morality, and national security permissible in a democratic system may constrain the presumption in favour of public trials.[50]

Weissbrodt[51] discusses the place of international human rights standards in the advancement of the administration of justice. He notes that the effect of the administration of justice within a state has practical significance on the affairs of ordinary individuals and groups. First, the fair administration of justice is important for the rule of law in that it ensures state practice and policies protect against the infringement of the fundamental human rights to liberty, life, personal security and physical integrity of the citizen. Second, as the main vehicle for the protection of individual rights at the national level, a system for administration of justice is required for the peace and stability of a state. Third, an equitable and effective system for the administration of justice is indispensable for protecting minority rights, which is important to ensure the flourishing of an inclusive democracy.[52] He observes that the right to a fair trial has both a structural meaning (legal environment within a state) and a technical meaning (the specific procedural safeguards). On the one hand, the

[49] Dugard, J, *International Law: A South African Perspective*, 3rd edn Juta & Co, Lansdowne South Africa 2005, at p. 241.
[50] Ibid.
[51] Weissbrodt, D., *The Administration of Justice and Human Rights,* City University of Hong Kong Law Review, 2009, vol.1, pp.23-47.
[52] Ibid.

structural dimensions of the right to fair trial impose a financial burden on the state to put in place the necessary infrastructure to effectuate the realisation of the right to fair trial for both citizens and non-citizen residents within the state.

On the other hand, the technical aspects of the right require constitutional, legal, and policy safeguards to facilitate the attainment of a fair trial. Weissbrodt takes the views that the administration of justice includes the norms, institutions, and frameworks by which states seek to achieve fairness and efficiency in dispensing criminal, administrative, and civil justice. Alsheban[53] argues that for a trial to be fair, the judge sitting in a given case must be independent. He points out that the principle of impartiality of the judge is one of the most important principles of judicial evidence, but one of the most important guarantees to litigation, and is one of the most important principles limiting the judge's powers of proof in favour of the litigants.[54] He observes that the departure of the judge from the principle of neutrality is a waste of justice, which must be achieved by the judiciary, and this principle must be applied in all civil and criminal disputes, so as not to leave the judge from the judiciary to the department of the opponent. As justice is served through the judiciary that is made up of judges, it means that the judicial power is enforced only through the court of law represented by the judge, the sole carrier of all those powers. He posits that the impartiality of the judge does not mean not making judgments or refusing to adjudicate; the impartiality of the judge is the personification of the principle of separation of powers. Because of this separation, no branch of power can interfere with the sphere of others. A State

[53] Alsheban, A, *Judicial Impartiality and Independence of the Judiciary*, IOSR Journal of Humanities and Social Science, 2017, Vol.22, No.5, pp.37-43.
[54] Ibid.

would be in violation of its international obligations if the judicial system was not a branch of power with independence from other powers. Although the above literatures do not belong to Rwanda and do not take into account the mechanism of the application of fair trial rights, they provide a broad understanding of the effectiveness and fairness of judicial system and are useful in giving diverse perspectives on the performance of administration of justice.

At regional level, studies have shown that, the separation of powers is indispensable to enhance the efficiency of judiciary in a country and the independence of the judiciary is paramount in achieving sustainable fairness and Justice. Nsekela,[55] flows from the justification of the theory of separation of powers in a democratic society. In the modern constitutional State, the principle of an independent Judiciary has its foundation in the theory of separation of powers, whereby the legislature, executive, and judiciary form three separate branches of government. It constitutes a system of mutual checks and balances intended to prevent abuse of power to the detriment of a free society.[56] Nsekela states that in a constitutional democracy, the doctrine of separation of powers permits dialogue among the three branches of government in order to achieve the goals set by the authors of the constitution. According to author, the courts ensure the executive and legislature arms are performing their duties in conformity with the constitution. Courts are established as fora to defend people

[55]Nsekela, H, The role of national courts and regional courts in protecting human rights and developing human rights jurisprudence, paper presented during the East African Magistrates and Judges' Association (EAMJA) annual conference and general meeting, 17th - 22nd May 2010, Arusha, Tanzania.

[56]Nsekela, R.H, Presentation on the role of national courts and regional courts in protecting human rights and developing human rights jurisprudence; during the EAMJA Annual Conference and General Meeting, 17th - 22nd May 2010, at Ngurdoto Mountain Lodge, Arusha, Tanzania.

against the oppressive and unjust laws and practices, against laws and practices that are not consistent with or in violation of the rights enshrined in the constitution.

Wambali,[57] in his article the enforcement of basic rights and freedoms and the state of judicial activism in Tanzania, posits that the invariably judicial activism invites some direct conflict between the judiciary and executive, or even the legislature. The main problem involved is always the complex choice bound to be made between what are political questions, exclusively reserved for the other branches of state, and the legal matters for the attention of the Court, whatever consequences they may have.

Dumbutshena deals with the role of judges in advancing human rights.[58] He cautions that the needs of different countries will vary. He posits that protection of individual rights should normally be left to the democratically accountable branches of government - the legislature, the executive and judiciary. The author observes that the judicial development of individual right requires two essentials to be met. First the personal philosophy of the judge should have "bias in favour of fairness and justice"; second, existence of an activist court. According to author, judicial activism in human rights cases is a prerequisite for development of human rights jurisprudence. However, this type of activism could be understood from a positive perspective, where the judge applies the law regardless of political or financial pressure, or negative, by having a judiciary that assumes an arbitrary law-making function beyond the scope of natural competence. Franceschi recommends that if judges develop a personal philosophy with a bias in favour of fairness and justice, as well as rationally guided

[57]Wambali, M.K.B, *The Enforcement of Basic Rights and Freedoms and the State of Judicial Activism in Tanzania,* Journal of African Law, 2009, Vol.53, No.1. pp.34-58.
[58]Dumbutshena, E, *The Role of Judge in advancing Human rights,* Commonwealth law bulletin, 1992, Vol.18, No 4, pp.1298-1305, at p.1301.

activist court work, then jurisprudence will influence the development of human rights culture; a culture in which no prejudiced political will can oppose.[59] An independent judiciary is the only one that can provide impartial justice on the basis of the law, thereby also protecting the individual's fundamental freedoms and liberties.

For this vital task to be carried out effectively, the public must have full confidence in the capacity of the judiciary to carry out its functions in an impartial and independent manner. If this confidence begins to be lost, neither individual judges nor the judiciary as an institution will be able to fully fulfill this important task. The different studies cited above do not pay particular attention to Rwandan judicial system but provides a useful guide to the administration of justice and are relevant and will assist the writing of this thesis. It must be noted that the purpose of this thesis is not to discover gaps in the international legal system pertaining to administration of justice in national judicial system. It is rather to take the international system as it presently exists and to examine the Rwandan judicial system, to see what weaknesses exist and to suggest solutions, which shall be a valuable foundation of effective justice in Rwanda. Thus, since it is the Rwandan system that is being critically examined, the literature reviewed here is primarily focused on Rwanda. As pointed out before, based on the literature review conducted to date, there is no specific research on the administration of justice in Rwanda. Little research has been conducted on some approaches of Rwandan judicial system. The only studies, which have attempted to discuss those

[59] Franceschi, L.G, In the African human rights judicial system, a proposal for streamlining structures and domestication mechanisms viewed from the foreign affairs power perspective. A dissertation for award of PhD at University of Navarra, Pamplona, Spain, 2011.

approaches, include the paper of Sam Rugege and the joint article of Titien Habumugisha, Thérèsphore Kavundja and Marie Josée Mukamazimpaka.

Rugege[60] examines the judicial independence in Rwanda. He observes that the judiciary has a problem with financial autonomy and financial security of judges. He points out persistent problems in the means of enforcing its decisions without the assistance of the other branches of government, and the legislature and the executive are those branches of power that may play a crucial role in determining their remuneration and conditions of service. He is of the view that the legal system itself may jeopardize the judiciary's independence in doing its work, although he does not go further to discuss different challenges to the protection of the judiciary from inappropriate or unwarranted interference with the judicial process, the mode of recruitment or vetting of animator of justice and other threats of independence of judiciary as institution and individual judges. He does not also propose feasible or practical methods to enhance judicial independence and what should be done to produce sustainable solution.

Questioning the issue related to the impartiality of judges in Rwanda, Habumugisha, and others[61] have examined the disqualification of a judge by reason of conflict of interest and the competent jurisdiction, admissibility by the court, and the voluntary withdrawal of a case. They noted that the mechanism provided by Rwandan law in ensuring the application of the principle of impartiality of judge is insufficient.

[60] Rugege, S. *Judicial Independence in Rwanda,* Pacific McGeorge Global Business & Development Law Journal, 2007, Vol.19, pp.411 - 425.
[61] Habumugisha T., Kavundja T., Mukamazimpaka, M.J, *Problématique de l'impartialité du juge en droit positif rwandais* (Problematic of the impartiality of the judge in Rwandan positive law). Kigali Independent University Scientific Review, 2011, Vol.22, pp. 4-32.

However, their study is limited to one case of disqualification. They did not include and analyse cases of different jurisdictions as Intermediate court, High court and specifically Supreme Court whose decisions are binding to other national courts and tribunals. In their analysis less attention is given to the analysis of different laws other than the law on civil procedure.

To fill that gap, this research provides comprehensive analyses of several cases from various Rwandan higher court, especially high court and Supreme Court. From this understanding, the current study goes further and makes a critical analysis of laws and practice pertaining to impartiality of Rwandan judiciary and touches the finger of the reality in court hearing and case law. Apart the weakness cited above which will be addressed in this thesis, it can be seen that there is no in-depth study to date pertaining to right to a public and fair hearing and post-trial rights in Rwandan ordinary courts and tribunals; this kind of analysis is absent in the literature, which justifies also the present research.

1.4 Objectives and Research Questions

1.4.1 General Objective

The main objective of this study is to critically examine the different legal approaches pertaining to the judicial system adopted by Rwandan legal system in light of the international standards related to the right to a fair trial and to suggest solutions on how to ensure application of fair trial rights.

1.4.2 Specific Objectives

This study intends to achieve the following specific objectives:

(i) To evaluate the adequacy of Rwandan law in administration of criminal justice.

(ii) To examine different legal approaches and legal practices that Rwandan legal system has adopted towards fair trial in administration of criminal justice.

(iii) To suggest suitable measures and mechanisms to ensure compliance of Rwanda's judicial criminal justice system with the right to a fair trial.

1.4.3 Research Questions

In the light of the above considerations, the following questions need to be posed:

(i) To what extent is the existing Rwandan law adequate in administering justice?

(ii) To which extent does the Rwandan legal practice implement and enforce fair trial in administration of criminal justice.

(iii) Which strategies and mechanisms should be considered by Rwanda in ensuring proper administration of justice?

1.5 Significance of the Research

This study is expected to contribute substantial information to the existing body of knowledge and this is substantiated by the fact that so far, very little has been done in the realm of Rwandan administration of justice considering international standards of an effective judicial system.

This work could alleviate and contribute to the construction and organization of Rwandan judiciary in the aspect of its independence *vis à vis* the executive and legislature Powers. Dissemination of the information gathered from this research will assist the parliament and Law Reform Commission for the amendments of laws in upholding the proper administration of justice.

In total, the study on administration of justice in Rwanda, focusing on impartiality and independence of Rwandan judicial system and its observance of fair trial court proceedings will allow the actors of justice, in particular the judges, to enforce and respect fair trial principles. It will also be of help in highlighting the strengths and weaknesses of these courts in the respect of fair trial in criminal proceedings and will provide elements of analysis on the need to develop mechanisms for the protection of judges, which allow efficiency and effectiveness in protection of fundamental freedoms and liberties.

This study is, therefore, very crucial for any standard setting and development in the field. It will contribute to the growing body of the literature in the administration of justice. To the bridge of social perspective, the study is a modest contribution to the construction of an independent judiciary, which respects international standards of a good and effective judicial system.

1.6 Research Methodology

In carrying out this study, a variety of research methods and techniques were used. Data and information for this study were gathered using doctrinal research method supplemented by empirical methods. This study used primarily qualitative data analysis, based mainly on documentary review.[62]

[62]Documentary research means that I did not conduct practical field research. This limitation was dictated by the paucity of funds to conduct such research. This approach, however, did not dismiss the necessity of field research. It is around it took into consideration the existence of comprehensive and meaningful analysis of field research reports and studies undertaken by authorities on the subject under study, while at the same time taking note of the pitfalls and dangers of relying entirely on documents.

Doctrinal method was used to review literature on administration of justice, particularly to the judicial system. There are two reasons for selecting doctrinal method. First, primary data for the study were obtained from legislations, through desk review. Moreover, this method is traditionally the main methodology of legal research as it primarily focuses on what the law is as opposed to what the law ought to be.[63] Under doctrinal methodology a researcher's main goal is to locate, collect the law, case law and apply it to specific set of material facts in view of solving legal problem.[64] In examining various laws, the researcher used historical, analytical and applied perspective approach.[65] Firstly, the historical perspective helped to understand the development of the judicial law and the evolution of the Rwandan judicial system. Secondly, analytical level, the researcher analysed whether positive Rwandan law pertaining to judiciary safeguards the person's liberty and freedoms, security and public interest in open justice. Lastly under applied level, the researcher has critically examined how and to what extent the positive judicial law guarantees the right to fair trial of all citizens by an impartial, independent and competent court constituted by law. The legal standard requires a confrontation to social realities, because the essential function of law is to regulate the social order. This component determines the organization of the courts. It searches also for the shortcomings of the texts relating to the administration of justice, in the sense of their improvement.

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[63] Makulilo, A.B, Protection of Personal Data in sub-Saharan Africa, PhD Thesis, University of Bremen, Germany, 2012 at p.52.

[64] McGrath, J.E. Methodology Matters: Doing Research in the Behavioural and Social Sciences, in Baecker, R. M. *et al*. (1995) (eds). Readings in Human-Computer Interaction: Toward the Year 2000, Morgan Kaufmann Publishers, p. 154, as quoted in Makulilo, A, B., note 124. See also, Singhal, A. K. and Malik, I, *Doctrinal and Social Legal Methods: Merits and Demerits*, Educational Research Journal, 2012, Vol.2, No.7, pp.252-256, at p. 252.

[65] Kiunsi, H.B, Transfer Pricing in East Africa: Tanzania and Kenya in Comparative Perspective, a PhD thesis, Open University of Tanzania, Tanzania, 2016. p. 23

With the reading of the legislation acts and case law supplemented by other legal related materials and reports, it was possible to present an overview of the right to independent and impartial tribunal and fair trial rights guaranteed in Rwanda legal system, and the level of Courts in the protection of those rights. A background appraisal of the forms and practices of an independent, impartial court and right to a fair trial was done through library research on empirical and other scholarly writings relating to the judiciary.

Archival work was undertaken on policy statements and legislative materials such as Bills, Records of a major organization and international courts like HRC, Inter American Court of Human Rights, African Court of Human Rights, European Court of Human Rights, so as to ascertain to what extent they have been addressed within the national courts and tribunals in respect and implementation of fair trial and valuable evidence illuminating the internal working on how the Rwandan judicial system can be improved in protection of fundamental individual rights.

Relevant documents were reviewed from the UN Information Centre, in the Supreme Court, High Court, the Ministry of Justice (MINIJUST) and the Institute of Legal Practice and Development (ILPD) in Rwanda. Library and archival work were conducted in the libraries of the Open University of Tanzania at Kibungo Centre, UCB-CERDHO library, ICTR library, Kigali Public Library, Centre of Research on Democracy and Development in Africa (CREDDA) library, at the *Université Libre des Pays des Grands Lacs* (ULPGL) in Democratic Republic of Congo and at Kigali independent University (ULK)/Gisenyi and Kigali libraries. Thus, in order to avoid

pitfalls of secondary data obtained, the researcher was advised by Kothari to consider seriously their reliability, suitability and adequacy.[66]

To complement doctrinal research, empirical method was employed in order to study the operative and functional aspects of the Rwandan judicial law and their effects. This method is important in revealing and explaining legal and regulatory practices to redress and dispute resolution and impact of legal phenomenon on a range of institutions, businesses and citizens.[67] It helped to measure the gap between formal law and practical reality.[68] In collecting data and information, the researcher used interviews to gather information from Rwandan courts and tribunals. It was necessary to conduct interviews with seventy-one (71) actors of justice (four judges of Supreme Court, eight judges of High Court, thirty-four court registrars, sixteen prosecutors, and nine lawyers) with the intention of knowing their views on the independence and impartiality of Rwandan Judicial system. Furthermore, sixteen (16) citizens were also interviewed about the effectiveness of the courts, judging and protecting their rights in court proceedings. In selecting those interviewees, the purposive approach helped in order to obtain specific information from specific group. In this case, the researcher used open-ended questions with target respondents including litigants, Judges of Supreme Court and High Court, advocates or lawyers, prosecutors and court registrars. During the interview, the researcher used open-ended questions in order to stimulate free thought, probe the respondents' memories, solicit suggestions and

[66] Kothari, C. R, *Research Methodology: Methods and Techniques,* 2nd edn. New Delhi: New Age International Publishers, 2011, at p. 111.
[67] Makulilo, A.B, Protection of Personal Data in sub-Saharan Africa, PhD Thesis, University of Bremen, Germany, 2012 at pp.53-54.
[68] Bell, F, *Empirical Research in Law*, Griffith Law Review, 2016, Vol. 25, No.2, pp.262-282, at p.275.

clarify positions. On the other hand, the observation helped to see how the judges, lawyers and prosecutors behave in field of respect of the procedural aspect of the rights of accused to a fair trial. This included the hearings in order to rub fingers with the reality on the ground.

Furthermore, the researcher had an opportunity to use books, journals, newspapers, magazines and Rwandan case law. Meanwhile, a comparison with different regimes in the world was inevitable during the course of the study, with the purpose of learning from foreign best practices in order to improve the Rwandan legal regime. This thesis is not a comparative study in the strict sense and did not engaged into the theoretical rhetoric of comparative methodology.

1.7 Limitation of the Study

This study is limited to the Judiciary of Rwanda. In this study, the legal practice was assessed in High Court and Supreme Court, especially in criminal justice. In this perspective, the Gacaca Courts charged with prosecuting and trying persons accused of the crime of genocide perpetrated against Tutsi and other crimes against humanity committed between 1 October 1990 and 31 December 1994, officially closed in 2012[69] and military judicial system were not part of this thesis.

1.8 Chapter Overview

This thesis contains seven chapters. Chapter one provides a contextual theoretical framework. In this chapter, background, statement of problem, research methods and relevant literature review are covered.

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[69] Organic Law nº25/2012 of 15/06/2012 terminating the National Service in charge of follow-up, supervision and coordination of the activities of Gacaca Jurisdictions, Article 2.

Chapter two provides an introduction to the study by providing the historical development of fair trial and its conceptualisation, the scope and nature of proceedings to which the right to a fair trial applies, and its importance.

Chapter three sets out the concept of fair trial under international human rights standards expressed in the international instruments; it refers to the conventions that relate directly to the fair trial rights such as the UDHR, ICCPR and the CRC in order to understand these fundamental rights. It also explores and analyses the rights to impartial and independent court. It provides an important backdrop to the discussion of the relevant rights that should underpin the judicial system in efficient and effective administration of Justice.

Chapter four analyses the Rwandan judicial system. Furthermore, it highlights the brief analytical exploration of the historical origins and evolution of Rwandan judicial system, the current judicial system and the criminal court hearing procedure.

Chapter five examines the right to a fair trial in Rwandan law. This chapter provides a detailed assessment of the compliance of Rwanda's current legal framework with the right to competent, independent and impartial tribunal. It analyses whether the Rwandan judicial system is separate with the executive and legislature powers. It also analyses the recruitment, vetting and removal of actors of justice, protection and respect of international guarantees of judges and other analysis relating to the impartiality and independence of courts.

Chapter six examines the Rwandan court proceedings to the test of implementation and enforcement of fair trial rights. This chapter sets out the road ahead for the

Rwandan legal system in respect to international standards related to administration of justice in the pre-trial, trial or hearing and judging; as well as in- Post-trial stages. It examines and evaluates the challenges identified in those stages within the Rwanda national law and draws subsequent relevant recommendations.

Chapter Seven presents a summary of key findings, general conclusion and recommendations of this thesis.

CHAPTER TWO

CONCEPTUAL FRAMEWORK AND SCOPE OF THE RIGHTS TO A FAIR TRIAL

2.1 Introduction

Effective judicial protection can be promoted only in an environment of legality; it is a socio-political milieu in which there is a constitutional guarantee of the independence of judicial system, the right to a public and fair hearing, and equality before the law.[70] In international law, the standards of administering justice are embedded in "the right to a fair trial" which certainly is the most important precondition for ensuring justice in the settlement of cases. In order to justify the understanding of the expression "fair trial" there is a need to delineate its choice and ensure the validity of the rights enshrined in it by putting aside essential elements that are used to apprehend the provenance or the birth of right to a fair trial, its conceptualisation, scope of application and importance.

This chapter provides firstly the historical development of fair trial and its conceptualisation. Secondly, it analyses the scope and nature of proceedings to which the right to a fair trial applies. This is essential because, as we shall see, the right to a fair trial does not apply to all proceedings before the courts. Therefore, it is important in a thesis of this nature to determine the nature of the criminal proceedings to which the right to a fair trial applies. Lastly, it highlights the importance of the right to a fair

[70] Arewa, J.A, Judicial integrity in Nigeria: challenges and agenda for action, judicial reform and transformation in Nigeria, Nigerian Institute of advanced Legal studies, 228-271, [http://www.nials-nigeria.org/journals/Arewa-Judicial%20Integrity.pdf] accessed 4 August, 2017.

trial in protecting individual rights in a democratic society and the legal duties for a state in its promotion.

2.2 A Brief Overview of Historical Development of the Right to a Fair Trial

Since ancient times, the traces of individual principles relating to fair trial in criminal proceedings have been observed in a number of texts, including the Code of Hammurabi, the Koran and the Bible, among other documents.[71] Long history may be, it is not one of which can be universally satisfied. Historically, the foundations of the fundamental principles of the right to a fair trial date back to the *Lex Duodecim Tabularum* - "The Law of the Twelve Tables" - which was the first written code of laws of the Roman Republic around 455 BC.[72] These laws gave all parties the right to be present at the hearing,[73] the prohibition of bribery for judicial officials and principle of equality amongst citizens.[74]

Another significant historical reference to the right to fair trial can be found in England. In 1215 the Magna Carta[75] as peace treaty between the king and the rebel barons was signed. This treaty which is one of the most important sources of Common Law as we know it today[76] was the most significant early influence on the extensive

[71] Mwimali, B. J, Conceptualization and Operationalization of the Right to a Fair Trial in Criminal Justice in Kenya, PhD thesis, University of Birmingham, United Kingdom, 2012.
[72] Robinson, P, *The right to a fair trial in international law, with specific reference to the work of the ICTY*, Berkeley JL Int'l L Publicist, 2009, Vol.3, No.1.
[73] *Lex Duodecim Tabularum* - the Law of the Twelve Tables, Tablet II, Law 3.
[74] *Lex Duodecim Tabularum* - the Law of the Twelve Tables, Tablet IX, law 3.
[75] Magna Carta, or "Great Charter," signed by the King of England in 1215, was a turning point in the process of human rights recognition. It was proclaimed in England by King John of England. In May 1215, the group rebel barons captured London, King John's hand has negotiated with the group, and the Magna Carta was created as a peace treaty between the king and the rebels.
[76] Hudson, J, The formation of English common law: law and society in England from the Norman Conquest to Magna Carta, Routledge, 2014; Poirier, D., Debruche, A, Introduction Générale à la Common Law (general introduction to the common law), 3rd edition, Yvon Blais, Paris, 2005, p.146.

historical process that led to the rule of constitutional law today in the English-speaking world.[77] The Magna Carta established principles of due process and equality before the law.[78] It proclaimed that, no freeman shall be taken, or disseized, or imprisoned, or outlawed, or in any way harmed or exiled, nor will we go upon or send upon him - except by the legitimate judgment of his peers or by the law of the country.[79] It also contained provisions forbidding bribery and official misconduct.[80] Widely regarded as one of the most important legal documents for the development of modern democracy, Magna Carta was a turning point in the struggle for the establishment of freedom and rule of law.[81]

After one century, in 1320 the treaty of Arbroath[82] was signed. It expressed the notion of equality for all,[83] a principle that was then replicated in other developing democracies, such as the twelve American colonies of the British Empire and France. It is claimed also that the United States declaration of independence was linked to that treaty.[84] During the period of the enlightenment of the 18th century, the scope of the right to a fair trial was further developed and codified. During this period, the political orientation of the government began to move away from an almighty ruler in favor of

[77] Maley, B, Magna Carta Talisman of Liberty, Centre for Independent Student, Occasional Paper 142, 2015, at p.3. [http://www.cis.org.au/app/uploads/2015/07/op142.pdf] accessed 20 Jun 2018.
[78] Clause 39 and 40 of Magna charta.
[79] The British Library, Magna Carta, http://www.bl.uk/magna-carta, (accessed 27 April 2015).
[80] Magna Carta, Clause 39.
[81]Kumar, K.S, *History of the development of Human rights*, International Journal of Academic Research, 2014, Vol.3, No. 1, at p.45; Breay, C., Harrison, J, Magna Carta an introduction, 2015, at [http://www.bl.uk/magna-carta/articles/why-magna-carta-still-matters-today], accessed 23 March 2014.
[82] This was a declaration of Scottish Independence sent by 51 Scottish nobles and magistrates as evidence o f a contract between Robert the Bruce and his subjects.
[83] Transcription and Translation of the Declaration of Arbroath, 6 April 1320, paragraph 2. National Records of Scotland, SP13/7 [https://www.nrscotland.gov.uk/files/research/declaration-of-arbroath/declaration-of-arbroath-transcription-and-translation.pdf] accessed 20 June 2018.
[84] Robinson, P, The right to a fair trial in international law, with specific reference to the work of the ICTY, *Berkeley JL Int'l L Publicist*, 2009, Vol.3, No.1.

the will of the people and the limits of the governmental power began to be restructured accordingly. This restructuring often took the form of written laws in which the right to a fair trial was also embodied.[85] Important historical reference and event can be found in France and in United States. In France, the declaration of the rights of man and of the citizen, which was adopted in 1789, is also a fundamental historical text, which has played significant role in the historical development of the right to fair trial. The beginning of its first article, which is "men are born and remain free and equal in rights", has been resumed as such by the declaration of human rights of 1948. Second, the declaration of the rights of man and of the citizen sets forth the basic principles of fair trial as the primacy of the law,[86] and the separation of powers.[87] It also provides the right to the presumption of innocence,[88] and prohibits illegal detention.[89]

After two years of French revolution, in 1791, the United States adopted "the sixth amendment to the United States constitution". This constitutional amendment is very significant step in the development of fair trial rights. It affords criminal defendants seven discrete personal liberties: the right to an impartial jury; the right to a speedy trial; the right to legal counsel, the right to be informed of pending charges; the right to compel witnesses to testify at trial, the right to confront and to cross-examine witnesses and the right to a public trial.[90] It was during the age of Enlightenment, in the 18th century, that the modern right to fair trial begun. The political orientation of

[85] Ibid.
[86] Declaration of the Rights of Man and of the Citizen in France of 1789, Article 9.
[87] Ibid. Article 16.
[88] Ibid. Article 9.
[89] Ibid. Article 7.
[90] Constitution of United States, 6th amendment, part of United States Bill of Rights, amendment of 1791.

the government began to change from an all-powerful sovereign to the will of the people, and the limits of government power began to be restructured accordingly.[91] It was in this period that, in Europe, the doctrine of natural law has been established. This doctrine as point out by Nowak, recognized individuals as rights-holders and placed them at the center of social and legal systems.[92] This period was really a philosophical foundation of the recognition of individual rights, particularly the fair trial rights.

The term fair trial was rarely used before the Second World War (WWII). In fact, it is after the Second World War that the right to fair trial has been universally codified. In December 1948, the United Nations general assembly adopted the universal declaration of human rights (UDHR);[93] the declaration provides that "everyone is entitled in full equality to a fair and public hearing by an independent and impartial court, in the determination of his rights and obligations and of any criminal charge against him."[94] Then, after the Universal Declaration of Human Rights of 1948, the right to a fair trial appeared successively in the international instruments; for instance, in the International Covenant on Civil and Political Rights of 1966 and then in different declarations.

[91] Robinson, P, The right to a fair trial in international law, with specific reference to the work of the ICTY, *Berkeley JL Int'l L Publicist*, 2009, Vol.3, No.1.
[92] Nowak, M, Introduction to the International Human Rights Regime, Vol.14, Raoul Wallenberg Institute of Human Rights Library, Brill Academic Publishers, 2003.
[93] 1948
[94] UDHR, Article 10.

Now that the historical background of the rights to a fair trial has been established, it is important to conceptualize it in order to make it clear in this thesis. This is the major focus of Section 2.3.

2.3 Conceptualisation of the Right to a Fair Trial

The right to a fair trial is a norm of international law intended to safeguard people from illegitimate and arbitrary curtailment or deprivation of other fundamental rights and liberties, of which the person's right to life and freedom is the most prominent.[95] The right to a fair trial remains to a treaty obligation,[96] and rest also on a general principle of law recognized by civilized nations and a norm of customary international law within the significance of article 38 (1) of the Statute of the International Court of Justice.[97] It is a fundamental safeguard to ensure that accused persons are protected from arbitrary or unlawful deprivation of their freedom and human rights.

As also pointed out by the Lawyer Comity for Human Right, the right to a fair trial is applicable to both determination of an individual's rights and duties in a suit law and with respect to the determination of any criminal charge against accused persons.[98] It must be implemented at all times and as stipulated in covenant on civil and political rights. In addition, the right to a fair trial is of paramount importance in the efficacy of protecting all other human rights and basic liberties [99] of accused persons. In absence

[95] Lawyers Committee for Human Rights, What is a fair trial? A Basic Guide to Legal Standards and Practice, USA, 2000, p.1.
[96] ICCPR, Article 14.
[97] For a thorough discussion of general principles of law as a source of international law, see Dixon and McCorquodale (2003), supra note 30, pp.43-47 and Harris D J (2004), *Cases and Materials on International Law*, Sweet and Maxwell, London, pp.44-50.
[98] Ibid.
[99] HRC, General Comment 32 (2007), supra note 2, para.2.

of this right, the individual freedom and other rights of accused persons remain at danger in discourse of criminal proceedings. It is, thus, acceptable to reaffirm with Naluwailo[100] that the protection of all other individual rights in a State relies on the accessibility of fair trial procedures in national courts through which someone in confrontation with human rights violation can seek remedies. Therefore, the effective protection of fundamental freedoms and other individual rights rests illusory when the fairness of court proceedings is not guaranteed.

The convention on civil and political rights provides that "in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial court established by law".[101] In a sense, the "fair trial" stands quite apart from the concept of "fairness", in that it can be defined as the set of a number of crucial parts and encompasses of various parameters related to the process of proceedings. This right may be reduced down to four core guarantees, notably the right to a public hearing, right to fair hearing, and the right to an impartial and independent court.

An overview of an understanding of a fair trial concept reveals that the concept of fair trial is founded on the natural justice principles, thus, it prevents the states, its agencies and officers to recourse to extra-legal methods in their battle against crimes and delinquency. In this perspective, the concept of fair trail reveals the following conclusions: First it is a basic human right that every accused person in criminal matter is entitled and constitutes an important feature in the administration of criminal

[100]Naluwailo, p 49.
[101] ICCPR, Article 14(1).

justice in any society governed under a system of democracy. No matter the kind of legal system in which an accused person is prosecuted. Secondly, it has revealed that the right to a fair hearing is different from the notion of fairness. Thus, any court or judicial authority handling the criminal matters must exercise the right to a fair trial in its broader sense. In this connection, the right to a fair trial may be understood as the guarantee of the neutrality of criminal courts in the handling criminal offence and ensuring that the administration of justice is not only done, but it is manifestly and undoubtedly also seen to be done or achieved.

2.3.1 Right to a Fair Hearing

Fair hearing is another concept, which acts as a key player in proceedings of the trial. In civil law jurisdiction like Rwanda, it refers to a period from which the case instituted to a court of law to its final judgment. During this period, the accused is needed to have every opportunity to reflect his plea and questioning the actions of the prosecutor and the legal proceedings during court trial. The concept of a "fair hearing" is an ethical and legal term used to define a court's procedural rules and the treatment of the accused person in a court trial.[102] This is essential because when accused person is charged to commit a criminal offence, he is opposed with the state's machinery. It implies that in order to maintain justice, the rights of an accused during the court trial have to be observed and protected by the court established by law. The right to a fair hearing is enshrined in many international instruments, such as the International Covenant on Civil and Political Rights[103] in the European Convention on Human

[102] WiseGeek, What is a Fair Trial?' [http://www.wisegeek.com/what-is-a-fair-t rial.htm] accessed 06 Jun 2018.
[103] ICCPR, Aricle 14.

Rights,[104] and the American Convention on Human Rights, which speaks of "due guarantees".[105] Largely, the right to a fair hearing occurs as an essential aspect and part of the scheme of the protection of accused persons in the international field. The legal frameworks of the operation of this rights in national legal systems precede the Universal Declaration relating to Human rights (UDHR) and has been existed in various national laws prior to the international rules established by the United Nations.

The European Court of Human Rights has interpreted that the right to a fair hearing is enshrined in the right to a fair trial. In a democratic society, it is among the basic principles of the rule of law. It seeks to secure the right to good administration of justice.[106] In the case of *Prosecutor v Slobodan Milosevic*, the court expressed that nation of fairness, rests essentially on the power exercised by the tribunal or court over the accused person.[107] Thus, the accused must be guaranteed of the fair chance or opportunity of dealing with the allegations against his person.

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

[104] ECHR, Article 6(1)
[105] ICCPR, Article 8(1).
[106] *Bonisch v. Austria* (1991) 13 E.H.R.R. 409; [1986] E.C.H.R. 8658/79 European Court of Human Rights.
[107] Prosecutor v. Slobodan Milosevic, Case No. IT-02-54-AR 73.4.

and preclusion of *ex officio reform in pejus*.[108] According to the Principles of the African Commission, in the fundamental elements of the right to a fair hearing is included the equality of arms between the parties to the all court proceedings; equality of all persons before any court of justice, without any distinction of ethnic origin, race, gender, sex, colour, religion, age, language, creed, national or social origin, political or other convictions, status, means, birth, disability or other situations.[109] Accordingly, in these values, equal access for men and women to justice and equality before the law is provided for in all legal proceedings.[110]

Furthermore, it is also provided in those African principles, the guarantee of accused persons to present arguments and his proofs in court proceedings, the adequate opportunity to prepare a case, and to respond or challenge the pieces of evidence or arguments opposed to him.[111] It further states that the accused persons have the guarantee of consulting and being represented, at all stages of the proceedings, by a legal representative or other qualified persons chosen by him; the right to have the a court decision based only on law and evidence presented in court of justice or judicial body and the right to assistance of an interpreter if he cannot speak or understand the language used in or by the court or in other of justice sector.[112] Moreover, the African principles provided as part of the fair hearing, the guarantee of accused persons to the guarantee to an appeal to a higher judicial body, and the determination of their rights

[108] *Yves Morael v. France*, U.N. Doc. Supp. No. 40 (A/44/40) at 210 (1989), para.9.3.
[109] According to Section A (2) of the African Commission Principles
[110] African Commission Principles, Section A (2).
[111] Ibid.
[112] Ibid.

and obligations without undue delay and with adequate notice of and reasons for the decisions.[113]

Additionally, the guarantee of equality is one of the general principles of the fair hearing. It prohibits discriminatory laws and includes the right to equal access to the courts and equal treatment by the courts. Its most important practical aspect is the equality of arms, comprising the idea that each party to a proceeding should have an equal opportunity to present its case and that neither party should enjoy any substantial advantage over its opponent.[114]

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

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

[114] The rule of law in democratic societies fair trial - core element of the rule of law the elements of a fair trial, [http://www.etcgraz.at/typo3/fileadmin/user_upload/ETCHauptseite/manual/versionen/modules_eng/206-Fair%20Trial%20and%20Rule/206-Fair%20Trial%20and%20Rule.pdf], (accessed 22 August 2017).

2.3.2 Right to a Public Hearing

The concept of public hearing can be understood as an opportunity in which the accused persons and public can express their views, explanation, available defenses, rebuttal and opinion on matters that affect them in a given case; the accused present all the defenses available to him, may show that the allegations against him do not constitute an offence, raise a plea of inadmissibility or other sorts of defense. Principally, all criminal trials must be performed publicly and orally. In particular, the publicity of hearings guarantees that the court proceedings are transparent and thus offers a significant safeguard for the interests of society at large and individuals.[115] General comment nº 32[116] also addressed the significance of public trials in ensuring transparent proceedings in the interest of a fair trial of the accused person, as well as informing the society's perception of the efficacy of the judicial system.

Public hearing, therefore, refers to the opportunity for accused persons to present their plea in an open hearing before a competent criminal court. This requirement increasingly regarded as a method of ensuring the respect of the rights of accused persons and the accountability of judges or court trial within a state with democracy. It may safely be said that a judge is obliged to be fairer and more cautious when dealing with a case and making a judgment in public than when the proceedings are held in secret or in camera.[117] In the words of Jurist Bentham, "in the darkness of secrecy, sinister interest, and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate.

[115] Zhang, J, fair trial rights in ICCPR, *Journal of Politics and Law,* Vol. 2, No. 4, at p.43.
[116] HRC, General Comment 32, 2007.
[117] Naluwailo, p.89.

Where there is no publicity, there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest guard against improbity. It keeps the judge himself while trying under trial".[118] More importantly, the mere fact that the criminal hearing was conducted in secrecy, is sufficient for making a doubt in the public's mind. In that regard, in *Axen v Germany*, the European Court of Human Rights has stressed the importance of the right to a public hearing under the ECHR; it asserted that the public nature of the procedure protects the litigants against the administration of justice in secret, without any governmental control.

It is also one of the means by which confidence in the judicial body, both inferior and superior, can be preserved.[119] In this respect, the publicity of criminal court proceedings also contributes to maintaining the confidence of the members of the public in criminal court processes. The vital aspects of the right to a public hearing necessitate that all required information of the court sessions be made accessible to all, and that a permanent place for all courts must be legally established and commonly publicized by the State.[120] In regard to the ad-hoc court, the place and duration of their proceedings should be designated and made public; adequate facilities must also be provided for the participation of interested members of the public.[121] The court should therefore not place any restrictions on the category of persons authorized to attend hearings when the merits of a case are under review or at the time of pronouncement. Media officials should attend the hearing and report on the legal proceedings unless a

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[118] Bentham, J., *Rationale of Judicial Evidence*, 1827, Vol.1, Hunt & Clerke, London, c.10, [https://books.google.rw/books/about/Rationale_of_Judicial_Evidence.html?id=6G9VF_qJFyMC&redir_esc=y], accesed 25 July 2016.
[119] *Axen v. Germany* (1984) 6 EHRR 195, para.25.
[120] Principles and guidelines on the right to a fair trial and legal assistance in Africa (African Commission Principles), A (a), at p.2.
[121] Section A (b) of the African Commission Principles.

judge is able to limit or restrict the use of cameras.[122] Furthermore, the general public and the parties deserve the right to know in what way justice is done.[123] Internationally, both the UDHR and the ICCPR protected the right to a public hearing.[124] Only specific grounds of public order, morality, and national security permissible in a democratic system may constrain the presumption in favour of public trials.[125] Even when such grounds precluded the attendance of the public or media at the trial, the final decisions of a court must be made available to the public, unless the publication of such findings would prejudice the rights of a child or would infringe the privacy of the parties such as in divorce proceedings.[126]

In sum, it is established three distinct rights. First of all, the trial should be carried out in public; secondly, the procedural aspect of proceedings must be fair; finally, the judgment must be publically, in its delivery and the public accessibility of all the documents for a good preparation of the pleading. Thus, public hearing procedure has to guide the process in court proceedings to ensure that a hearing is conducted fairly. However, the camera can be pronounced during the whole or a part of the court trial either when the respect of the private life of the parties in question requires either in the interest of public morals, national security or public order in a democratic state, either still in the measure or the court deems it absolutely necessary, because of the particular circumstances of the case, when the public hearing can prejudice the interests of justice. Nevertheless, any judgment rendered in criminal matters will be

[122] Ibid.
[123] Part 3 of Article 9 of the UN declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognised human rights and fundamental freedoms (Declaration on Human Rights Defenders).
[124] UDHR, Articles 10, and 14 (1) of ICCPR.
[125] *Lubuto v Zambia* (1995), UNCHR Coin No 390/1990, UN Doc CCPR/C/55/D/390/Rev 1.
[126] Ibid.

public, except when the trial relates to the guardianship of children or the matrimonial disputes and where it is required in the interest of juvenile persons.[127] In any way, as analyzed above, in order to protect and assuring the rights of accused persons, the publicity of hearing remains an important rights, therefore any exceptions to it must be rigorously interpreted and motivated and must be applied only where necessary. The criteria on how the exceptions of the publicity of hearing should be interpreted have to be clearly established with aim to fight against the abuse and evasion of the right to the public hearing.

2.3.3 Right to an Independent Court

The right to an independent court is a concept, which guarantees everyone accused of crimes that their case will be heard by an independent and impartial court. As pointed out by Landsberg,[128] two kinds of definitions of the concept of right to an independent court may have emerged; an institutional-type definition, and a performance-based definition. As required by the principle of separation of powers, the court must be institutionally independent, particularly from the legislature and the executive[129] while, on the other side, individual independence necessities that only persons with adequate legal training and skills and who have and integrity and competence should be agreed as judges.[130] Consequently, judicial independence is both a set of the arrangements of the institutional aspect and its operation and a state of mind. The former is in fact concerned with identifying the relationships between the judicial

[127] International Covenant on Civil and Political Rights, Article 14, 1.
[128] Brian K. Landsberg, The Role of Judicial Independence, 2007, pp.331-335.
[129] Naluwairo, R, Military justice, human rights and the law: an appraisal of the right to a fair trial in Uganda's military justice system. PhD thesis, University of London, England, 2011, p.83
[130] Ibid.

power and other branches of powers, in order to ensure the appearance of independence and the truth, the latter is worried with the individual independence of the judge. As established in Venice Commission recommendations, when judges make decisions must be able to act without improper influence, any restriction, threats or interferences, inducements, pressures, indirect or direct, for any motive or from any sector.[131] Judges should be free when they decide cases, in accordance with appropriate rules of law, with their consciousness and interpretation of the facts. Judges could not be requested to report to anyone outside the courts on the merits of their judgments.[132]

Rapporteur on the independence of judges highlights that the judicial independence remains an essential component of a state governed under a system of democracy.[133] It is recognised as central to the proper functioning of the judiciary within the concept of separation of powers. This last principle is the foundation of the requirements of impartiality and judicial independence. Consideration and respecting the doctrine of separation of power is an essential condition for a state governed under a system of democracy;[134] it requires the three arms of government to constitute a system of checks and balances in order to avoid and mitigate abuses of government authority.[135] In this respect, the Human Rights Committee has highlighted that the prerequisite of court's independence refers, among other things, to "…the actual independence of the

[131] Venice Commission, Recommendation (94)12, principle I.2.d.
[132] Ibid.
[133] *Report of the Special Rapporteur on the independence of judges and lawyers*, UN document E/CN.4/1995/39, para 55.
[134] Ibid.
[135] Montesquieu, De l'Esprit des Lois, Book IX, Chapter 6. Whitefish, Kessinger Publishing, (1748),

judiciary from political interference by the executive branch and the legislature".[136] On the other hand, the decisional independence of judicial officers requires legal protection of judges' term of office, security, adequate remuneration, their independence, conditions of service, the age of retirement and pensions.[137] In this view, the requirement of an independent judiciary is the symbol of the basis and legitimacy of judicial functioning in every State, having both institutional and individual judge dimensions. Without the independence of the judiciary justice remains illusory, thus, this rights remains a precondition for access to justice. Only an independent court is able to render justice impartially on the basis of law.[138] Guarantees of judicial independence are the means to protect judicial decision-making in individual cases from external influence and provide for a genuinely impartial arbiter.[139]

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

> *"all persons shall be equal before the courts" and further, that "in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by an independent and impartial court established by law"*; [140]

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[136] HRC General Comment No 32, 2007, para.19.
[137] Dugard, J, *International Law: A South African Perspective*, 3rd edn Juta & Co, Lansdowne South Africa, 2005, at para 241.
[138] Office of the High Commissioner for Human Rights, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, United Nations, New York and Geneva, 2003, p.115.
[139] Streeter, P.A, Fair trial in Lithuania: from European convention to realisation, PhD thesis, University of Leicester, England, 2012, at p 41.
[140] ICCPR, Article 14(1) .

The Human Rights Committee (HRC) has clearly assumed that "the right to be tried by an independent and impartial court is an absolute right and would not suffer any exception".[141] Therefore, this right is applicable in all courts and all circumstances, whether special or ordinary. Accordingly, the African Charter on Human and Peoples' Rights obliges State parties to ensure the independence of the courts.[142] In this perspective, that the African commission on human and peoples' rights held that the independence of the court should be considered "*non-derogable*" as it affords minimum protection to persons".[143] It is thus a right, which applies in all situations. The absence of impartiality and independence of court may lead to a denial of justice and makes the credibility of the judicial process dubious. It needs to be highlighted that independence as well as the impartiality of the judiciary are important in protecting individual rights of accused or the consumers of justice in general than a privilege of the judiciary as organ for its own interest.

Most importantly, the independence of justice applies to both judiciary as a system and courts as institution, and to the judges called to decide on particular matters. Institutional independence emphasises the requirement that the judicial institution itself, as an organ, should be free of control and pressures.[144] Usually, threats to the institutional independence through control, pressure or any form of improper

[141] Communication nº 263/1987, *M. Gonzalez del Río v. Peru* (Views adopted on 28 October 1992), in UN doc. *GAOR*, A/48/40 (vol. II), p. 20, para. 5.2.
[142] African Charter on Human and Peoples' Rights, Article 26.
[143]ACHPR, *Civil Liberties Organisation, Legal Defense Centre, Legal Defense and Assistance Project v. Nigeria*, Communication No. 218/98, decision adopted during the 29th Ordinary session, 23 April - 7 May 2001, p.3, http://www1.umn.edu/humanrts/africa/comcases/218-98.html, (accessed 16 August 2017).
[144] Bahma, S, The Right of an Accused to a Fair Trial: The Independence of the Impartiality of the International Criminal Courts, PhD theses, Durham University, England, 2013, at p.100.

influence could emanate from external as well as internal sources.[145] Bahma posits that personal independence or individual independence, on the other hand, rests on the individual judge who should be able to exercise his judicial functions without fear or favour of any control or pressure from any party.[146] If it could be shown that a judge is not independent by virtue of his connection to a party to the action, whether a private party or the State, there would be doubts as to his impartiality and consequently, the correctness of his decision, even if he did ensure that the proceedings were fair in every other aspect.[147]

Both postulates of judicial independence have a bearing on each other. A judge may be individually independent but if the court, of which he is a member, is not independent, then, any convictions issued by the court could be rendered unsafe by virtue of that dependence. This would adversely affect the decisions of the court even if the convictions were arrived at after observation of other standards of fair trial.[148] In a democratic state, the right to an independent court and the right to an impartial court maybe the most important tenet in the administration of justice.

2.3.4 The Impartiality of Court

Impartiality means that a judge is not biased in favour of the other party. In this context, a judge must have the freedom to float the positions of the parties and finally make a fair and adequate solution by correctly applying the law and the rules of the

[145] Ibid.
[146] Ibid.
[147] Ibid.
[148] Ibid.

jurisprudence relating thereto.[149] According to MacDonald and Vohrah, impartiality is characterized by objectivity in balancing the legitimate interests at play.[150] Thus the impartiality may refer to the fact that judges are not prejudiced and they do not have any interest in terms of moral values and material in an indirect or direct way. The European court of human rights has explained the concept of impartiality in *Morris v UK.*[151] The court considered that in the concept of judicial impartiality there are two dimensions. Firstly, the Court should be objectively impartial, which means that there should be adequate guarantees for the Court to reject any illegitimate objection regarding impartiality.[152] Second, the Court should also distance itself from personal bias and influence.[153]

The impartiality is essential element for the good administration of justice in decision making process. The European Court of Human Right has well established in *Sramek v. Australia* that the principle of impartiality is an important element in support of the confidence which the courts have to stimulate in a society governed under a system of

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[149] Trechsel, S, Human rights in criminal proceedings, Vol. XII/3. Oxford: Oxford University Press, 2005, p.50.

[150] *Prosecutor v. Kanyabashi,* ICTR-96-15-A, Appeal Chamber, 3 June 1999, Decision on the Defense Motion for the interlocutory appeal on the Jurisdiction of Trial Chamber I, Joint and Separate Opinions by Judge MacDonald and Judge Vohrah, para. 35.

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

[152] Ibid.

[153] The case originated in an application (Case Number 38784/97) against the Northern Ireland and the United Kingdom of Great Britain lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a United Kingdom national, Mr Morris ("the applicant"), on 31 October 1997. The applicant considered that he had been denied a hearing before an independent and impartial court on account of various structural defects in the court-martial system. In addition, he argued that his hearing before the court martial was not fair due to the actions of the prosecuting authorities and his own defending officer. He also maintained that he had been denied his right to free legal assistance.

democracy.[154] The Bangalore Principles of Judicial Conduct,[155] in its second significance, impartiality is considered as crucial element for the correct execution of the judicial function, associated not only to the decision making process but also to the court decision. With regard to the conduct required of judges, the Bangalore Principles provides the guidance on conduct within and outside the courts and contains restrictions on liberty of speech, establishing the "appearance of impartiality" as an appropriate factor.

The determination of impartiality of the court is based on both subjective and objective criteria. The committee has reaffirmed this point of view in its general comment nº 32 of 27 July 2007 relating to the issue of impartiality of a court.[156] Consequently, for the first aspect, the court must be subjectively impartial; in this case, the members of the court should not hold any bias or personal prejudice, nor have preconceived ideas about a specific case before him or her.[157] Second, from an objective viewpoint, the court must also be impartial; in this respect the court must offer satisfactory guarantees, for exclusion of any kind of legitimate doubt.[158] Weissbrodt posits that subjective impartiality is the personal impartiality of the judge as an individual. A judge is supposed to be subjectively impartial until proven

[154] *Sramek v. Australia*, judgment of 22 October 1984, Application nº 8790/79, par 42.
[155] The Bangalore Principles, endorsed through ECOSOC Resolution 2006/23, set up a veritable code of judicial ethics, although they have not received this designation expressly because it has "*prescriptive and exhaustive connotations in civil law countries".* In contrast to the Basic Principles of 1985, Bangalore Principles are addressed directly to the judges and according to its preamble, should be considered as a guiding framework of, "*standards for ethical conduct of judges*". The Bangalore Principles identify six core values of the judicial system: Independence, Impartiality, Equality, Integrity, Propriety, Competence and Diligence. It also defines the required conduct of their recipients and describes their content.
[156] General comment nº 32 of the international human rights committee, par.21; also the communication of *Karttunem v. Finland*, communication no 387/1989, views of 23 October 1992. CEU, 2007 by Natia Katsitadze.
[157] Ibid.
[158] Ibid.

otherwise. A reasonable third party must discern a behavioural impartiality based on how the trial is conducted.[159] subjective impartiality necessitates a considerable effort in adjudicating; the Judicial Ethics Report 2009-2010[160] provides subjective impartiality as a set of rules of conduct aimed at ensuring the impartiality of judges, which refers not only to the exercise of their judicial role but also to the sphere of their personal and social life. However, objective impartiality is the conviction of the parties and the public that the court as an institution is not partial. In this case, an absence of personal bias, prejudice, or pre-judgment must be demonstrated.[161] Objective impartiality needs that judges confer certain guarantees to eliminate any suspicion of impartiality.

From the above analysis and an overview of understanding of the concept of impartiality of court reveals that the notion of fair trial is founded on the behavior of the criminal court as institution and of the individual judge. The criminal court and the individuality of judge must appear to be impartial to a reasonable person. This requirement is very important, and it may be the utmost significant safeguard for ensuring the right of accused to a fair trial. For accused persons, the impartiality of criminal court is more likely more than any other fair trial guarantees. Therefore, the criminal court that lacks impartiality is not a court at all. A democratic State should take all legal and practical measures in the respect for minimizing all doubts concerning the impartiality of the criminal judges and their jurisdictions. Now that the different concepts of fair trial relating to the proper administration of criminal justice

[159] Weissbrodt, D, *Administration of justice and Human rights*, 2009, at p.29.
[160] European Network of Councils of the Judiciary (ENCJ), the Judicial Ethics Report 2009-2010, was published, based on the Decision of the European Network of Councils for the Judiciary, June 2007.
[161]Weissbrodt, D, 2009, at p.29.

has been examined. As a matter of importance, it is established that the right to a fair trial encompasses in particular the right to a public and fair hearing and the right to be tried by an impartial and independent court. It is apt to start analyzing its value and importance in a fair administration of criminal justice and, before analysing the scope of its application in criminal court proceedings.

2.4 The Objectives and Importance of the Right to a Fair Trial

The right to a fair trial is an essential right in States respecting the principle of rule of law. When this right is respected fairly, the accused person can be sure that processes will be fair and certain. The Inter-American Commission on Human Rights has considered, in case of *Malary v Haiti*, the right to a fair trial as one of the foundations of a society governed under the system of democracy.[162] The commission considers it also as a basic safeguard of respect for the other rights provided in the Convention, as it is a real limitation to the State to abuse of its power.[163]

Generally speaking, the fairness of criminal process and judgement are the most important components of administration of criminal justice. Weissbrodt stressed that the right to a fair trial remains one of the essential individual rights aimed for ensuring the good administration of justice as it ensures proper administration of justice by providing procedural safeguards to the rule of law.[164] Accordingly, it prevents governments from abusing their powers, and it remains the best means of separating

[162] *Guy Malary v. Haiti*, Report Nº 78/02, Case 11.335, 27 December 2002, para 53.
[163] Ibid.
[164] Weissbrodt, D, *The Administration of Justice and Human Rights*, City University of Hong Kong Law Review, 2009, Vol. 23, No. 1, at p.28.

the guilty from the innocent and protecting against injustice.[165] In this context, the objective of securing the interests of the community is considered as the utmost significant objective of a fair trial in crimes against the physical integrity of individuals that are committed against the integrity of the body and the life of a living person.[166] In accordance with the interpretation of the Court of Strasbourg, the right to a fair trial is a fundamental principle of the rule of law in society governed by the system of democracy and is aimed to guarantee the right to the proper administration of justice.[167] It is arguable that the notion of fairness, and justice go together specifically in criminal matters. It is very difficult to get justice from a criminal court which is not guaranteeing the right of citizen or suspect to the procedural fairness and which is not independent and impartial.

It is impossible to overemphasize the significance of the right to a fair trial in a community governed by the system of democracy. In this community, it is taken as the most significant human right in the administration of justice.[168] Moreover, the right to a fair trial guarantees neutrality in the adjudication of conflicts through the multiple guarantees it offers in the conduct of trials. In this connexion, as also pointed out by Naluwailo, specifically in criminal proceedings, it is arguable that the notions of fair trial and justice are inseparable.[169] It is impossible to have or to get justice

[165] The Right to a Fair Trial, [https://www.fairtrials.org/about-us/the-right-to-a-fair-trial/] accessed 23 August 2017.
[165] Preamble of UDHR.
[166] Rezaeifard, S., at all, Principles and Objectives of Fair Trial, in Crimes Against Physical Integrity of Individuals, in Iran's Penal System, International Journal of Scientific Study, vol.5, Issue 4, 2017, at p.915.
[167] *Demir and Baykara v. Turkey*, Judgment of 12 November 2008, paragraphs 65-68.
[168] Naluwairo, R, Military justice, human rights and the law: an appraisal of the right to a fair trial in Uganda's military justice system. PhD thesis, University of London, England, 2011, at p 48.
[169] Ibid.

rendered by a court which is neither neutral nor independent, and which does not guarantee the other rights associated with fair trial rights and legal procedures.[170]

More importantly, the fundamental importance of right to a fair trial is greatly illustrated by its inclusion in the non-derogable rights. The ACHPR[171] and HRC[172] have said that the right to a fair trial must be considered non derogable. Indeed, in *Chad v Commission Nationale des Droits de l'Homme et des Libertes*,[173] the ACHPR noted that, unlike other human rights instruments, the African Charter does not permit countries to derogate from their commitments under the Treaty during the emergency circumstances. Therefore, even in the situations of emergency, the provisions of the African Charter dealing with the right to a fair trial are not derogable.[174]

In the above case, the ACHPR argued that even a civil war in Chad could not be used as a pretext for the State to violate or allowing violations of rights enchrined in the African Charter.[175] HRC also emphasized that States derogating from the standards of fair trial in the event of a government emergency should guarantee that such derogations do not exceed those strictly needed by the requirements of the real state.[176] It stressed that fair trial guarantees could certainly not be subject to derogation

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[170] Ibid.
[171] *Civil Liberties Organisation, et al v. Nigeria,* African Commission on Human and Peoples' Rights, Comm. No. 218/98 (1998), para.27.
[172] UN Human Rights Committee, General Comment No.32, 19th Session of the Human Rights Committee, 23 August 2007, CCPR/C/GC/32, para.6.
[173] *Commission Nationale des Droits de l'Homme et des Libertes v. Chad*, African Commission on Human and Peoples' Rights, Communication No. 74/92 (1995), para.21; Naluwairo, R, at pp.49 -51.
[174]Naluwairo, R, at pp.49 -51.
[175]Naluwairo, R, at pp.49 -51.
[176] HRC, *General Comment No.32*, para.6. Ibid. (n 150).

policies that would avoid the protection of the entrenched rights.[177] Because it is inherent in the protection of freedoms explicitly recognized as non-derogable in Article 4(2) of the ICCPR that procedural safeguards, including often-judicial guarantees, must be guaranteed.[178] Indeed, the HRC declared well before that even in emergency situations, certain aspects of the right to a fair trial cannot be subject to derogation.

Certainly, the lack of fair trial in administration of justice generates so many bad impacts in the country, society and on individual person. Normally, the fair trial is a set of rights aimed to secure the fair administration of justice during different time periods of the trial process, the violation of rights or one right during one stage may well have an effect on another stage. This view has also been pointed out by Longford. He expressed that without fair trial, all other rights are at risk and if the state is unfairly advantaged in the trial process, it cannot be prevented in the courts from abusing all other rights.[179] For Weissbrodt the impact of the administration of justice in a state has a practical significance on the affairs of groups and ordinary individuals. First, the fair administration of justice is essential for the rule of law in that it ensures that state practice and policies protect against the infringement of the fundamental human rights to liberty, life, personal security and physical integrity of the human being.[180] Second, as the main vehicle aimed to safeguard the human rights at the national level, a strong system for administration of justice remains obligatory

[177] HRC, *General Comment No.32*, para.6. Ibid. (n 150).
[178] HRC, *General Comment No.32*, para.6. Ibid. (n 150).
[179] Langford, I, *Fair Trial: The History of an Idea*, Journal of Human Rights, 2009, Vol. 8, No.1, at p.37.
[180] Weissbrodt, D, The Administration of Justice and Human Rights, City University of Hong Kong Law Review, 2009, Vol. 23, No. 1, at p.25.

for the peace and stability of a state. Thirdly, a fair and efficient administration system of justice is indispensable for the protection of minority rights, which is crucial for ensuring the flourishing of inclusive democracy.

From the above analysis, it is true to affirm that without respect the rights of fair trial, the rule of law and public confidence in the justice system collapse.[181] The international community asserted the right to a fair trial to be a foundation of peace, justice and freedom in the world.[182] Therefore, the right to a fair trial is an incomparable way to avoid miscarriages of justice in criminal proceedings and is indispensable for a just society. Without it, the rule of law may be considered as having failed to demonstrate its standards and importance in a particular society. In this connection, there is no insurance nor confidence in a given country that the criminal court cannot convict the accused persons or take away their liberty, without observation of the facts, pieces of evidence, law and protection of other individual rights related to the protection of the integrity of human being.

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

[181] The Right to a Fair Trial, [https://www.fairtrials.org/about-us/the-right-to-a-fair-trial], accessed 23 August 2017.
[182] Preamble of UDHR.

democracy. The notions of fair trial and justice are not separable; thus, denial of fair trial is much injustice to the accused person as it is to the victim and society. Rwandan legal system and court practices need to take into consideration the importance of a fair trial guarantees with respect to protect individual rights and upholding the rule of law principles because without this right, public faith and the rule of law in the justice system can collapse. Having established the importance of fair trial, it is also important to scrutinize its scope of application, particularly with the criminal courts. In a society governed under a system of democracy, the position and weight of the right to a fair trial cannot be underestimated. Even if it is important, it does not explain that the right to a fair trial must be applied to all proceedings before criminal courts. The section below addressed the applicability of fair trial rights in all proceedings before criminal court.

2.5 The Scope of Application of the Right to a Fair Trial in Criminal Matters

The major important components of criminal justice are its fairness. The right to a fair trial is considered in the most famous, most popular and most important human rights that emerged during the development of human rights civilization.[183] Article 14 (1) of the ICCPR states that "in the determination of *any criminal charge against him, or of his rights and obligations in a suit at law …* everyone shall be entitled to a fair and public hearing by an independent and impartial court established by law".[184] Likewise, the UDHR provides that "everyone is entitled to a fair and public hearing by an independent and impartial court, in the determination of his *rights and obligations and*

[183] Sasan Rezaeifard S, Akbar Varvaii A, Mohammad Javad Jafari MJ. Principles and Objectives of Fair Trial, in Crimes Against Physical Integrity of Individuals, in Iran's Penal System. International Journal of Scientific Study, 2017;5(4):915-920, at p.915.
[184] ICCPR, Article 14 (1).

of any criminal charge against him".[185] The right to a fair trial therefore refers to trials concerning the determination of the rights and responsibilities of a person in a lawsuit and those related to the determination of a criminal charge. Criminal courts hardly ever deal with the rights and responsibilities of a person in a lawsuit. Consequently, the civil matters are deliberately excluded from the scope of this thesis. With regard to proceedings relating to the determination of a criminal charge, the HRC indicated that, in principle, criminal charges relate to the actions, which are provided to be punishable under national criminal law.[186] This implies that in determining whether there is a criminal charge for the reasons of applying the right to a fair trial, the classification of the offense and criminal court proceedings under domestic legislation should be considered.

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

[185] UDHR, Article 10.
[186] HRC General Comment 32 (2007), para 15.

territory of Rwanda by either a Rwandan or a foreigner.[187] They are also competent to deal with accomplices of felonies and misdemeanors committed outside Rwanda if they are both punishable by the law of the country where they were committed and the Rwandan law. The criminal proceedings, in Rwanda, involve, four distinct phases: Investigation phase, prosecution, criminal action and adjudication. The development in this thesis examines the Rwandan commitment to respect of fair trial rights during the discourse of the trials. In fact, Rwanda is a civil law country, but its legal system has also some common law elements, particularly, its procedural laws. The criminal procedure code is used in order to prosecute and find the guilt of a person who is presumed to commit an offence;[188] therefore, the criminal liability is personal. It is widely agreed that, at least one of the purposes of the criminal trial is to discover whether the charges laid on the defendant are true, in the sense of being sufficient to justify a guilty verdict in relation to the particular offences charged.[189] Hence, procedure is heavily geared towards promoting the finding of this legal truth.

Furthermore, the Rwandan penal code provides different crimes and their penalties with intention to protect the citizen against arbitrariness of the judge. Thus, it is the principle of legality of sentences and penalties often explained by Latin maxim *"nullum crimen, nulla poena sine lege*" (there is no punishment or crime without legal text). Even provided as such, the legitimacy is lacking if the defendant had no chance

[187] Organic Law N° 01/2012/OL of 02/05/2012 instituting the Rwanda Penal Code, Official Gazette nº Special of 14 June 2012, article 9.
[188] Law nº 30/2013 of 24/5/2013 relating to the code of criminal procedure, article 1.
[189] Hock, H. L, Liberalism and the criminal trial, *Sydney Law Review,* 2010, Vol 32, 243 – 246.

to properly rebut the charges put on him/her.[190] In order to do so basic rights have to be afforded by the defendant, commonly expressed in the right to a fair trial. Hence, limitations of the defendant's participation in the trial, including the non-disclosure of relevant information, which impairs rebuttal of the charges, may seriously impair the legitimacy of the trial. In Rwanda as well as in other democratic states, the rights of the accused must be the primary concern in the conduct of any criminal proceedings, starting at preliminary investigation, prosecution and judging process. The character of a procedure under national law cannot be decisive for the question whether the right to a fair trial is applicable, otherwise the national authorities could evade these obligations by introducing disciplinary proceedings for offenses which should be part of the criminal law; that is to say, the operation of fair trial rights would be subordinated to the sovereign will of state. Therefore, as Johannes pointed out the adoption of an autonomous interpretation, independent of the national legal system, was inescapable.[191]

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

[190] Krebs, J, The Right to a Fair Trial in the Context of Counter-Terrorism: The use and suppression of sensitive information in Australia and the United Kingdom, PhD thesis, The Australian National University, 2016.
[191] Ibid.

the analysis in this thesis focuses to total trial process, from the trial to final judgement.

2.6 Legal Duties for a State in Promotion and Respect of Fair Trial Rights

Fair trial rights carry corresponding obligations that must be translated into concrete duties to guarantee these rights. International human rights law obligations require that the State must respect, protect and fulfil[192] its obligations related to the enjoyment of fair trial rights by the accused persons within their territory and/or jurisdiction. In fact, first obligation of a State is the duty to respect which in its turn is considered as a negative obligation.[193] It denotes that the State have the obligation to guarantee that all its legislations, policies, etc. comply with the human rights obligations. It requires responsible parties to the treat relating to a fair trial, to refrain from acting in a way that deprives people of the guaranteed rights. Second, the duty to protect requires that the State has to respect and implement the provisions of ICCPR and other international legal frameworks aimed at ensuring the protection of accused persons to the infringement of the other people. Bindu pointed out that it is required to States to prevent the violations of such rights by third parties and to ensure provisions for redress.[194]

Third, for the duty to fulfil necessitates a State to take appropriate administrative, legislative, judicial, budgetary, and other different measures on the way to the full

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

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

[194]Kihangi, Bindu K, Environmental and developmental rights in the SADC: Specific reference to the Democratic Republic of Congo and the Republic of South Africa, Lambert Academic Pushing, LAP, Germany, 2011, p.195.

realisation of such rights for all members of society.[195] Therefore, the State should facilitate and promote the full exercise of rights by its citizens. Moreover, as prescribed in UN basic principles of independence, the State has a constitutional obligation to ensure the right to a fair trial of all people by an impartial, independent, and competent court.[196] The HRC stressed that the public hearing requirement is an obligation placed on the State and does not rely on the parties' request to the courts proceedings.[197] Specifically, for European states, the ECHR imposes an obligation upon states to organise their judicial and legal systems well as to align with the requirements of right to a fair trial.[198]

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

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[195] Ibidem.
[196] UN Basic Principles on the Independence of the Judiciary, 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Italy, 08/26-09/06/1985 and 40/146 of 12/13/1985; UN GAOR, 40TH Session, Supp. no. 53, UN Doc. a/40/53 (1985); The Bangalore Principles of Judicial Conduct, Adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Roundtable Meeting of Chief Justices held at the Peace Palace, the Hague, the Netherlands,11/25-26/2002.
[197] *G. A. Van Meurs v. The Netherlands*.
[198] Weissbrodt, D, *The Administration of Justice and Human Rights*, City University of Hong Kong Law Review, 2009, Vol. 23, No.1, at 39.

servanda".[199] In this sense, Rwanda is technically obliged to comply with its treaty obligations and fulfill those obligations by putting in place appropriate administrative and legislative measures.

2.7 Conclusion

To sum up, this chapter has explored the conceptualisation, scope and importance of the right to a public and fair hearing by an impartial and independent court, specifically, as regards to the administration of justice and embedded into the right to a fair trial. Historically, the scope of the right to a fair trial has been further developed and codified during the period of the enlightenment, when the government began to limit the governmental power in the interest for the will of the people. The twentieth century has just confirmed and enlightened the protection and promotion of fair trial, in the application of the Universal declaration of Human rights.

The right to a fair trial aims at securing the right to a proper administration of justice and is a fundamental principle of the rule of law in a society governed under the system of democracy. When States ratify treaties or international conventions, they both agree not to violate specific rights and to guarantee the enjoyment of these rights by individuals and groups within their jurisdictions. As such, States have duty to respect, protect, promote and fulfil enjoyment of right to public and fair hearing by impartial and independent court, within their territory and jurisdictions. This means that Rwanda, as a democratic state and party to different international instruments

[199] The doctrine of *pacta sunt servanda* provides that any treaty in force binds the parties. This doctrine is a principle of customary international law and is codified in Article 26 of the Vienna Convention on the Law of Treaties, 1969.

pertaining to good administration of justice, in particularly those which need the protection of the right to a fair trial would, as a general rule, still be bound to safeguard and maintain the right to a fair trial as a norm of customary international law. The right to a fair trial is applied in full to all proceedings whether they are administrative, criminal, civil, or military, all courts and to, before ordinary courts and special courts. It was also established that the right to an impartial and independent court is an absolute right, meaning that it must be applied without any exception. The scope of application of the right to a fair trial shall apply to proceedings concerning the determination of the rights and responsibilities of a person in a lawsuit and determination of criminal charges. By their very nature, criminal courts hardly deal with person's obligations and rights in lawsuit. It must be acknowledged that the rights of the accused person play a central role in the conduct of any criminal court proceedings and they must be at the highest standards of fairness in number distinct respects, starting from trial to court judgment.

After having analysed the conceptualisation, objectives, scope of application of fair trial and the legal duties for a state in upholding fair trial rights, it is now important to determine how the main content of the right to a public and fair hearing by an impartial and independent court are enshrined in the international arena. The next Chapter examines the fair trial rights in international law and regional agreements.

CHAPTER THREE

FAIR TRIAL AT INTERNATIONAL LAW AND REGIONAL INSTRUMENTS

3.1 Introduction

The idea of individual right protection, particularly, rights to a fair trial, at international level, was conceived in the "Declaration of the United Nations" in 1942 which has initiated and arrived at the "universal declaration of human rights". The establishment of this Charter may be considered as a breakthrough for the protection of individual rights.

Throughout the years, with desire and effort to strengthen the respect for fair trial as well as other individual rights, the regional systems of protection of individual rights were created. This chapter examines and considers the normative content of fair trial, specifically, in the criminal court proceedings as enshrined in international law and regional agreements. It explores some significant declarations and treaties containing rights to a fair trial such as the Universal Declaration of Human rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), Regional instruments in Africa and other non-binding materials but of relevance considered as "*soft law*".

3.2 Fair Trial at International Law

3.2.1 Universal Declaration of Human Rights

The notion of rule of law including right to a fair trial is aligned among the main foundation of democracy and has a crucial impact on the individual freedoms. This right is considered as an element of international public order.[200] Under the United

[200] The ECtHR has based its decision on article 31 of the Vienna Convention on the Law of Treaties of 1969 in order to give Article 6 of the European Convention of Human rights the characteristics of rights to a fair trial.

Nations, the legal instruments for the standards of the fair trial include the "Universal declaration of Human rights". At international level, it was necessary to wait for the "Universal Declaration of Human Rights" (UDHR) of 1948 to consecrate the principles of the generality and universality as mentioned in the first sentence of the preamble "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world".[201]

The Universal Declaration of Human Rights is a declaration adopted by the UN General assembly on 10 December 1948 at Paris.[202] The Declaration is considered as the first global expression of rights to which all individuals are inherently entitled. It sets out in detail an impressive catalogue of universal standards for ensuring the protection and promotion of freedoms and rights of the citizen in society. Therefore, the UDHR is a fundamental constitutive document of the United Nations. Its sets out in details an impressive catalogue of universal standards aimed at ensuring the protection and promotion of rights and freedoms of the individual in society.

The UDHR contains a preamble and 30 articles, which include the article 7 concerning the general principle of equality before the law. It sets other various types of rights and obligations for political and civil rights dealing with personal freedoms,[203] which have been considered by Tomuschat, as the traditional rights and

[201] The Universal Declaration of Human Rights of 1948, Article 1.
[202] Universal Declaration of human rights has been Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.
[203] UDHR, Articles 3 to 20.

freedoms based on domestic experiences of the countries of the world.[204] These include rights to liberty, life, and security of a person, freedom from torture and cruelty, freedom from slavery and servitude, inhuman or degrading treatment or punishment, the right to recognition before the law, the freedoms of thought, expression, conscience, opinion, religion, assembly and association. Thereafter, it devotes one provision to political rights relating to forming the government of their choice.[205]

In fact, since the adoption of the Universal Declaration of Human Rights in 1948, the right to a fair trial existed and has been recognized in the international legal system as an important part of the general regime for protecting of the accused persons. The article 10 of the UDHR constitutes the foundation of the concept of a fair trial. The article 10 provides that,

> *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial court, in the determination of his rights and obligations and of any criminal charge against him."*[206]

The content of this article was included in the definition of human rights, in the aftermath of the war in order to avoid such a catastrophe in the future as well as prevention of human rights abuses of accused persons. Bahma stressed that the article 10 contains very fundamental principles that are needed to ensure the protection of an

[204] Tomuschat, C. (2008). *Human rights: Between idealism and realism*, Tom 2, New York, Oxford. p.30.
[205] UDHR. Article 21.
[206] UDHR, Article 10.

individual against arbitrary conduct by a State.[207] Not binding per se, the importance of UDHR should not be undermined by the non-binding status of the UDHR provisions, and is considered *in toto* as part of binding customary international law.[208] In this sense, the article 10 should enjoy the status of general principle of law and customary international law since its provisions are fundamental to the due process of law.[209] For Wiessner the UDHR has become binding to the extent that its various provisions are backed up by conforming state practice and *opinio juris*.[210]

It is, however, important to stress that the article 10 of UDHR is of great importance as it establishes the safeguards to accused persons in order to protect them from the illegitimate and to be arbitrary deprived of their other basic rights correlated with the liberty of the human person, since in criminal matters, it is the sacredness of liberty and life of the accused persons that is sought to be protected. Furthermore, it is also important to note that certain fundamental elements of UDHR which qualify the notion of the rights to a fair trial have been placed outside article 10. For instance, the right of accused persons to be presumed innocent until proven guilty in a public trial, as well as the guarantees for the defense of the accused persons, is stated in Article 11. The providing of the presumption of innocence in this first universal instrument pertaining to human rights shows the level and desire of the consideration and protection of the personality of the accused which should be much more complete of all accused persons throughout the world than that which existed before the Second

[207] Bahma, S., The Right of an Accused to a Fair Trial: The Independence of the Impartiality of the International Criminal Courts, PhD thesis, Durham University, 2013, p.27,
[208] Ibid.
[209] Ibid.
[210] Wiessner, S. (2011). The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges. *The European Journal of International Law.* 22 (1): 121–140, p.130.

World War. Smith claims that the presumption of innocence is regarded as the cornerstone of a democratic culture and formed by pursuing the legal process.[211] He argues also that, this principle remains a fundamental principle of the right to a fair trial.[212] Moreover, the required "competence" of national courts is provided for in article 8. This makes the UDHR more protective and essential in the protecting of the rights of accused individuals, during the procedure from the first arresting of the suspect, during the investigation and throughout the court trial process.

In sum, the Declaration reflects pre-existing customary international law[213] relating to the rights to be presumed innocent and to equal protection of accused persons by an independent court, and in a public and fair hearing; it is binding on states which do not qualify as persistent objectors, which may be invoked in appropriate circumstances by national criminal courts, and is a powerful tool in applying moral and diplomatic pressure to governments that violate any of its articles including right to a fair trial.

The Declaration has served as the foundation for two binding[214] UN human rights covenants: "the International Covenant on economic, social and cultural rights" (ICESCR) which is out of the scope of this thesis and "International covenant on civil and political rights" (ICCPR). The provisions of this Declaration relating to rights to a fair trial has been given effective legal force and codified in the articles of the ICCPR.

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[211] Smith, R. K.K, *International Human Rights* (5th edn, OUP 2012) 274.
[212] Ibid.
[213] Office of the High Commissioner for Human Rights. Digital record of the UDHR. United Nations.
[214] Dugard, J. (2009). The Influence of the Universal Declaration as Law, *Maryland Journal of International Law.* 24, p.85.

3.2.2 International Covenant on Civil and Political Rights

The international covenant on civil and political rights (ICCPR) was adopted in 1966 and entered in force in 1976.[215] The article 2 of the covenant sets out the obligations of States Parties and compels them to immediately implement and guarantee that the substantive rights enshrined in the convention are respected and observed in their jurisdictions.[216] The obligations enshrined in the ICCPR are binding on every State Party.[217] The content of the article 2 imposes a duty on State Parties to adopt domestic legislations, other measures and legal policies to give effect immediately to the covenant rights unless such rights are already part of national law. The ICCPR establishes fair trial rights and provides for the minimum rights of accused persons. Several international documents relating to human rights have given them since the Universal Declaration of Human Rights recognized fair trial rights. Articles 14 and 15 of the ICCPR are the most comprehensive and detailed provisions on fair trial rights among these international documents.

The Lawyers Committee for Human Rights,[218] in its guide-book on fair trial criteria, categorized fair trial in three categories namely pre-trial rights, in-trial rights and post-trial rights. The pre-trial phase involves the rights to legal counsel, the right to appear promptly before a judge to contest the legitimacy of arrest and detention, prohibition

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[215] International Covenant on Civil and Political Rights adopted 16 December 1966, entered into force 23 March 1976.

[216] *General Comment No. 31(80): Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26th May 2004*, UN Doc. CCPR/C/21/Rev.1/Add.13, Paragraph 3. Substantive rights are those contained in Part III of the ICCPR (Article 1 is also considered a substantive right). Part III is comprised of Articles 6 to 50. These rights include, *inter alia*, the right to life, freedom from torture, inhuman and degrading treatment, and punishment, the rights to liberty and security of the person, the right to a fair hearing and the right to equality before the law and rights of non-discrimination.

[217] Ibid, paragraph 4.

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

on incommunicado detention, the right to know the reasons for arrest, prohibition on arbitrary detention and arrest, the right to respect the human condition during pre-trial detention and prohibition on torture. In criminal proceedings, the accused person must enjoy these rights in the stage of pre-trial, which consists of the investigation stage usually carried out by the police and the prosecution stage. This stage concerns the period of investigation, therefore, it is beyond the scope of this thesis.

When considering the safeguard provided in articles 14 and 15 of the ICCPR, it found that the rights to a fair trial are more deeply established in the context of criminal court proceedings. Moreover, Rwanda has ratified the ICCPR,[219] thus it can be applied as a model for the criminal court proceedings and remains the guarantee for ensuring the good administration of justice in Rwanda. According to the ICCPR, three distinct rights are to be found in Rwandan criminal proceedings. Firstly, the criminal proceedings must be fair and the trial must be carried out in public, secondly, the courts must exercise their mandates impartially and independently and being established with a legal act; finally, the post-trial rights of the accused person have to be efficiently observed and protected. In fact, the right to a fair and public hearing is provided for and protected by international law.

Accordingly, the second paragraph of Article 14(1) of the ICCPR states, inter alia, that "in determining any criminal charge against him or his rights and responsibilities in a lawsuit, everyone has the right to a fair and public hearing". The content of this article is very crucial as it recognizes the equality of individuals before the courts and ensures

[219] Decree-Law nº8/75 of 12 February 1975 relating to the ratification of International Convention on Civil and Political Rights.

the publicity of hearing. It establishes and details the specific minimum guarantees in the fairness of criminal proceedings. In those minimum guarantees prescribed in the Article 14(3) there are the rights to be informed of the charge; to communicate with counsel and to have sufficient time and facilities for the preparation of a his defense; to get attendance and eximantion of witnesses of the accused persons under the same conditions as witnesses to the prosecution, to examine or cross-examine witnesses against the accused; to be tried without undue delay; to be assisted with an interpreter freely, if the accused cannot speak or/and understand the language used in court hearing.

Importantly, this provision is an essential element for safeguarding the public and fair hearing, it encourages the application of equality of arms, the respect of the principle of presumption of innocence, to have adequate facilities of accused person and his counsel to access pieces of evidence, documents, and other materials of the prosecution against the accused person. The article 14 (1) of ICCPR provides for the independence and impartiality of the court. It is stipulated that "in the determination of any criminal charge against him, everyone shall be entitled to a fair and public hearing *by an independent and impartial court"*. This independence and impartiality require constitutional recognition of the doctrine of separation of powers between the legislature and the judiciary as well as the executive.

In this regard, as also posited by Montesquieu, the three arms of Government must create a "system of checks and balances",[220] in order to mitigate and prevent abuses of the executive and the legislative power and the proper execution of the judicial

[220] Montesquieu, De l'Esprit des Lois, Book IX, Chapter 6. Whitefish, Kessinger Publishing, (1748).

function, linked not only to the decision-making process but also to the decision of the court, this is, thus, of paramount importance in criminal proceedings.

In similar terms, the American Bar Association described the importance of judicial independence as follow: "Judicial independence makes a system of impartial justice possible by enabling judges to protect and enforce the rights of the people and by allowing them without fear of reprisal to strike down actions of the legislative and executive branches of government which run afoul of the Constitution. Independence is not for the personal benefit of the judges but rather for the protection of the people, whose rights only an independent judge can preserve."[221] This analysis shows that the importance of impartiality and judicial independence is evident and crucial; these rights could only be enjoyed if they are observed and respected by a criminal court that has two postulates.

Furthermore, under Article 14, paragraph 6, compensation shall be paid to individuals convicted of a criminal offense by a final judgment and punished as a result of that conviction, where their conviction has been overturned or forgiven on the ground that a new reality has demonstrated conclusively that a miscarriage of justice has occurred. The rest of the article imposes specific and detailed obligations around the criminal procedures in respect for protecting the rights of an accused person throughout the criminal court proceedings. It establishes the forbidden double jeopardy[222]and the

[221] American Bar Association, An Independent Judiciary a Report of the Commission on the Separation of Powers and Judicial Independence, July 1997, page 3. [http://www.americanbar.org/content/dam/aba/migrated/poladv/documents/indepenjud.authcheckdam.pdf,], accessed 10 January 2015.
[222] Ibid. Article 14.7.

presumption of innocence.[223] It requires that those convicted of a crime should be allowed to appeal to a higher court[224] It also establishes rights to a speedy trial, to counsel against self-incrimination, and for the accused to be present and to call and examine witnesses.[225] Importantly, the basic principles of impartiality and independence of the judiciary, as well as the standards of procedural fairness provided in ICCPR, is relevant when measuring a quality of the judiciary in a country. It generally reflects State practice and contains principles of law that are common to national jurisdictions. Rwanda's ratification of the ICCPR was one of the important steps Rwanda has taken, although respect and observance of these rights are of paramount importance when it comes to the enjoyment of those rights aimed at protecting other individual rights.

2.2.3 The Convention on the Rights of the Child

In 1989, the General Assembly enacted the Convention on the Rights of the Child and entered into force on 2 September 1990. The Convention has been ratified almost universally since its adoption. The guiding opinion in this international agreements is that "in all actions concerning children ... the best interests of the child shall be a primary consideration."[226] The CRC has transformed the traditional notion of the child from an object of intervention into a legal person capable of enjoying individual rights.[227] In fact, juveniles need special protection in criminal proceedings. Both the CRC and the African Children's Charter provide that a child has a right to be heard in

[223] ICCPR, Article 14.2.
[224] Ibid. Article 14.5.
[225] Ibid. Article 14.3.
[226] Article 3(1) of the Convention on the Rights of the Child adopted by the General Assembly in 1989 and entered into force on 2 September 1990.
[227] Bakta, S.M, a critical analysis of the child justice system in (mainland) Tanzania, PhD thesis, University of Cape Town, South Africa, 2016, at p. 19.

judicial proceedings as well as in other proceedings. Article 14, paragraph 4, of the ICCPR provides that, in the case of juveniles, the proceedings must emphasize on the desirability of promoting their rehabilitation and must taking into account their age. Normally, minors must benefit from at least the same protection and guarantees as those granted to adults under article 14 under article 14 of ICCPR as early analysed. However, due to his status, the appropriate legal assistance at the time of preparation and presentation of their arguments, court proceedings, judging and in post-trial, rights must be afforded to him. The article 40, which is closely, related the right to a fair trial sets guarantees of a juvenile suspected or accused which have infringed the penal law. It provides in paragraph 2b that,

> *"(i) To be presumed innocent until proven guilty according to law; (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defense; (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance; (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality; (v) to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law; (vi) To have the free assistance of an interpreter if necessary; (vii) To have his or her privacy fully respected at all stages of the proceedings."*[228]

In the provision of the above article and others of the convention, it seems that the CRC has established that children should be heard either directly or through a representative[229] in a child-friendly environment;[230] information on charges must also

[228] CRC, Article 40, 2(b).
[229] CRC, Article 40, 2 (b), (i, ii, iii) Article 12; article 4 (2) African Children's Charter. See also CRC General Comment No 12, "The rights of the child to be heard", UN Doc CRC/C/GC/12, Fifty-first

be supplied to the child's advocate or parent.[231] While both the CRC and the African Children's Charter provide for legal and other appropriate assistance, the presence of parents or legal guardian in a child's hearing is an additional requirement provided for only under the CRC.[232] Legal assistance for children is important as it goes beyond legal advice.[233] It also serves in assisting children in understanding legal proceedings, that, otherwise, she/he might not be able to understand. This may be due to an intimidating court environment and technical legal language as well as their mental and physical immaturity.

Furthermore, detention should be prevented as far as possible before and during the trial. Measures other than criminal trials, such as mediation between the victim and the accused and meetings with the perpetrator's relatives, should be regarded where appropriate.[234] With regards to guarantee the respect for the right to privacy, it is recommended that children's cases should be heard in camera and anonymity maintained,[235] and that court documents, such as court orders and judgments, should not disclose children's names.[236] It is normally to point out that the CRC amended the ICCPR and adapted the rights of juvenile accused in the context of detention, legal assistance and other appropriate assistance which are mandatory and thus it plays an important in all criminal proceedings. In case of Rwanda, these rights aimed at

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session 1 July 2009 para 36 recommends that a representative could be a parent, a lawyer or a social worker.

[230] CRC General Comment No 12 (2009) 'The rights of the child to be heard' UN Doc CRC/C/GC/12, para 34.

[231] CRC, Article 40 (2) (b) (ii).

[232] Ibid. Article 40 (2) (b) (iii).

[233] Ibid. Article 37 (d); art 17 (2) (c) (iii) African Children's Charter.

[234] Ibid.

[235] CRC General Comment No 10 (2007), 62 paras 64.

[236] Ibid.

protecting juveniles are of a paramount importance and should be taken carefully since the almost half of Rwandans are in the category of children as shown by the National population census.[237] In this studies, the importance of the Convention on the Rights of the Child (CRC) arises from the fact that it was signed and ratified by Rwanda.[238] It also has many privileges in connection with the rights of the accused juvenile in criminal trials.

3.2.4 Non- Binding Documents of Relevance to the right to a Fair Trial at International Level

3.2.4.1 Introduction

Normally, the legal standards against which a court trial must be measured in terms of equity are complex, various, evolving, and constantly. They are constituted by human rights treaties to which the state is a party which have the binding obligations. But, they may also be found in different documents which are not binding. It is true that those materials are not legally binding but they are interpretative materials to the relevant provisions of the treaties which are legally bindings and are relevant to the critical importance in the succeeding analysis. Its nature and normative content have been established from a careful analysis of the various international and regional materials and instruments in which this right has been exposed and elucidated. Those documents, at international level, consist of the UN Basic Principles on the right to the

[237] National Institute Of Statistics Of Rwanda**,** the fourth Population and Housing Census, Kigali, 2012; 42.9% of people of Rwanda is under 14 years [Unstats.un.org/unsd/demographic/default.htm] accessed 17 August 2018.
[238] Presidential Order nº 773/16 of 19 September 1981 relating to the ratification of the Convention on the Rights of the Child of 20 November 1989.

independence of the court[239] and the HRC's General Comment on the Right to Equality before Courts and to a Fair Trial.[240]

3.2.4.1 UN Basic Principles Relating to the Right of Independence and Impartiality of the Court

Keeping with the previous considerations drawn from regional and international human rights instruments, the fair trial right is a multi-faceted right. Among those facets, there is the right of the accused persons to have his case heard by an independent court.[241] This independence of the judiciary has a great role in upholding the right of accused, the impartiality, and independence of courts. For instance, in USA, the importance of judicial independence is emphasized in the Code of Conduct which refers to the independence of the judiciary; it states that "an *independent and honorable judiciary is indispensable to justice in their society*." It is in this perspective that the United Nations formulated a set of provisions on judicial independence and impartiality, in a document called the "Basic Principles on the Independence of the Judiciary." The UN Basic principles have been adopted by the United Nations Congress on the prevention of crime and treatment of offenders in 1985.[242] The purpose of formulating these principles, as it is stated in the preamble, is to support States in the task of promoting and securing the rights of accused persons or other

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[239] Basic Principles on the Independence of the Judiciary adopted by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders, Milan 26 August - 6 September 1985, U.N.Doc. A/conf./121/22/Rev.1, I.B], G.A. Res. 40/146, 13 December 1985, 40 U.N. GAOR Supp. (No.53) 254, U.N. Doc A/40/1007.

[240] HRC General Comment No 32 (2007), supra note 2.

[241] Certain human rights instruments, for example the International Covenant on Civil and Political Rights 1967 refer to the right of the accused to have his case heard by a competent, independent and impartial tribunal.

[242]UN Doc A/CONF 121/22/Rev.1 at 59(1983). [http://www.unhchr.ch/html/menu3/b/h_comp50.htm] accessed 24 October 2018.

people to be tried by an independent court.[243] They must be taken into account and respected by governments within the framework of their domestic laws and practices and brought to the attention of judges, attorneys, members of the legislature and the executive power.[244] In fact, the most important aspect in the independence of the judicial system is its position in the constitution of a country. For the proper functioning of the judiciary, this position may be reinforced and centered within the separation of powers.

The Principle one recommends that the independence of the judicial system must be protected in the Constitution and legislation and all institutions, whether governmental and private, must observe and respect this independence.[245] Moreover, with the objective to realize the institutional independence in practice, the judiciary should be provided with adequate budget and resources to properly perform its functions,[246] and must be able to manage its own administration and issues that affect its overall functioning.[247] It is also provided that the judicial process should not be subject to any unwarranted or inappropriate interference, and the decisions of courts should not be reviewed by the executive or legislator;[248] all the same, the court of justice shall decide all cases before them impartially, in accordance with the law and on the basis of given facts, without any improper influences, restrictions, inducements, threats or interferences, pressures, indirect or direct, for any reason or from any quarter.[249]

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[243] UN Basic Principles on the independence of the Judiciary, Preamble, Paragraph 9.
[244] Ibid.
[245] UN Basic Principles, p. 1.
[246] Ibid. p. 7.
[247] Ibid. p. 14.
[248] Ibid. p. 4.
[249] Ibid. P. 3.

Furthermore, the power of the judiciary of making decisions with independence also includes jurisdiction over all matters of a judicial nature and the exclusive power to decide whether a matter referred for its decision falls within its jurisdiction as provided by law.[250] Furthermore, the independence of judicial system applies to the individual judges who decide on particular matters and to the justice as an institution. Principle six expresses the spirit of the right of fair trial. It provides that the purpose of the principle of independence of the judicial system is to guarantee that the rights of the parties are respected and that the trial is fair.

The Member States must provide adequate resources, which would include financing and qualified personnel to ensure that the judiciary would be able to properly perform its duties.[251] Importantly, principle 10 deals with aspects of qualifications, selection, and training of judges. It calls for a careful mode of judges' selection, without improper motives. It highlights that not only the candidates for judicial offices have the integrity but also they should have qualifications in law and other appropriate training. Thus, the mode of recruitment and appointment of judges in Rwanda as other democratic countries has to be fair and should not be vulnerable to criticisms concerning judicial independence. Other things, in case of the discipline, removal, and suspension of judges, the procedural guarantees must be in place for the fair and expeditious investigation; they should also beneficiate the right to a public and fair hearing. Judges can be suspended or removed only based on grounds of incapacity and behavior that make them unfit to perform their duties.[252] The principles of

[250] Ibid. p. 3.
[251] Ibid. p. 7.
[252] UN Basic Principles, p. 17- 20.

independence, as well as impartiality, are the hallmarks of the rationale and legitimacy of the judicial function in every State, as also highlighted by the Office of the High Commissioner for Human rights,[253] it may be the most important tenet in the administration of justice in any society governed under a system of democracy. Only an independent court can be able to adjudicate cases impartially on the basis of law. As stated in the preamble of the UN Basic Principles,[254] considering that Rwanda has ratified the different statutes relating to a fair trial, the organization and administration of justice in Rwanda as well as every state should be inspired by those principles which supplement and clarify the rights to a fair trial as enshrined in different statutes; the great efforts should be made in order to integrate them and fully conform to reality.

3.2.4.2 The HRC's General Comment on the Right to Equality before Courts and to a Fair Trial

The HRC's General Comment on the right to equality before courts and to a fair trial was adopted by the Human Rights Committee (HRC).[255] It is a compilation of General Recommendations and General Comments adopted by human rights treaty bodies. This makes it important since it is the fruit of the Committee's jurisprudence on article 14 of the Covenant, as has been particularly developed.

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

[254] UN Basic Principles, Paragraph 3 of the preamble.

[255] UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to a fair trial*, 23 August 2007, CCPR/C/GC/32, available at: http://www.refworld.org/docid/478b2b2f2.html [accessed 13 August 2018].

Normally, the article 14 of international covenant on civil and political rights is of a particular complex nature, since it combines diverse safeguards with different scopes of application. For that reason, the HRC, in its General comments no 32, has distinguished different aspects of the rights of individuals to an impartial and independent court, as well as the right a public and fair hearing, if they are subject to criminal prosecution. The HRC indicated that the requirement of an independent court has both institutional and decisional dimensions. On the one hand, the safeguard of institutional judicial independence requires constitutional recognition of the doctrine of separation of powers between the judiciary and the executive.

A situation in which the functions and powers of the judiciary and the executive can obviously not be distinguished or in which the latter can regulate or direct it, is incompatible with the concept of an independent court. On the other hand, the decisional independence of judicial officers requires legal protection of individual judges. Following the HRC, the requirement of independence of the judiciary, on the one hand, made particular reference to the qualifications required and the procedure for the appointment of judges and guarantees for their security of tenure until the mandatory retirement age or the expiry of their mandate; where applicable, the conditions governing the promotion, suspension and termination of their functions, transfer, and the effective independence of the judicial system from political interference by the executive and legislative branches.[256] In this respect, the HRC posits that States have to take particular steps to ensure judicial independence, protecting judges from any type of political impact in their decision-making by

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

creating or adopting legislation setting out objective criteria and clear processes for the appointment, promotion, tenure, remuneration, procedure of disciplinary sanctions and suspension and dismissal of members of the judicial system.[257] However, judges may only be dismissed on severe basis of incompetence or misconduct in accordance with just processes, which ensure impartiality and objectivity enshrined in the constitution or in the law.[258] Thus, it is important to affirm with Dugard[259] that both postulates of judicial independence are interdependent. A judge may be individually independent but if the court, of which he is a member, is not independent, then, any conviction issued by the court could be rendered unsafe by virtue of that dependence. This situation can unfavourably affect the decisions of the court despite the fact that the convictions were arrived at after observation of other standards of fair trial.

On the impartiality of the court, the HRC established two aspects to the requirement of impartiality. The court must be subjective impartial and must also be impartial from an objective point of view. According to HRC, judges should not allow their judgment to be influenced by personal prejudice, or bias nor preconceived ideas about the specific matter before them, nor act in a manner, which, incorrectly, promote the interests of one of the parties to the detriment of the other.[260] Moreover, the court must also appear to a reasonable observer to be impartial. For example, a court trial seriously affected by the involvement of a judge who, under national laws, should be

[257] Ibid,19.
[258] Ibid, §20.
[259] Dugard, J, *International Law: A South African Perspective*, 3rd ed. Juta & Co, Lansdowne South Africa, 2005, at para 241.
[260] Ibid., §21.

challenged, cannot be regarded impartial.[261] Another essential element of the rights to a fair trial, as acknowledged by the HRC, is the guarantee of a public and fair hearing. It allows a public scrutiny of the judicial proceedings and thus protects against unfairness and arbitrary action by the courts.[262] The fairness of the proceedings implies that on either side or for any reason there is no indirect or direct influence, intrusion, intimidation or pressure.[263]

Moreover, all criminal trials must be performed publicly and orally in principle. The publicity of hearings guarantees that the proceedings are transparent and therefore offers a significant safeguard on behalf of society at large and particularly to individuals. Courts have to provide adequate facilities for the participation of all interested persons, relying on the potential interest of the cases under review and the duration of the hearing and must inform and communicate to the public all information concerning the time and venue of the oral hearings.[264] However, the necessity for a public hearing does not necessarily extend to all appeal procedures that may take place to the decisions of pre-trial made by the prosecution authority, or on the grounds of written submissions.[265] Furthermore, in a democratic society, the court has the power to make the decision to exclude all or part of the public when the private interests of one or all parts require, or for reasons of morality, national security or public order, or to the extent that the court deems it necessary in the particular circumstances in which the publicity of the hearing would be prejudicial to the

[261] Ibid.
[262] General Comment, §28
[263] Ibid.
[264] Ibid.
[265] Ibid.

interests of justice.[266] Moreover, a hearing must be accessible to the general public, including members of the press; except for these situations, the hearing must not also, for example, be restricted to a specific category of individuals. More importantly, even in instances where the public is excluded from the trial, the court decision must be pronounced in public, as well as legal reasoning and supporting evidence, unless the proceedings concern marital disputes, or where the interests of juveniles require otherwise.[267] Another significant element of a hearing's fairness is its promptness. Where the delays are due to an absence of funds, additional budgetary funds for the administration of justice should be assigned to the extent possible.[268] Clearly, HRC's remarks are more useful in assessing the inconsistency of a State's legislation and legal practice with regard for and protection of fair trial rights.

3.3 Fair Trial under African Regional Instruments

3.3.1 African Charter on Human and Peoples' Rights

The right to a fair trial plays an important role in Africa, where the African Union[269] adopted the "African Charter on Human and Peoples' Rights". [270] This charter has been adopted in 1981. Sometimes, one also talks about "Banjul Charter". Article 7 and article 26 of the African Charter remain the main source of the right to a fair trial. First of all, article 7 of the African Charter[271] provides, *inter alia*, for *"the right to be tried within a reasonable time by an impartial court."* Secondly, article 26 of the African

[266] Ibid, §29.
[267] Ibid.
[268] Ibid, §27.
[269] Former Organization of African Unity.
[270] The roots of the African Union can be found in the "Sirte Declaration" of 1999 which called for the establishment for the AU. *See* African Union. [Online] Available: [http://www.au.int/en/about/nutshell] Accessed 16 July 2018. The constitutive act of the AU was adopted in 2000 at the Lome summit in Togo and finally entered into force in 2001.
[271] African Charter on Human and Peoples' Rights 1981, 21 *I.L.M.* 58, (1982)

Charter states that *"States shall have the duty to guarantee the independence of Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."* It is clear from the wording of those articles that the approach taken by the system of African human rights is analogous to that of the international system discussed above. They ensure that every individual shall have the right to have his reason heard.[272]

They allow people to appeal to domestic bodies if their fundamental rights enshrined and guaranteed by conventions, constitutions, laws, customs and other legal documents in force are violated.[273] Despite, the word "*fair*" is not mentioning in the wording in this article, the guaranteed rights include and demonstrate same clauses as in other regional and international instruments. Consequently, secondary legislation supports Article 7 of the Charter. [274] The African Commission, for example, adopted a resolution on the right of recourse and fair trial with aim of specifying the fair trial right.[275] In 1999, the Commission also decided to establish so-called "guideline on the right to a fair trial", while adopting another resolution namely "the resolution on the right to a fair trial and legal aid in Africa".[276] These rules contain a general hypothesis of the right to a fair trial that refers to all types of legal proceedings: criminal,

[272] ACHPR, Art. 7.
[273] ACHPR, Art. 7 (a).
[274] Originally, the African Charter was not modeled to include a Court. The structure was more comparable to the UN Human Rights Committee where the Commission takes on the role of a semi-judicial body. As a result, further legislation was adopted over the years.
[275] ACHPR/RES.4(XI)1992
[276] ACHPR/RES.4(1XXVI)1999: The AfComHPR "decides to establish a Working Group on Fair Trial" and "requests the Working Group to prepare a draft of general principles and guidelines."

administrative, commercial and civil matters.[277] In addition, some of the safeguards found in the Guidelines and Principles are applied only to criminal proceedings.[278] This means that the right to a fair trial for all matters is generally assumed, and a more particular one applies only to criminal matters.

As pointed out by Widder, Article 7 of the African Charter does not clearly include terms such as disclosure of pieces of evidence and equality of arms, similar to the American and European Conventions. Whereas the ECtHR, the HRC, the IACtHR and the IAComHR have implemented these terms through their case law and resolutions, the African system has a secondary legislation that identifies the notion of equality of arms.[279] With the safeguards of the principle of equality of arms, the public prosecutor and accused are equal footing in all procedural matters. According to article 2 of the 2003 guideline, the prosecutor and defense witnesses shall be given equal treatment in all procedural matters, and the defense and prosecutor shall be allowed equal time for presenting their pieces of evidence.[280] It can therefore be understood that the principle of equality of arms in the African Charter is based on equality in proceedings.

The Charter has numerous inherent weaknesses, which have resulted in the ineffectiveness of its implementing body the African Commission. The mandate of the Commission as established in article 45 of the Charter is to promote and protect

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[277] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission in 2003. *Lit* A refers to "all legal proceedings."
[278] Ibid *lit* A and N.
[279] Widder, E.R, A Fair Trial at the International Criminal Court? Human Rights Standards and Legitimacy, Ph.D. thesis, University of Hull, 2015, at p.108.
[280] *Littera* N 6 (a) of the Guidelines. Furthermore, equality of arms applies to all kinds of proceedings in the general sense, mentioned in letter A of Article 2 (a) of the Guidelines.

human rights in Africa, as well as interpret the provisions of the Charter. Within the African Charter or the Principle and guideline on the rights to a fair trial, the words right to adversarial proceedings is not written anyway. However, the Guidelines guarantee the privileges of the accused to attend and to be present during his court trial.[281] While this does not clearly provide that the accused has the right to contest or comment the prosecution's submissions, the guarantee of being present at least means the involvement of the advocate of accused and himself in the proceedings. [282] Another loophole is the absence of a general derogation clause in the Charter.

States have used claw back clauses to suspend *de facto* many fundamental rights in their national laws.[283] The African Commission has held in *Chad v. Commission Nationale des Droits de l'Homme et des Liberties*, that the absence of a derogation clause means that the Charter does not allow derogation under any circumstances. It has pointed out by Manga that failure to arrive at a unanimous position regarding the inclusion of a derogation clause was responsible for its total exclusion from the Charter.[284] Furthermore, the rights to an independent court is not clearly provided in the African Charter, but the article 26 of the Charter obliges States Parties to guarantee the independency of their justice systems. Under the aforementioned requirements of the Treaty, principle 1 of the Basic Principles on the Independence of the Judiciary of the Union Nations says that ... the independence and impartiality of the judicial system is enshrined in the Constitution or the law of the State and

[281] Littera N 6 (c) of the Guidelines.
[282] Littera N 6 (b) of the Guidelines.
[283] Anthony, A.E, Beyond the Paper Tiger: the Challenge of a Human Rights Court in Africa, *Texas International Law Journal*, Vol. 32, pp.511-518.
[284] Manga C.F, *Cameroon's Emergency Powers: A Recipe for (Un) Constitutional Dictatorship*, Journal of African Law, 48 (1) 2004, 62-81 at 66

protected by the State. A review of the Charter, consequently, and a clear inclusion of a derogation clause define clearly the judiciary's independence, and rights to a fair hearing would be a positive way forward.

Even if there are those loopholes to be addressed, the African Charter on human rights has a significant role in protecting the rights of accused person in criminal proceedings in Africa considering the political, tradition and legal cultures of African countries; with the progressive interpretation of the charter done by the African Commission. Its provisions have given the guidance about the content, nature, and obligations linking to a fair trial under the charter. Those obligations have also to inspire the Rwanda legislation and criminal court practice, because in the moment of the ratification of this charter in 1981,[285] Rwanda has the purpose of protecting individual rights, particularly right to a fair trial much more of the existing in the moments.

3.3.2 Fair Trial in East African Community

The East African Community (EAC) is a regional intergovernmental organization of six Partner States, comprising Rwanda, Kenya, Burundi, Tanzania, Uganda and South Sudan; its headquarter is located in Arusha, Tanzania. The Founding Treaty came into force in 2000,[286] its broad goal is to develop policies and programs intended to widen and deepen the integration in the political, economic, social, cultural fields, defense and security, research and technology, legal and judicial affairs for the mutual benefit

[285] Presidential Order nº 773/16 of 19 September 1981 relating to the ratification of the African Charter of Human and Peoples' Rights of 27 June 1981.
[286] The East African treaty came into force on 7th July 2000, See the Treaty for the Establishment of the East African Community (As amended on 14th December 2006 and 20th August 2007).

of the Partner States.[287]Throughout the treaty, the right to a fair trial has not any direct reference; however, some provisions provide in general the respect of principles in which right to fair trial is part of them, such as respect of the principle of rule of law, social justice, and respect of human rights. Article 6 and 7 of the treaty are related to the fundamental principles of the EAC and operational principles. In article 6 related to the fundamental principles it is provided that:

> *The fundamental principles that shall govern the achievement of the objectives of the Community by the Partner States shall include: (d) good governance including adherence to the principles of democracy, accountability, transparency, the rule of law, social justice, gender equality, equal opportunities, as well as the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and Peoples' Rights;*[288]

In order to ensure that the rights of the community enshrine in the Treaty are operational, the article 7 (2) affords obligations of States. It provides that,

> *The Partner States undertake to abide by the principles of good governance, including adherence to the principles of democracy, the rule of law, social justice and the maintenance of universally accepted standards of human rights.*

Those articles provide different principles in which some of them are related to the fair trial rights. It includes the observance to the democracy's principles, the rule of law, (..), as well as the recognition, protection and promotion of individual rights as set out in the African Charter on Human and Peoples' Rights;[289] article 123 of the treaty states that with respect to the eventual establishment of a Political Federation of the Partner States, the Partner States shall establish common foreign and security

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[287] The East African treaty, Article 5. [https://www.eac.int/documents/category/key-documents] accessed 09 August 2018.

[288] The Treaty for the Establishment of the East African Community, Article 6(d).

[289] The East African treaty, Article 6, (d), Article 7 (2).

policies, with the objective to develop and consolidate the rule of law and democracy and respect for fundamental freedoms and human rights.[290]

Furthermore, it can be seen that the creation of the East African Court of Justice (EACJ) was the fundamental structure for exercising the notion of fair trial at the regional scope. Its main responsibility is to guarantee the respect of law in the application, interpretation of/and compliance with the Treaty.[291] It, therefore, provides judicial protection to the people of East Africa through judicial decisions on matters that are brought before it by anyone seeking judicial protection within the EAC framework. Point 2 of Article 27 of the Treaty further instructs that the Council may determine and establish another jurisdiction of the ECJ whether original, appeals, or relating to human rights. Unfortunately, no any regulation or protocol has defined clearly this extension of the court. In the light of these considerations, the fair trial rights in East African region are not clearly defined, the treaty refers to the African Charter on human and people's rights. Hence, even if the drafters of the African charter have considered the African cultural values and civilization, the African Charter replicates some principles of the ICCPR which has been drafted without the presence of African representative.[292] Thus, the East African community wishes to consecrate a regulation or protocol relating to rights to a fair trial which takes into account and considering its cultural values. In addition, the suggested regulation would outline and assume a number of distinct duties for the EAC State Partner to ensure effective judicial, legislative or other steps to respect the right to a fair trial.

[290] The East African treaty, Article 123, 3 (c).
[291] Ibid, article 27(1).
[292] The members of the drafting committee were from France, Lebanon, and the US, and they formulated a text based on proposals from the United Kingdom and the US (See UN Doc E/CN.4/21 at 3- 4 (1 July 1947).

3.3.3 Non- Binding Documents of Relevance to the Right to a Fair Trial at African Regional Level

3.3.3.1 Introduction

At African regional level, the fair trial may also be found in different documents which are not binding but of relevance as its normative content have been established from the in-depth analysis of the different regional instruments and materials in which this right has been elucidated. Those documents consist of the "Dakar Declaration on the Right to a Fair Trial in Africa"[293] and the "African Commission Principles".[294] The examination and consideration of the normative content of fair trial rights at African regional level specifically in the criminal court proceedings enshrined in those non-binding materials is the major focus of this section.

3.3.3.2 Dakar Declaration on the Right to a Fair Trial in Africa

The 1999 Dakar Declaration is the result of a collaborative workshop on the right to a fair trial organized by the African Commission on Human and Peoples' Rights in cooperation with the International and Comparative Law Society of Africa, held in Dakar from 9 to 11 September 1999. It was adopted in a resolution at its 26th Ordinary Session in November 1999 by the African Commission on Human and Peoples' Rights. As it is stated in its preamble,[295] it was adopted with main purpose for strengthening different articles of the African Charter relating to the rights to a fair trial. In fact, provisions relating to the rights to a fair trial enshrined in the African

[293] Adopted by the African Commission in November 1999 at its 26th Ordinary Session in Kigali, Rwanda. For an overview of this Declaration, see Murray R (2001), ―The Right to a Fair Trial: The Dakar Declaration, *Journal of African Law*, Vol.45, No.1, pp.140-142.

[294] Adopted by the ACHPR at its 33rd Ordinary Session in Niamey-Niger, May 2003, DOC/OS(XXX)247, reprinted in 12 Int'l Hum. Rts. Rep. 1180 (2005).

[295] Preamble of Dakar Declaration on Fair trial in Africa.

Charter on Human and Peoples' Rights, in particular, articles 7 and 26 do not specify all elements which could help to the full realization of this right. Thus, the realization of the right to a fair trial depends on the existence of certain conditions and is hindered by certain practices.

In the declaration diverse issues have been raised. The Dakar Declaration has highlighted some practices including those related to the fair trial and rule of law, independence and impartiality of the court and legal aid. According to this declaration, only the society respecting the fundamental rights and freedoms and the rule of law can fully respect the right to a fair trial.[296] It is stated that the existence of the legal or constitutional provisions establishing the independence of the judicial system alone do not ensure the independence and impartiality of the court. It emphasizes that the problems and practices that undermine the impartiality and independence of the judicial system include the lack of impartial and transparent procedures and mechanisms in the appointment of judges, supervision of the judicial system by the legislature or executive, insufficient funds for the judiciary, interference, the absence of adequate remuneration and security of tenure.[297] Moreover, owing to the elevated court fees and professional charges, most aggrieved and accused individuals are unable to provide legal services. Governments have an obligation to provide legal assistance or services to indigent people with aim for making fair trial rights more efficient.[298] At the light of these practices,

[296] Dakar Declaration, &1.
[297] Ibid, &2.
[298] Ibid, &8.

recommendations have been formulated to the attention of State parties to the African Charter.

The State must allocate sufficient resources to law enforcement institutions and judicial institutions to enable them to guarantee better and more effective fair trial guarantees to the parties to the trial and to the public; it must also examine the ways or procedure whereby legal assistance could be extended to indigent defendants, including through adequate funding for the legal aid scheme and the public defender;[299] and it must integrate the African Charter into national law and take concrete action at national level to fulfill its commitments enshrined in the Charter, including particular measures to maintain its duty to safeguard the fair trial rights.[300] In this declaration, less attention has been made to the procedural aspects of the fair trial in criminal court proceedings, even those, the content of the declaration is very significant to the institutional impartiality and independence of the court as well as the independence of judges.

3.3.3.4 The African Commission Principles

The African Commission on human and people' rights has adopted a number of resolutions and principles of relevance to the rights to a public and fair hearing by the impartial and independent court. Through interpretation of the African Charter and its communications, recommendations, and resolutions, the commission has clarified, improved and set the principles and guidelines aimed to give the operational effect of the rights to a fair trial. The African commission principles set out principles intended

[299] Dakar Recommendation for the State parties to the African Charter.
[300] Ibid.

to ensure the fairness of proceedings, the equilibrium between the accused and the prosecutor, rights of accused person and implementation of principles that are capable of safeguarding judicial impartiality and independence. However, the principles of the guarantees of independent and impartial court are not well detailed as those established in UN General Comments No 32 and other analyzed documents in international soft law.

The special attention remains on the *section N* relating to the provisions applicable to criminal proceedings in the phase of preparation of hearing, in the court hearing and post-trial and other general rights of accused which are relevant in criminal proceedings. Among general rights, the Principles of the African Commission created, first, that the right to counsel applies at all phases of any investigation, including, prosecution, trial and post-trial procedures. The defendant has the right for choosing his own counsel freely,[301] and has the right to adequate time and facilities to prepare his argument, to communicate with his counsel, and cannot be tried without his counsel being notified of the date of the trial and the charges in time, in order to prepare his defense in a proper way.[302] Second, the accused is entitled to consult reasonably needed legal materials in the aim to prepare his defense. The accused and his defense counsel shall have the right to know and question all the pieces of evidence that can be used to support the decision before the pronouncement of judgment or sentence. The judicial body must consider all evidence submitted by all parties. After the pronouncement of judgment and before any appeal proceedings, the

[301] African Commission on Human & Peoples' Rights, principles, and guidelines on the right to a fair trial and legal assistance in Africa, DOC/OS(XXX)247, at p.13, [http://hrlibrary.umn.edu/research/ZIM%20Principles_And_G.pdf], accessed 14 August 2018.
[302] Ibid.

defense counsel or the accused has the right to consult and access to the pieces of evidence that the court has taken into consideration in rendering its decision and the legal reasoning of the judicial body in the judgment. Thirdly, the accused has the rights to an interpreter;[303] the right to interpretation applies to both oral and written proceedings. The right also applies to translate or interpret all statements or records needed for the accused to help in preparing a defense or to comprehend the proceedings.[304]

The right without undue delay has always been considered as a fundamental component of the fair trial rights and the African commission principles have made satisfactory guidelines in this regard.[305] The right to be tried without undue delay implies the right to a trial that gives rise to a final judgment and a sentence without undue delay where applicable. Factors appropriate to what constitutes an unreasonable delay include the behavior of the defendants, the complexity of the situation, behavior of officials or authorities, and whether a defendant is arrested pending proceedings.

African Commission Principles has established numerous guarantees of an accused person during the court trial. It is stated that with the principle of equality of arms, both public prosecutor and defendant must beneficiate the procedural equality in criminal proceedings. In this perspective, equal treatment shall be provided to the witnesses of defense and those for prosecution in all procedural matters, and the

[303] Ibid, p.14.
[304] African Commission principles, p.14.
[305] African Commission principles, P.15.

defense and prosecution shall have equal time to present pieces of evidence.[306] Moreover, the defendant has the right to obtain the attendance of his defense witnesses and to be interrogated under the same conditions as the prosecution witnesses and also the right to interrogate himself or to have the prosecution witnesses questioned. The African commission principles have elucidated in this case, that the Prosecutor shall provide the defendant, within a reasonable time before the trial, the names of the witnesses that it intends to use as evidence at trial, leaving sufficient time for the accused to prepare effectively of his defense.[307]

Furthermore, the defendant also has the right to be present during the interrogation of a witness, and the right to question witnesses may be limited to witnesses whose testimony is relevant and may contribute to the establishment of the truth. Therefore, if the defendant's presence cannot be guaranteed or the defendant is excluded, the counsel of defendant shall always be entitled to attend in order to maintain the right of defendant to examine the witness. [308] More importantly, if according to domestic law the defendant does not have the right to examine witnesses during preliminary investigations, the defendant must through his counsel or personally have the right to cross-examine the witness during the trial. However, in regard to the child witnesses and the victims of sexual violence, the right of a defendant to cross-examine witnesses personally may be restricted, taking into account the right of the defendant to a fair trial.[309]The African Commission principles have set out also the guidelines in respect to the safeguard of post-trial rights. It is indicated that all convicted persons in

[306] Ibid.
[307] Ibid, pp. 15-17.
[308] African Commission principles, pp. 15-17.
[309] Ibid.

criminal proceedings are entitled to review their conviction or/and sentence by a higher court.[310] The right to appeal allows impeccable re-examination of the case; reexamination must affect the facts and the law. If exculpatory evidence is found after the trial and conviction of a person, and this new evidence could have changed the verdict, the post-conviction proceedings, or the right of appeal, must be able to correct the verdict, unless proving that the non-disclosure in time of such evidence is attributable in whole or in part to the accused. A judicial body must suspend the execution of any sentence as long as the case is being appealed to a higher court.[311]

Although there is no adequate compensation or satisfactory remedies in case of wrongful imprisonment, the African Commission principles have set measures which can minimize or prevent injustice. According to African Commission Principles,[312] when a person has been convicted of a criminal offense by a final decision and subsequently that his conviction has been overturned or that he has been acquitted on the ground that a newly discovered fact conclusively demonstrates that a miscarriage of justice has occurred, the individual who has been sentenced as a consequence of that conviction must be compensated in accordance with the law. Importantly, although these guideline and principles are not binding on states, they are precepts emanating from a rich body of jurisprudence of the African Commission, that conform in some sense to the real interpretation of the article seven (7) of the African treaty on human rights. There are the expectations of the required behavior of a judiciary committed to upholding the principles of the fundamental structural standards of fair

[310] Ibid.
[311] Ibid.
[312] Ibid, p.18.

proceedings, independence, and impartiality of courts. This guideline of the fair trial has valuable importance, as it provides detailed specific fair trial standards of procedural safeguards in case of fair criminal court proceedings and in turn forms a prerequisite to the effective enjoyment of all individual rights. It helps state parties in general and particularly Rwanda in their bid to enact legislation and improve criminal court proceedings towards improving the status of respect of the rights of an accused person in their countries.

3.4 Conclusion

To sum up, this chapter has explored the fair trial at international law level. It has examined and considered the normative contents, elements and nature of fair trial standards particularly with respect to the administration of criminal justice and enshrined in significant declaration and treaties containing rights to a fair trial as UDHR, ICCPR, ICRC, Regional instruments in Africa, and a fair trial in the East African region. It has also considered other international materials in which the rights to a fair trial in criminal matters has been developed and elucidated. Regarding the elements, contents, and nature of the right to an impartial and independent court, it has been established that this necessitates the personal independence of judges as well as the institutional independence of the judiciary. Institutional independence requires that the judiciary must be independent of the legislator and the executive. This independence has to be extended to the financial and administrative autonomy. The legislator and the executive must respect the decisions of courts or should not interfere in its functioning. Individual independence needs judges to be integrity persons with adequate training. It also needs that judges be protected within the judiciary itself from

indirect or direct subordination. Finally, the requirement for the independence of individual judges needs that financial and tenure entitlements be protected against arbitrary or discretionary interference by the legislature, executive, or other authority. Any disciplinary sanction, suspension or dismissal of judges shall be based solely on incompetence and misconduct in accordance with the processes set out by law.

As regards the right to a public and fair hearing, it has been established that the right comprises equality of arms between the prosecutor and the accused and other parties to the proceedings, equality of all persons before any court, respect for the intrinsic dignity of the human person, adequate chance to prepare a case, entitlement to the help of an interpreter in oral or written court proceedings where he or she is unable to speak or comprehend the language used by the court, the right to determine their rights and obligations without undue delay and with adequate notice and reasons for the decisions, the accused shall have the right to obtain appearance of witnesses on his side in court hearing, examination of his witness under the same conditions as witness to the prosecution, examine or cross-examine witnesses against him; publicity of hearing, and right to appeal, right to compensation for wrongful imprisonment. Certainly, to secure these rights, the accused individuals must always be presumed innocent until proven guilty by a final court decision.

These conditions are recognized by international law as comprising the scope and main content of the right of an impartial and independent court to hold a public and fair hearing. In all the same, States must respect all those guarantees, irrespective of their domestic law and their legal traditions. It remains to be seen how these requirements were complied with in Rwanda judicial system and legal practice, as a

state committed to respecting the principles of the rule of law and party to the international instruments aimed at protecting fair trial rights. The next chapter explores the Rwandan judicial system before and after independence and the notion of administration of justice by the judicial system, before the examination of the domestication and incorporation of those intentional standards of administration of justice in Rwandan judicial legal framework.

CHAPTER FOUR

THE RWANDAN JUDICIAL SYSTEM

4.1 Introduction

Having examined and analyzed the scope and nature of the right to a fair trial, and fair trial in international law, and particularly having established in previous chapters that the right to a fair trial is applied in full to the judiciary as institution and to all criminal court processes in the administration of justice as it does in civil and other courts, it is now appropriate to examine the Rwandan judicial system.

To have a clear and critical understanding of the Rwandan legal framework on the administration of justice by the judicial system, one needs to have a look, first of all at the geographical, administrative background of the country, secondly to the historical origins and evolution of Rwandan judicial system over the years. It is also important to ascertain the notion of foundation of Rwandan judicial system and the functional mechanism of court, particularly, criminal procedure, as this thesis is based on criminal justice.

4.2 The Geographical and Administrative Background of the Republic of Rwanda

The Republic of Rwanda is a landlocked country located in Central Africa, to the East of the Democratic Republic of the Congo. Its countryside consists of grasslands and rolling hills, and it has a temperate climate.[313] Rwanda is bordered by Uganda to the North, Tanzania to the East, Burundi to the South and the Democratic Republic of

[313] Government of Rwanda, [http://www.gov.rw/home/geography/,] accessed 15 February 2014.

Congo to the West. The surface area is 26,338 square kilometres (10,169 sq. mi). The entire country is at a high altitude: the lowest point is the Rusizi River at 950 meters (3,117 ft.) above sea level.[314] Rwanda's countryside is covered by grasslands and small farms extending over rolling hills, with areas of rugged mountains that extend south-east from a chain of volcanoes in the northwest. The divide between the Congo and Nile drainage systems extends from north to south through western Rwanda at an average elevation of almost 2 750 m. Administratively, the Rwanda's system follows a pyramidal structure. The state is divided into five provinces which are Northern Province, Southern province, Eastern province, the City of Kigali, and Western Province. Provinces and the City of Kigali are subdivided into thirty districts.[315]

Moreover, according to the results of the 4th population and housing census as of "*census night*", of 15 August 2012, the country contained a total resident population of 10,537,222 people (5,462,280 females and 5,074,942 males).[316] The most populated province is the Eastern Province with 2,600,814 inhabitants, followed closely by the Southern Province (2,594,428 inhabitants) and the Western Province (2,476,943 inhabitants). The Northern Province and Kigali City includes respectively 1,729,927 and 1,135,428 inhabitants.[317]

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[314] Ibid.
[315] Organic Law nº 29/2005 of 31/12/2005 determining the administrative entities of the Republic of Rwanda, Article2.
[316] National Institute Of Statistics Of Rwanda**,** the fourth Population and Housing Census, Kigali, 2012. According to the President of the Republic of Rwanda for the Presidential Order No. 02/01 of 07/02/2011 organizing the 4th General Population and Housing Census and the Minister of Finance and Economic Planning, the Chairperson of the National Census Commission, for the Ministerial Order No. 001/12/10/TC of 19/01/2012 determining the administrative structure and technical organization of the 2012 Population and Housing Census.
[317] Ibid.

4.3 Foundation of the Rwandan Judicial System

Rwandan legal regime is purely civil law system with some elements of common law system. The source of law is constituted by the written laws such as constitution, organic laws, international treaties and agreement legally ratified laws, decrees and orders.[318] The function of Judges is to apply and interpret the law contained in the code to the case at hand.[319]In the absence of such rules, the judge adjudicates according to the rules that he would establish if he had to act as legislator, relying on precedents, customs, general principles of law and doctrine.[320] The most important principle of the Rwandan legal system is founded upon the Rule of Law based on the respect of human rights, freedom and equality of all Rwandans before the law.[321] None can circumvent the laws of the land, not the governors or those governed by the law.

In Rwanda, as provided by the constitution, the Supreme Court and other Rwandan courts exercise the judicial power;[322] they apply regulations and orders only when they are consistent with the constitution, organic laws and ordinary laws.[323] Article 145 of the 2003 constitution confers to the Supreme Court the attributions of coordinating and overseeing activities of courts, while ensuring judiciary independence.

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[318] Constitution of the republic of Rwanda of 2003 revised in 2015, article 95.
[319] Ibid, article 151 (5).
[320] Law No 22/2018 of 29/04/2018 relating to the civil, commercial, labor and administrative procedure, Article 9.
[321] Preamble of the constitution of 2003: "Resolved to building a State governed by the rule of law, based on the respect for human rights, freedom and on the principle of equality of all Rwandans before the law as well as equality between men and women".
[322] Constitution determines that the Supreme Court is the highest jurisdiction in the country, Article 144.
[323] Ibid.

In criminal system, the Rwandan system remains inquisitorial; consequently, the preliminary investigation is conducted initially by police, prosecution and then more extensively by an examining judge. It is assumed that a specific verdict is derived from an exhaustive and careful investigation.

4.4 History of Rwandan Judicial System

4.4.1 Rwanda's Justice during the Pre-Colonial Period

Before the colonisation, Rwanda administered justice according to the customary rules applied in various communities, all powers including the judiciary was wielded by the King.[324]The main purpose of the justice was about preserving the peace necessary and the social harmony for community life rather than retribution. Compensation sufficed to bring harmony in the community. This restorative justice did not require defense lawyers, professional judges, police officers, prosecutors or prisons.[325] Justice was rendered by those invested with political powers.

The right to punish belonged first of all to the family. The punishments were purely based on customs and are assimilated to the *vendetta* law. For instance, in case of an individual who killed a person from a different family lineage; the offended lineage killed another person from the lineage of the murderer. If they managed to reach an agreement, one could give part of his land as a form of appeasement. This was the case with *Abagwabiro* from *Bugoyi*, [326] who gave part of the *Rugerero* village to

[324] Rwanda Gateway, Colonial Rwanda, http://www.rwandagateway.org/spip.php?article4, (accessed 6 November 2014).
[325] ILPD, study on the end to end process mapping of the criminal justice system in Rwanda, 2013, at p.31.
[326]National Unity and Reconciliation Commission, at p.125.

Abungura for having killed one of its members. Accordingly, the parties could successively appeal their case to the Heads of families, the representatives of the King (*abatware b'intebe*) and ultimately to the King who was the supreme judge and the appellate judge by excellence for all cases decided by his representatives.[327] Rwandans believed that the King who was next to God had a divine right to punish as political power meant also judicial power. Not exercising the judicial power was no more than a sign of a weak leadership. The political authority with judicial powers was seized by the complainant as the authority could not search for crimes *ex officio* except where these crimes were against the person of the King, the security of the Country or against the collective harmony.[328]

In the same way, criminal investigation was a victim's personal or family matter. The victim could seek assistance from neighborhood or chief; especially, in the case of cattle theft.[329] There was no judicial police; everyone was supposed to play the judicial police role in his/her case by collecting physical evidence and testimonies. In some cases, like mysterious deaths, the victim could even resort to a witch or a sorcerer. It is important, though, to observe that in Rwanda, the administration of criminal justice in the pre-colonial period was purely based on custom and there was no matter of the protection of the accused persons or the notion of independence of person in charge of adjudication of criminal cases. The notion of the fairness of criminal proceedings, and generally fair trial rights, were inexistent and the criminal justice was generally tyrannical in nature.

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[327] ILPD, study on the end to end process mapping of the criminal justice system in Rwanda, 2013, at p.31.
[328] Ibid.
[329] Ibid.

4.4.2 Rwanda's Justice during the Colonial Epoch

The colonial period was dominated by the two regimes of German administration and Belgian administration. At the Berlin Conference of 1 July 1890,[330] German hegemony over major portions of East Africa, including Rwanda and the neighbouring Burundi, was recognized by a treaty between the United Kingdom and Germany.[331] In return, Germany accepted British control of Uganda and a sphere of influence in Zanzibar. In 1899 a protectorate, known as Ruanda-Urundi, was established under the administration of a Governor, Count von Goetzen.

Germany did not initially interfere with existing domestic institutions, governing the territory under what was essentially a military command. The German administration relied on the traditional oligarchy. Thus, the general administrative organization was completed by indigenous chiefs who, due to their power over the population, acted as auxiliaries of the administration. By keeping the indigenous organization intact and basing its system on traditional authorities, the German empire grounded its system on indirect rule. For an ordinary Rwandan, the institutions of the kingdom remained the source of authority and protection.[332] There were criticisms against traditional judicial systems, as reflected by the National Unit and reconciliation commission, the recourse to royal court was ridiculous and crimes were badly judged.[333] Under German rule, the notion of the right to a fair trial as it is understood in the modern human rights law was largely non-existent; the legislation did not apply equally to everyone. As point

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[330] The Berlin Conference, http://www.sahistory.org.za/dated-event/germany-declares-south-west-africa-german-protectorate, [accessed 6 November 2014].
[331] The Heligoland-Zanzibar Treaty of 1 July 1890 ("Anglo-German Treaty").
[332] Schabas, W. and Imbleau, M. (1997). Introduction to Rwandan law, les Editions Yvon Blais, Quebec, p.4.
[333] National Unity and Reconciliation Commission, history of Rwanda, from the beginning to the end of 20th century, 2016, p.263.

out by Schabas, written law applied only to those of European origin, whereas customary law continued to apply to native Rwandans, there was no attempt to codify customary law, which continued to have wide application.[334] There were no any mechanism for protecting citizen against the power of indigenous authorities and any formal procedure of settlement of disputes between citizens.[335] Certainly the justice was in the hands of the King who had absolute rights without limits including the rights to life; the justice could not be rendered according to the force of law.

Following Germany's defeat in the First World War, all German colonies were parcelled out to its victors. The Versailles Treaty, adopted at the Paris Peace Conference in 1919, assigned Ruanda-Urundi to Belgian rule. On 31st August 1923, Belgium was entrusted with a League of Nations mandate over the Rwanda territory. The mandate system was created by Article 22 of the Covenant of the League of Nations to deal with those colonies and territories which, as a consequence of the war, ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by people not yet able to stand by themselves under the strenuous conditions of the modern world.[336] In 1924, the Belgian Parliament officially accepted the League of Nations mandate for Rwanda. The following year, an organic law[337] adopted on 21 August 1925 combined the administration of Rwanda and Burundi with that of the Belgian Congo. The article 1 of organic law of 21 August 1925 relating to the administration of Rwanda and Burundi has automatically rendered applicable to Rwanda all laws that were in application in the Belgian Congo. Therefore, Ruanda-

[334] The Heligoland-Zanzibar Treaty of 1 July 1890 ("Anglo-German Treaty").
[335] Ibid.
[336] Ibid.
[337] Ibid, p. 5.

Urundi was considered by the Belgium as a territory of Congo. These laws were adopted by the Belgian Parliament and sanctioned as well as promulgated by the Belgian King.

The most important of them was "Colonial Charter",[338] which considered as the constitution of the Belgian colonies. Belgian administration was directed by a Governor-General headquartered in Leopoldville in the Congo (DRC) and a Deputy Governor-General for Ruanda-Urundi who was based in Usumbura (Burundi). Laws applicable in the territory were enacted by the Belgian Parliament or by the King of Belgium (decrees) and in emergency situations, by the Governor-General (legislative orders).[339]

Executive power was exercised by the King of Belgium, the Belgian Minister of Colonies, and by orders issued by the Governor and Deputy Governor, pursuant to delegated powers. Belgium did not initially impose its own domestic legislation upon Ruanda-Urundi. Instead, it adopted special codes or laws,[340] generally borrowing these from legislation already enacted for the neighbouring Congo. There was no attempt to codify Rwandan customary law, which continued to have wide application. Furthermore, legislation did not apply equally to everyone. Written civil law applied only to those of European origin, whereas customary law continued to apply to native Rwandans. The native jurisdictions were restricted to customs and traditions. In 1925, jurisdictions were organized. Two sort of courts have been established, namely a territorial court at the headquarters of each territory, and the king's court in Nyanza

[338] The law of 18 October 1908, relating to the Governance of the Belgian Congo.
[339] Ibid.
[340] National Unity and Reconciliation Commission, history of Rwanda, from the beginning to the end of 20th century, 2016, p.262.

which had acted as the court of appeal. Those native jurisdictions were competent to judge all conflicts between Rwandese.[341]

In 1934 and 1935, reconciliation courts were created in territories. They aimed at solving less important cases and were supposed to make conflicting parties to agree before native courts handled their cases. These courts did not solve problems but just reconciled conflicting parties. The Order of the King no 3 of 13 April 1937 only recognized indigenous courts as the only courts in the Province (Chieftaincy courts and reconciliation courts), there were also territorial courts, the court of appeal and the King's Court. These courts handled matters between natives.[342] Unfortunately, this order did not ensure the impartiality and independence of these courts. The King acted as judge in all native courts of the country and he was also free to revisit all judgements made.[343]

Although the establishment of Chieftaincy courts and reconciliation courts court of appeal and the King's Court was a landmark phase in the evolution of Rwanda's criminal justice system, a critical analysis of the provisions governing these courts shows no guarantee of their independence and impartiality, nor of measures that could ensure fair trials. The criminal justice and the power of judging remain in hands of the persons of the King and chief of territories. On the 30 August 1944,[344] the Royal Ordinance was passed to consolidate the custom and to establish the civil and

[341] Vanhove J., « Les juridictions indigènes du Rwanda", in *Congo*, 1939, p.161.
[342] Schabas, W. and Imbleau, M. (1997). Introduction to Rwandan law, les Editions Yvon Blais, Quebec, p.4.
[343] Ibid.
[344] Ordinance law No. 45 of 30 August 1944.

repressive justice. This law has radically changed the administration of criminal justice in Rwanda. It established the police courts whose jurisdiction was determined by the Royal Commissar, a territorial court for the entire country and a court of appeal for the entire Ruanda-Urundi territory. These courts were, in principle, competent to handle all crimes committed by natives. In practice, these crimes were of written nature (written law).

This structure of courts was reformed by the decree of 1949.[345] This decree has established a police court in every territory, the prosecution courts and resident court of Rwanda and the court of appeal of Ruanda-Urundi territory. This structure was maintained until 1962 when the new organization of courts was established by the law of 24 August 1962.[346] During this period, the customary norms were only applied if they were not contrary to public order, legal provisions and regulations. Moreover, the competence of native jurisdictions was determined by formal law whereas the traditional customary punishments were based on customary ethics. A dependent system (customary system) was authorized to stay and was a supervised pluralistic legal system.[347]

From the above legal analysis, despites that the Belgium colonialism epoch is discriminatory somehow and not significant, it has an important consequence in the enforcement of the right to fair trial and road to the rule of law. First, the establishment of the police, prosecution courts and the court of appeal even if it was

[345] Decree of 5 july 1949 relating to the administration of courts.
[346] Digneffe F., Fierens J. *et al.* (eds), Justice et Gacaca, l'expérience rwandaise et le génocide, Namur: Presses Universitaires de Namur, 2003, at p. 33.
[347] Ibid.

jurisdiction in Ruanda-Urundi is a good start points of the fair trial; second, the dual-judicial system which made it possible for the coexistence of both traditional and imported law was not as rigid because the Belgium order always had precedence over native order and the decisions of native courts became gradually legal. In sum, during colonial period, it is clear that the origins of Rwandan criminal justice were Belgium. As a colony, all legal frameworks of Rwanda relating to justice have been adopted by the Belgian Parliament, King of Belgium, Belgium minister of colony and Resident orders.

These laws as was the case with many colonised countries at the time, paid less attention to the fairness of trials, separation of powers, in general the issues of good administration of justice. The custom was wide application in whole country with application of customary punishments which degraded the physical integrity of human being as corporal punishment or physical punishment in public. Despite that the Belgium has the status of colonizer in Rwanda; the Rwandan criminal justice system has gained some improvement and begun to provide certain guarantees to ensure fair trials. This change could be due to three reasons.

First, since the mission of colonialism was almost accomplished, it was not necessary to maintain the traditional tyrannical control of the accused persons. The second factor could be the influence of the adoption of human rights instruments, such as the Charter of the United Nations and the Universal Declaration of Human Rights which emphasized the need to protect and respect human rights and fundamental freedoms and equality of all human beings. Finally, after the Second World War, many Western countries, re-examined its criminal justice system and initiated reforms to make it

more humane and more equitable, which may be the case in Belgium. It could also have had an impact on subsequent reforms in the Rwandan criminal justice system.

4.4.3 Rwanda's Post-Independence Criminal Judicial System

Rwanda obtained its independence on 1st July 1962; after five months, in November 1962, Rwanda established her first constitution as the first source of the law. This constitution, among other things, created judicial system appropriate to Rwanda. However, the criminal judicial system continued from its colonial past, essentially it adopted the system drawn from the Belgium coloniser. Nevertheless, the 1962 constitution insists that the constitutional order remains the supreme law of Rwanda and is binding on all the authorities and citizens of the country. Under Article 108, if a legal provision, any decision or act and custom is inconsistent with any of the provisions of the Constitution, the Constitution prevails; this legal provision, decision or act and custom are void because of its incompatibility. Rwandan constitution has experienced many revisions and changes.

In fact, up to 2015, in the space of 53 years, Rwanda has experienced four constitutions[348] and one fundamental law,[349] with a total of 9 changes.[350] In fact, Rwandan judicial system has currently established the fundamental law of 28 January 1961 under the ambit of the Supreme Court. It was stated that the Supreme Court was composed of five members appointed by the President of the Republic. With the

[348] Constitution of Republic of 1962, 1978, 1991 (etc.). Constitution of Republic of Rwanda of 2003.
[349] The Fundamental Law of 5 May 1995.
[350]Constitution of 1963 [Amendment of 12 Jun 1963 (OG 2nd Year nº 14 of 17 July 1963)]. Constitution of 1991 [Amendment of 03/08/1993 (OG 32nd Year, Special Number of August 1993)]. Constitution of Jun 2003 [Amendment of 2nd December 2003 (O.G special of 2nd December 2003, p. 11), Amendment of 8th December 2005 (O.G special of 8th December 2005), Amendment of 13th August 2008 (O.G special of 13th August 2008), Constitutional Amendment nº 04 of 17 June 2010 (O. G.no special of 17 June 2010), amendment of 2015 (OG n° Special of 24/12/2015)].

advent of the first constitution of 24 November 1962, it has been established that the Supreme Court comprised of five sections,[351] namely, the Court of Cessation,[352] the Department of Courts,[353] the State Council,[354] the Constitutional Court,[355] and the Court of Accounts.[356] The constitution provided for separate bodies to perform functions of the state; however, the traditional disrespect of independence of the judicial system inherited from colonial time continues its influence. Judges were appointed and dismissed by the President of the Republic[357] and they had no financial and administrative autonomy.

From July 1973 until December 1978, Rwanda was governed without any constitution, because all articles of the 1962 constitution had been suspended by the *coup d'état of* 1973 and the general assembly had been dissolved. Therefore, in this particular period, all executive, legislative and judicial powers were placed in the hands of the executive power. In this situation the accused persons as well as other citizens who find themselves out of power could remain virtually unprotected. The Rwanda developed another constitution in 1978, which had largely the purpose of protecting the State security and its existence. As in the period of colonialism, the development of institutions relating to the administration of criminal justice, in this constitution, was apparently organized with the structures under which the judicial system was effectively subordinated to other state organs. It did not bring many changes in the administration of criminal justice. Thus, the judiciary had been taken as

[351] Constitution of the Republic of Rwanda of 1962, Article 103.
[352] Ibid.
[353] Ibid.
[354] Ibid.
[355] Ibid.
[356] Ibid.
[357] Ibid. Article 104.

an institution of the executive power. It was stated in this constitution that the President of the Republic was the guarantor of the independence of the judicial power[358] and was also the President of the high council of the judiciary (HCJ) while the Minister of Justice was the Vice-President of HCJ. Moreover, the chief of the executive had the exclusive power to appoint all members of HCJ, the highest organ of the judicial system.

Due to the strong pressure from inside and outside the country including the war launched by the Rwanda Patriotic Front (RPF), the constitution of 1978 was repealed and replaced by another constitution of 1991. Nevertheless, the judicial system continued to be regarded as an attachment of the Executive and it also failed to create adequate structure that would safeguard the fair trial rights. It was provided that judges were appointed and dismissed by the President of the Republic on recommendation of the Minister of Justice after consultation with HCJ.[359] There were no transparent ways of vetting or recruitment of judges in all instances.

The Supreme Court with 5 sections was replaced by four (4) high jurisdictions[360] which were separated from each other, namely, the Court of Appeals,[361] the Council of State,[362] the Constitutional Court (combined the Council of State Court and the court of cessation)[363] and the Public Accounts' Court.[364] While structurally the judicial system was an autonomous body, it was functionally under the authority of the

[358] Constitution of the Republic of Rwanda of 1978, Article 81; Constitution of 1991, Article 86.
[359] Constitution of 1962, Article 82; Constitution of 1991, Article 87.
[360] Constitution of 1991, Articles 88 -89.
[361] Ibid.
[362] Ibid.
[363] Ibid.
[364] Ibid.

Ministry of Justice, within the Department of Courts and Tribunals. In this context, most critics think that the judiciary could have received instructions from the state. This constitution has not introduced a satisfactory reform in the field of criminal justice, as regards the guarantee of the right to a fair trial.

In 1994 the genocide against Tutsi, up to a million victims were killed in the course of 100 days. This tragedy has largely destroyed the principles, structures, and resources of the Rwandan judicial system. After this tragedy, in the period from 1994-2003, Rwanda had adopted a fundamental law that instituted the following ordinary jurisdictions: The Canton courts, the First Instance courts, the Court of Appeals and the Supreme Court. This new Supreme Court consisted once again of 5 sections;[365] the Constitutional Court, the Department of Courts and Tribunals, the Council of State, the Court of Appeals and the Auditor Office. According to the reform of the constitution of 18th April 2000, it was also provided with a sixth section[366] named the Department of "GACACA jurisdictions".[367] The Supreme Court was headed by a president assisted by 6 vice-presidents and included advisers acting as judges.[368] Every vice-president was also president of one of the sections of the Supreme

[365] Arusha Peace Agreement of 1993, Article 28.
[366] Fundamental Law of 2000, Article 2.
[367] The word "Gacaca" indicates in Kinyarwanda the lawn or grass where communities assemble to resolve community disputes. Although the new system is officially called Inkiko-Gacaca (Gacaca courts," or "Gacaca jurisdictions)"; Bolocan, M.G. *Rwandan Gacaca: An Experiment in Transitional Justice.* Journal of Dispute Resolution, 2002, Vol. 2 No 2, pp.355-400, at p.355. *Gacaca* were heralded as a new form of transitional justice that uniquely combined mechanisms of punitive and restorative justice (Brehm, H.N., Uggen, C., Gasanabo J.D. *Genocide, Justice, and Rwanda's Gacaca Courts,* Journal of Contemporary Criminal Justice, 2014, Vol. 30, No 3, pp.333–352, at p.337). The tribunals of GACACA, had jurisdiction over crimes against humanity and genocide committed in Rwanda between 1 October 1990 and 31 December 1994 or other offenses proscribed by the penal code provided they were committed during the said period and with the "intention" of committing crimes against humanity and genocide. The courts have closed on 18 June 2012, after completed 1,958,634 cases.
[368] History of the Supreme Court [http://judiciary.gov.rw/about-us/judicial_power/history_of_the_supreme_court.html] accessed 12 December 2017.

Court.[369] The High Council of the Judiciary, composed of 21 professional magistrates, was in charge of managing the career of the judges of the courts and tribunals other than the president and the vice-presidents of the Supreme Court.[370]The High Council of the Judiciary (HCJ) was composed of 21 judges and was responsible for managing Court Judges excluding the President and Vice Presidents of the Supreme Court.[371] However, articles 157 and 158 of the Constitution providing for the establishment and composition of the HCJ were repealed by articles 36 and 37 of Special Law.[372] There was no recruitment system of judges. The statistics of judges shows that in 2004, among 702 judges only 74 (10.5%)[373] were lawyers.

Finally, at the end of the transition period, Rwanda adopted a new constitution in 2003.[374] This constitution has entailed deep changes concerning organization, functioning and competence of the courts. As compared to the criminal justice system under the auspices or during the period of the constitution of 1962, 1978, and 1991, criminal justice under the period of the constitution of 2003 had a big starting point as regards the protection of the right to a public and fair hearing by an impartial and independent court. First of all, different laws relating to administration of justice have been published[375] and new courts were created as well. The High Court replaced the 4

[369] Ibid.
[370] Ibid.
[371] Ibid.
[372] Amendment of 13/8/2008 of the Constitution of the Republic of Rwanda of 4 June 2003.
[373] Republic of Rwanda, Report of the Judiciary of 2004-2011.
[374]The Constitution of the republic of Rwanda of 4 Jun 2003.
[375] Organic Law n° 02/2004 of 20/03/2004 determining the organization, powers and functioning of the Superior Council of the Judiciary; Organic Law n°07/2004 of 25/04/2004 determining the organisation, functioning and jurisdiction of courts; Law n° 13/2004 of 17/05/2004 relating to the Code of Criminal Procedure; Organic Law nº 01/2004 of 29/01/2004 establishing the organization, functioning and jurisdiction of the Supreme Court; Law nº 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure; Law nº 06 bis/2004 of 14/04/2004 on the Statutes for judges.

courts of appeal. At the lower level, "Tribunaux de Canton" were abolished and replaced by Primary Courts whose jurisdiction was extended to criminal offences. Last but not least, traditional mechanisms of dispute resolution, the "Abunzi" (Mediation Committee) were also introduced[376] with jurisdiction to handle petty cases, including criminal cases. In fact, the effect of law relating to mediation committee in as far as protecting and guaranteeing the rights to a fair trial in criminal justice system is concerned, was to take back the system to the traditions of pre-independence.

4.5 The Constitutional Evolution: Battle for the Integration of Fair Trial Rights

4.5.1 The Constitution of the Republic of Rwanda of 1962

Historically, as earlier discussed, after World War II, Rwanda was joined with Burundi to become a Belgian League of Nations mandate, under the name Ruanda-Urundi. This union was dissolved on 1st July 1962, when Burundi and Rwanda became separate and independent states. Rwanda then adopted its first constitution on 24th November, 1962. Indeed, part one of the Constitution of 1962 aimed at ensuring the protection of human rights in general, and Article 13 provided basically for the protection of fundamental freedoms in the following terms:

> *"The fundamental liberalities, as defined by the Universal Declaration for Human rights are guaranteed to every citizen. Their exercise can be regulated by laws and regulations."*[377]

The content of this article reveals that the Constitution recognized all fundamental liberties listed in the UDHR, including, effectively, those pertaining to the proper administration of justice and rights of the accused persons. However, their enjoyment was, in a certain sense, challenged by the limitation provided in that provision. In fact,

[376] Organic Law no 17/2004 of 20 June 2004 relating to mediation committees.
[377] Party one of the constitution of 24 November 1962 (Article 12-24).

article 13 (2) provided that the enjoyment of all human rights enshrined in the constitution could be regulated by Rwanda laws and regulations. Thus, as also noted by Gahamanyi, this limitation provided in the constitution is conducive to a lot of potential abuses, especially, from the executive authority.[378] Generally, the expectation of Rwandan people would be an adoption of a constitution where more safeguards would be guaranteed not only for the law abiding them, but also in the procedure of determination the guilty and the protection of the dignity of citizens.

The constitution of 1962 in article 15 provided for other procedural protections of the fair trial rights in criminal trials. It was ensured that the accused persons or individuals were not deprived of their personal liberty except in circumstances provided by the law.[379] It further provided that the punishments can be imposed only when they are provided under the written law.[380] Further and closely related to the right to defense, it is provided that the right to defense is absolute in all degree of procedures.[381] It is important to note that, it is during this period that the core International human rights instruments were ratified. These included the ICCPR and its optional Protocol, the ICESCR and the Convention on the Elimination of All forms of Racial Discrimination (CERD).[382]

[378] Gahamanyi, B.M. (2003). Building Constitutional Order in the aftermath of Genocide' in An Na'im, Human Rights Under African Constitutions: Realizing the Promise for Ourselves, University of Pennsylvania Press, pp.251-194, at 254.
[379] Constitution of Rwandan of 1962, paragraph 1.
[380] Ibid, paragraph 2.
[381] Ibid, Paragraph 4.
[382] Decree No 8/75 of 12 February 1975, published in the Official Gazette No 5 of 1 March 1975.

4.5.2 The Constitution of the Republic of Rwanda of 1978

The second constitution of Rwanda has been adopted in 1978. Its preamble shows that it has been adopted with purpose to upholding the rule of law and democracy. It stated as follow;

> *"Faithful to democratic principles and concerned about ensuring the protection of human rights and promoting respect for fundamental freedoms, in accordance with the Universal Declaration of Human Rights and the African Charter of Rights of Humans and People".*[383]

The constitution of 1978, in his second title named "Public liberalities", [384] organized limited rights relating to a fair trial. The article 12 provided safeguards relating to the right to life and physical integrity and the right to presumption of innocence to every person who is charged with a criminal offence.[385] As an essential aspect of the right to a fair trial, it is also stipulated that no person should be prosecuted, arrested, detained or sentenced for a criminal offense which is based on an omission or act which at the time where it occurred, did not constituted a criminal offense.[386] It also states that no offense may be punished with penalties which were not provided for by law before its commission.[387]It further provided for the publicity of the hearing[388] and the independence of the judiciary.[389] In addition to these protections, Article 14 of this constitution also provided other procedural protections to guarantee the right to defense. It is provided that the right to defense as an absolute right in all instances and at all stages of the procedure.[390] Although, the constitution provided that the judiciary

[383] Constitution of the republic of Rwanda of 1978.
[384] Constitution of the republic of Rwanda of 1978, Article 12 and 14.
[385] Ibid, Article 12.
[386] Ibid. Article 12, paragraph 2.
[387] Ibid. Article 12, paragraph 3.
[388] Ibid, Article 88.
[389] Ibid, Article 81 (1).
[390] Ibid, Article 14.

must be independent, some of its provisions contradict it, for instance, in the provision of article 81, the minister of justice is the member by right and president of the Republic[391] remained its president,[392] moreover, the issue of financial independence is totally absent. In *Gunes v Turkey*, the ECtHR pointed out that in order to establish whether a court could be considered independent, it must take into account the existing measures to guarantee the judiciary against external pressure, the appointment of its members and whether the court has an appearance of independence.

Under Constitution of 1978, the limitations of rights were restricted. They were determined only by the law but not by regulation. Nonetheless, the prevalent political environment was not favourable to the enjoyment of rights enshrined in these instruments.[393] Furthermore, many other rights of accused persons including impartiality of courts, fair hearing, legal representation, rights to appeals are not provided anywhere in this constitution. Although at least by this time, Rwanda had ratified the Universal declaration for Human Right and African Charter. However, even if Rwanda would not have ratified these international instruments, it shall without any conditions protect the fair trial rights as an obligation under customary international law

4.5.3 The Constitution of the Republic of Rwanda of 1991

The pressure from the elements of opposition's political parties constrained the regime to write a new constitution guaranteeing democracy and eliminating single party

[391] Ibid, Article 81 (3).
[392] Ibid, Article 81 (2).
[393] Ibid, (n 297), p.255.

system. This constitution has been adopted on 10th June 1991. It introduced a multiparty system in political milieu and allowed judges to elect their representatives in the high council of the judiciary.[394] However, what is striking is that despite the circumstances under which the constitution was written the international law regime relating to the right to a fair trial did not have the considerable changes. First, a provision from 1978 Constitution which provided that the High Council of the Judiciary was under the leadership of the President of the Republic was maintained;[395] second, other provisions relating to the rights to a fair trial, as discussed in the constitution of 1978, have been replicated as they are; third, the only article 44[396] could show the relationship between the international law and the domestic legal framework remained almost the same with article 44 of the previous constitution. Therefore, even if in the preamble of the Constitution of 1991, it is read in part that the Rwanda and people of Rwanda convinced of the imperative to realize effectively national unity, social justice, peace, and human rights respect based on freedom, fraternity and equality among all Rwandans",[397] the environment of the protection of accused persons remained the same as it was in the period of the previous constitution where the rights enshrined in it was insignificant and their enjoyment was in part not favourable.

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[394] Constitution of 1991, Article 87 (2).
[395] Ibid, Article 87 (3).
[396] Article 44, 6º of the constitution of 1991 provides that The President of the Republic shall negotiate, conclude, and ratify all international treaties, conventions, and agreements, whether of public or private law, and send them to the National Assembly as soon as allowed by the State's interest and security. However, peace treaties, alliance treaties, treaties that may bring modifications to the national territorial borders or affect sovereignty rights, treaties concerning the Republic's relations with one or several other States, as well as treaties, conventions, and agreements involving financial implications not anticipated in the budget, shall be enforceable only following approval by law. The federation of the Republic of Rwanda with one or several other democratic States must be approved by means of a referendum.
[397] Constitution of the Republic of Rwanda of 1991, para. 7 of the Preamble.

4.5.4 The Fundamental Law of the Republic of Rwanda of 5 May 1995

The Basic Act including the 1991 Constitution, the Arusha Peace Agreement between the RPF and the former Government of Rwanda, the RPF's Declaration relating to the establishment of Institutions of 17th July 2004 and the Protocol Agreement concluded by all the political parties except the *Mouvement Revolutionnaire National pour le Development (MRND)* on the establishment of national institutions.

Under the 1995, Fundamental Law of the Republic of Rwanda,[398] besides the other three international human rights instruments mentioned in 1978 Constitution, the UDHR and ACHPR which contain the rights relating to good administration of justice have been part of fundamental law that one could rely on within the country. However, the remaining question was the silence of the constitutions about their integrations in domestic legal order, their place in the hierarchy as well as their applicability. In sum, after the independence, the constitution of 1962 has opened the first constitutional step. This constitution stayed in force until the military coup d'état of 1973. A new constitution was adopted in 1978 as a way of legitimizing the *1973 coup d'état*. During the period between the two constitutions the authors of the coup d'état were ruling under decrees because the former constitution was abolished and the new one was not yet written and the Parliament was dismissed. The 1991 Constitution (C) came into being as a result of a strong pressure from inside and outside including the war launched by the Rwanda Patriotic Front (RPF).

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[398] See the Official Gazette of the Republic of Rwanda nº 11 of 1 June 1995. At 5 May 1995, the Transitional National Assembly adopted a Fundamental Law which composed by the constitution of 18 June 1991, provisions of the 1993 Arusha peace agreements, the Declaration of the Rwanda Patriotic Front of July 1994, and the declaration of November 1994 multiparty protocol of understanding between political parties.

Before the current Constitution of 2003, the Transitional National Assembly had adopted on 5th May 1995 a Fundamental Law which governed the transitional period of 9 years. However, those constitutional reforms did not bring a big change in terms of protection of accused persons in breach with criminal acts. In this connection, the right to impartial court, independent court, fair hearings, right to appeal, right to the representation of a legal counsel, safeguards of accused persons among many others remained not protected. Now, the evolution of incorporation of fair trial rights in different constitutions has been examined and it shows that the situation was not satisfactory; it is now time to start analysing the current structure of Rwandan judicial system and the criminal courts proceedings.

4.6 The Current Structure of Rwandan Judicial System

4.6.1 Introduction

The Constitution of the Republic of Rwanda states that justice is rendered in the name of the people and no body may be a judge in his or her own cause.[399] It further proclaims that the judicial authority of Rwanda is vested in the judiciary, which is composed of the ordinary and specialized courts.[400] Article 153 (5) provides that subject to the provisions of the Constitution, Parliament may make the law on the functioning and jurisdiction of the courts. Pursuant to this provision, Parliament enacted the law Nº012/2018 determining the organization and functioning of the Judiciary, and law N°30/2018 of 02/06/2018 determining the jurisdiction of courts as the major legal framework governing the judiciary and operation of courts of justice

[399] Constitution of the republic of Rwanda of 2003 revised in 2015, Article 151 (1).
[400] Constitution of the republic of Rwanda of 2003 revised in 2015, Article 148.

of Rwanda. From the structural point of view, ordinary courts consist of Supreme Court, Court of Appeal, High Court, Intermediate Courts and Primary Court.

4.6.2 The Primary Courts

Article 152 of the constitution of the republic of Rwanda of 2003 as revised in 2015 establishes a Primary court as the lowest court. There are 41 primary courts throughout the country.[401] Each Court comprises of at least two judges (one of whom is a President), Chief Registrar, registrars and other support staff according to need.[402] All the above staffs are appointed by the High Council of the Judiciary[403] after exam except the president and chief registrar who are assigned by the president of the Supreme Court, after consultation with the high council of the judiciary.[404] It may be argued that that this aspect of appointment without exam is one of the issues that put the impartiality and independence of Rwanda's criminal court into question. The quorum of a Primary court is a single judge assisted by a registrar.[405]

By virtue of their jurisdiction, the Primary Courts is restricted to original jurisdiction in criminal. It may try all offences punishable to a term of imprisonment not exceeding five (5) years.[406] It has also jurisdiction over some crimes of genocide against Tutsi and crimes against humanity committed in Rwanda between 1st October 1990 and 31st December 1994,[407] namely acts of torture;[408] homicide;[409] acts of rape or

[401] Annex I to law n°30/2018 of 02/06/2018 determining the jurisdiction of courts.
[402] Law Nº012/2018 of 04/04/2018 determining the organization and functioning of the Judiciary, Article 62, para 1.
[403] Law N°10/2013 of 08/03/2013 governing the Statutes of Judges and judicial personnel, Article 13.
[404] Decree of the president of the Supreme Court nº 048/2012 of the 24/04/2012 laying down the procedures for the recruitment, placement and appointment of judges and clerks, Article 3 and 27.
[405] Law Nº012/2018 of 04/04/2018 determining the organization and functioning of the Judiciary, Article 62, para.2.
[406] Law n°30/2018 of 02/06/2018 determining the jurisdiction of courts, article 26 (1).
[407] Ibid, article 26 (2).

genital mutilation;[410] degrading acts on a dead body;[411] serious harms to persons having resulted in death;[412] acts that cause injuries or a serious harm to persons, with intent to inflict death, even if the purpose of inflicting death is not accomplished;[413] any other criminal acts against persons without any intent to inflict death;[414] and other crimes committed by any person who was in the administrative organs at the commune level or sub-prefecture, in political organizations, in the communal police or in any militia and who committed or incited other citizen to commit such crimes with her accomplices;[415] It further hears the review of cases tried by Gacaca courts[416] and hear exclusively all applications for provisional detention and release at first instance.[417] Furthermore, except in case of the criminal cases related to the review of Gacaca court cases, a party to the criminal proceedings of a Primary court who is not satisfied with its decision has the right to appeal to an intermediate court.[418]

From the above analysis, it, therefore, means that primary courts have jurisdiction to determine and hear all offences and have the power to pass any sentence of imprisonment of less than five years and in case of offence related to genocide, they have power to pass life imprisonment sentence. It is therefore clear that the right to a fair trial applies to the Primary Court as well; moreover, its observance is of paramount importance.

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[408] Ibid, article 26 (2) a.
[409] Ibid, article 26 (2) b.
[410] Ibid, article 26 (2) c.
[411] Ibid, article 26 (2) d.
[412] Ibid, article 26 (2) e.
[413] Ibid, article 26 (2) f.
[414] Ibid, article 26 (2) g.
[415] Ibid, article 26 (2) h.
[416] Ibid, article 26 (3).
[417] Ibid, Article 26, para 2
[418] Ibid, Article 30.

4.6.3 The Intermediate Courts

Rwanda's criminal justice structure also consists of Intermediate Court.[419] There are 12 intermediate courts in the country.[420] Each Intermediate Court has three specialized chambers including the chamber of minors and family,[421] the chamber of administrative and the labour cases,[422] and the chamber for economic crimes.[423] Intermediate courts consist of the President as the chairperson seconded by the vice president, and at least seven judges, chief registrar and registrars appointed by the High Council of the judiciary, and other support staff as deemed necessary.[424] As it is primary court, the managerial posts in intermediate court are not subject to exam. Each Intermediate Court sits with a single judge, assisted by a registrar. However, the President of the court may assign three (3) or more judges depending on the assessment of complexity and importance of a case.[425]

The Intermediate Courts have both original and appellate jurisdictions in criminal matters. Original criminal jurisdiction of the Intermediate Courts relates to offences whose sentence is a term of imprisonment exceeding five (5) years,[426] and some crimes of genocide against the Tutsi and other crimes against humanity committed by the category of masterminds, planners, instigators, supervisors and leaders of genocide or other crimes against humanity with his/her accomplices;[427] and a person who was at

[419] Constitution of the republic of Rwanda, Article 152.
[420] Annex II to law n°30/2018 of 02/06/2018 determining the jurisdiction of courts.
[421] Law n°30/2018 of 02/06/2018 determining the jurisdiction of courts, article 33.
[422] Ibid, Article 35 - 37.
[423] Ibid, Article 38.
[424] Law Nº012/2018 of 04/04/2018 determining the organization and functioning of the Judiciary, Article 64.
[425] Law n°30/2018 of 02/06/2018 determining the jurisdiction of courts, article 29.
[426] Ibid, Article 26.
[427] Ibid, Article 29 (2) a.

that time in the administrative organs at the national or prefectural level and his/her accomplices.[428] The Court further hears criminal cases and appeals against decisions of Primary Courts located within their territorial jurisdiction.[429] All decisions of Intermediate courts, except cases related to the provisional detention of accused persons, are appealable in High Court.[430]With respect to the important issue of whether or not the right to a fair trial applies to the intermediate courts, these courts, like the primary courts, have unlimited jurisdiction under the law of jurisdiction of the courts in case of provisional detention of an accused person in appeal level. Likewise, they have jurisdiction to hear and decide all offences provided for under the Rwandan penal code, in original or in appeal, except offences of high treason, offences against State security and terrorism, which are in the jurisdiction of High Court. They may also impose any criminal penalty under the Penal Code, a term of imprisonment of five years or more including a life sentence. From this point of view, therefore, the right to a fair trial also applies in Intermediate court.

4.6.4 The High Court

Rwanda's criminal justice structure also includes the High Court. It comprises of a President and Vice President[431] who have a term of 5 years renewable once,[432] and at least 30 judges, registrars and other necessary support staff;[433] Except President, and

[428] Ibid, Article 29 (2) c.
[429] Ibid, Article 30.
[430] Law Nº012/2018 of 04/04/2018 determining the organization and functioning of the Judiciary Article 60. Para1.
[431] Law Nº012/2018 of 04/04/2018 determining the organization and functioning of the Judiciary Article 60. Para1.
[432] Law N°10/2013 of 08/03/2013 governing the Statutes of Judges and judicial personnel, Article 27.
[433] Law Nº012/2018 of 04/04/2018 determining the organization and functioning of the Judiciary, Article 60.

vice president who are appointed by the president of the Republic,[434] and supporting staff who are governed by general statutes of public servants,[435] all other members of the High court are appointed by the High Council of the Judiciary.[436]It covers the entire territory of the Republic of Rwanda. The High Court has four chambers seating in Nyanza, Musanze, Rusizi and Rwamagana and has its seat in Kigali City.[437] The High Court has both original and appellate jurisdictions. Criminal cases which may be heard on first instance include offences committed by civilians except minors, offences related to high treason,[438] threats to national security,[439] terrorism, war crimes, international crimes, and crimes of genocide and crimes against humanity other than those committed between 1st October 1990 and 31st December 1994.[440] Its appellate jurisdiction contains all appeals referred to it from decisions of Intermediate courts.[441] The decisions of High Court rendered at first instance as well as those rendered in first appeal could be appealable in Court of Appeal.[442]As the Intermediate court, the High Court also has original and appeal jurisdiction. When found guilt, it can sentence life imprisonment to the accused person according to the offence committed. For those reasons, the fair trial rights also applies to it and may protect the accused persons to the power of other branch of powers, and the respect of its procedural safeguards.

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[434] Law N°10/2013 of 08/03/2013 governing the Statutes of Judges and judicial personnel, Article 17 para3.
[435] Ibid, Article 10 para2.
[436] Ibid, Article 15 para3.
[437] Law Nº012/2018 of 04/04/2018 determining the organization and functioning of the Judiciary, Article 59.
[438] Law n°30/2018 of 02/06/2018 determining the jurisdiction of courts, Article 39 (1).
[439] Ibid, Article 39 (2).
[440] Ibid, Article 42.
[441] Ibid, Article 40, 41.
[442] Ibid, Article 52.

4.6.5 The Court of Appeal

The Court of appeal has been established by the organic law Nº002/2018.OL.[443] The Court of Appeal comprises of its President,[444] Vice President and at least eleven (11) judges,[445] Chief Registrar, Registrars[446] and other necessary support staff members in various duties of the court provided by the law.[447]All Judges of the Court of Appeal are appointed by the President of the Republic after approval by the Senate. The court of Appeal hears and determines all appeals referred to it from decisions of the High Court and the Military High Court.[448] Cases tried by the Court of Appeal are not appealable.[449] The quorum of the court of Appeal, as well as that of Primary and Intermediate court is a single judge,[450] but the President of the Court may determine the other appropriate number of the sitting judges depending on the importance of the case.[451]

In all the same, the sitting of single judge in a judgement, which is not subject to appeal, may not be preferable in criminal matters due to the high penalties including the life imprisonment, which can be pronounced by the court of appeal at last instance. The collegiality is more preferable, by that way, it can be as pointed out by Solus a guarantee of justice enlightened, independent and impartial, and indispensable guarantee of objectivity.[452] It, therefore, offers one solid option for achieving the fair

[443] Organic Law Nº002/2018.OL of 04/04/2018 establishing the Court of Appeal.
[444] Law Nº012/2018 of 04/04/2018 determining the organization and functioning of the Judiciary, Article 11.
[445] Ibid.
[446] Ibid.
[447] Ibid.
[448]Law N°30/2018 of 02/06/2018 determining the jurisdiction of courts, Article 52.
[449] Ibid.
[450] Judicial power law Article 56
[451] Ibid.
[452] SOLUS H. et PERROT R., Droit judiciaire privé, introduction aux notions fondamentales, organisation judiciaire. Cited by ROETS, D. (1997). *Impartialité et justice pénale*, Paris, Cujas, p.174.

and impartial administration of justice.[453] The observation of the right to a fair trial in a court whose decisions are not subject to any appeal is of paramount importance. In this respect, fair trial rights certainly also applies to the Court of Appeal.

4.6.6 The Supreme Court

The Supreme Court of Rwanda has been established in the constitution of Rwanda of 2003 in its article 152. According to the law determining the organization and functioning of the Judiciary, the Supreme Court is the highest court in the Country.[454] And its decisions are neither appealable nor revocable except in case of presidential pardon or review of its decision on own motion in the interest of the law.[455] Furthermore, the constitution confers the Supreme Court the task of coordinating and overseeing activities of courts, while ensuring judicial independence.[456]It is headed by a President assisted by a Vice- President and five (5) judges. All these members of the Supreme Court are appointed by the president of the Republic on the advice of the High council of the judiciary.[457]

Its jurisdiction covers the entire national territory.[458] It further includes court registrars and other civil servants assigned to Court services.[459] Cases at the Supreme Court are

[453] Lefever R.D. (2009). The Integration of Judicial Independence and Judicial Administration: The Role of Collegiality in Court Governance. Williamsburg-USA. *The Court Manager*. 24 (2), p.5.
[454] Law Nº012/2018 of 04/04/2018 determining the organization and functioning of the Judiciary, Article 50.
[455] Ibid.
[456] Constitution of the republic of Rwanda of 2003 as revised in 2015. Article 154.
[457] Law N°10/2013 of 08/03/2013 governing the Statutes of Judges and judicial personnel, Article 20
[458]Law Nº012/2018 of 04/04/2018 determining the organization and functioning of the Judiciary, Article 51.
[459] Ibid, Article 52.

normally presided over by three judges, assisted by a registrar.[460] However, depending on the importance of the case being tried, the number of judges presiding may be more than 3 or 5. Moreover, on the administrative level, the president of the Supreme Court is responsible for the administration, functioning and discipline of the personnel of Court. The president of the Supreme Court is also responsible for the general smooth functioning of other ordinary courts. In criminal matters, the Supreme Court has exclusive jurisdiction to try in criminal cases, in the first and last instances, the President of the Republic, the Speaker of the Chamber of Deputies, the President of the Senate, the President of the Supreme Court and the Prime Minister, and their co-offenders or accomplices.[461]It is clear that, like all the other courts mentioned above, the right to a fair trial also applies to the Supreme Court. In any case, it is true that there is no best structure or organization of the courts which can only guarantee the real protection of rights to a fair trial to the accused person. Thus an overview of the structure of Rwanda's criminal justice system can be incomplete without highlighting the procedure of institution of criminal cases. Therefore, the next section explores the operation of criminal court proceedings.

4.7 The Criminal Court System in Rwandan Law

The actual criminal court hearing is governed by the law on criminal procedure entitled "Law Nº 30/2013 of 24/5/2013 relating to the code of criminal procedure."[462] According to this law, in Rwandan criminal proceedings, the parties are the

[460] Ibid, Article 52 para 2.
[461] Law Nº012/2018 of 04/04/2018 determining the organization and functioning of the Judiciary, Article 66.
[462] Official Gazette nº 27 of 08/07/2013.

prosecutor[463] who is public servants of the State and the accused person. The purpose of the criminal court proceedings is to protect the innocent persons, to punish the offenders, co-offenders and accomplices.[464] The foundation of Rwandan criminal procedure is stated in article 85 which establishes that every accused is presumed innocent until proven guilty. It means that in the whole process of criminal proceedings, the accused must be treated as innocent. The major focus in this section is the proceedings of criminal court starting on seizing of criminal court to the final court adjudication.

4.7.1 Preparation of the Cases by the Parties in Criminal Matters

In principle, when the investigation is completed, the prosecution seizes the court by transmitting a complete criminal case file to the competent court;[465] the defendant will be summoned [466] to appear at the main hearing in order to respond to the presented charge. In practice, when a case file is ready for hearing, parties shall immediately be summoned by the court registrar to appear for a hearing. According to the criminal procedure, the summonses state the offense committed, the law that punishes it, the court seizes the action, the date and time of the hearing and the place. The summonses also states whether the accused must appear in person or be represented or assisted.[467] Contrary to civil proceedings, where summons may be accompanied by the submission of the plaintiff; in criminal matters, the accused or his counsel shall come

[463] Law Nº 30/2013 of 24/5/2013 relating to the code of criminal procedure, Article 3
[464] Ibid, Article 1.
[465] Code of Criminal Procedure, Article 124.
[466] Law nº 30/2013 of 24/5/2013 relating to the code of criminal procedure, Article 127.
[467] Code of criminal procedure, According to article 151.

to court in order to read his case file or to prepare the defense.[468] The Public prosecutor does not communicate to the accused the proof or indictment. This practice may endanger the rights of accused persons. The mutual communication of the proofs to the parties could help in the preparation of defense of the accused.

4.7.2 The Criminal Court Hearing Procedure

In criminal matters, it is a general principle that an accused appears in person in court assisted or not by a legal counsel and the judge has the duty to control and preside over the court hearings. The criminal procedure provided that the accused may appear through his legal counsel, only in case of a petty offence, if he gives serious reasons preventing his personal appearance; in other case, an accused must appear in person in court, assisted by an advocate or his legal counsel.[469] The Code of Criminal Procedure set out the modalities for conducting criminal hearings in its article 153. First all, the court registrar verifies the preliminary arrangement in court hearing in order to confirm that the accused person is the real person being charged with crime.[470]

He calls the roll of parties to the proceedings and reads out particulars of the accused and the offence alleged against him/her.[471] The court trial or judge asks the accused whether he/she pleads guilty or not guilty; [472] after, it asks to the Public Prosecution to present evidence proving the guilt of the accused.[473] Without any kind of assessment whether the guilt of accused has been established, the court trial asks the accused to

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[468] Declaration in interviews with Courts registrars of Intermediate Court of Musanze, Rubavu, Karongi, Rusizi, Nyamagabe, Huye and Muhanga (March-August 2015), Prosecutors at Intermediate Court level of Rubavu, Musanze, Karongi and Muhanga. Declaration of prisoners (15/09/2015).
[469] Law nº 30/2013 of 24/5/2013 relating to the code of criminal procedure, Article 147.
[470] Ibid, Article 153, 1.
[471] Code of Criminal Procedure, Articles 153.
[472] Ibid.
[473] Ibid.

present his or her defense and explains the circumstances in which he committed the offence if he pleads guilty.[474]

Generally, in criminal matters, judge or court trial remains active. In this phase, he examines the parties to the proceedings, prosecution or defense witnesses, or parties question witnesses or directly cross-examine and contested points of evidence are debated and the court decides thereon; if the court finds it necessary, consider the evidence that may help determine the truth;[475] after that the public prosecutor presents the unfolding of the alleged facts, with the evidence to the support and the punishment requested against him;[476] the court gives the last opportunity to the he accused person to be heard; if necessary, the accused verifies the conformity of the minute of hearing taken by the clerk before it is signed; the court closes the hearing and informs the parties present of the date and time at which the judgment will be pronounced.[477] More importantly, a judge or court trial has the power to order to the prosecution and accused to produce, if any, evidence which it deems conclusive.[478] He may also, during the hearing, itself collect pieces of evidence, which has not been collected by the Prosecutor, the accused or their representatives, and the plaintiff.[479]

However, as explained in *Prosecution v. Gasasira,*[480] he shall not have the obligation of the prosecution authority of collecting pieces of evidence, but during hearing the court, based on his personal conviction, with intention to verify existing pieces of

[474] Ibid.
[475] Ibid.
[476] Ibid.
[477] Ibid.
[478] Ibid, Article 87.
[479] Ibid.
[480] *Prosecution v. Gasasira,* Case No RPA 0538/09/TGI/NYGE, the Intermediate court of Nyarugenge, judgment of 23 April 04/2010, para 61.

evidence already produced by the prosecution or accused person, he may consider himself to collect pieces of evidence which have not been collected by the parties as taking the decision to visit the scene of crimes or doing a field visit, order the apparition of testimonies, producing or doing expertise, forensic evidence,…

The stage of proceedings in court hearing is very crucial in criminal proceedings. Therefore, the rights of accused persons have to be observed in every step of the court criminal proceedings as well as in the whole criminal court process. The equality before the law, equality of arms, cross-examination of witnesses, the equal opportunities in presentation before the court hearing, assisting by advocate, etc., equality between the prosecutor and the accused persons must be protected by the law and observed in criminal court proceeding as well as in preparation of the case. More importantly, on one view, theories of procedural fairness might apply as well as the guarantees of public hearing. In other words, in the context of court proceedings the dignity, independence and impartiality may play a great role in protecting the accused persons; thus, on a serious matter, an individual will have the opportunity to put his or her case and to make sure that the case will be treated, as being put in good faith.

4.7.3 The Judging and Sentencing Phases

Normally, the principal duties of a judge are to adjudicate a case. When the hearing is closed, the case passes to the deliberation stage and the final verdict is read to the accused in court once a decision has been reached.[481] A judge or court trail assesses the pieces of evidence presented and interprets the law; in this case, judges must

[481] Law nº 30/2013 of 24/5/2013 relating to the code of criminal procedure, Article 153, 12.

respect the relevant rule of law,[482] be bound by the law and decide cases according to the evidence.[483] Therefore, it is important to sustain the balance between an individual fundamental rights and efficient fight against crimes, which includes the right to a reasonable trial, equal assessment of piece of evidences presented by the prosecution authority and the accused person or his legal counsel. Indeed, in the criminal matter, evidence must be based on all facts and legal considerations provided that the parties have the opportunity to present contradictory arguments.[484] The court decides on its absolute freedom to act on the admissibility and veracity of exculpatory or not the incriminating evidence.[485] In assessing evidence, decisions regarding their admissibility are left entirely to the discretion of the judge, who determines both the admissibility and the weight of the evidence presented.[486] The criminal judge may adjudicate a criminal case on the basis of law only, in absence of rules he would never adjudicate according to the rules that he would establish if he had to act as legislator, not relying on precedents, customs, general principles of law and doctrine. In case of obscurity or insufficiency of the law, the Rwandan penal code provided that the criminal laws must be construed strictly and judges are not allowed to pronounce sentences by analogy.[487]

It therefore, states that an accused person shall not be punished for an omission or act that would not constitute an offense in the commission under international or national

[482] Law No 22/2018 of 29/04/2018 relating to the civil, commercial, labor and administrative procedure, Article 6.
[483] Law N° 15/2004 of 12/06/2004 relating to evidence and its production, Article 4.
[484] 2004 Evidence Act, Article 119.
[485] Law nº 30/2013 of 24/5/2013 relating to the code of criminal procedure, Article 86; Law N° 15/2004 of 12/06/2004 relating to evidence and its production, Article 119.
[486] Murray, J. (2010). Assessing Allegations: Judicial Evaluation of Testimonial Evidence in International Tribunals, *Chicago Journal of International Law.* 10 (2): 769-797, at p.792.
[487] Organic Law N° 01/2012/OL of 02/05/2012 instituting the penal code, Article 4.

law and not be penalized for a heavier penalty than that which was provided for by law.[488] Moreover, the judge decides whether or not they are certain that the accused persons are guilty beyond all reasonable doubt. For this reason, in adjudicating, when judge doubts on the efficacy of pieces of evidences, the accused must benefit of that doubt. The criminal procedure provides that_if the proceedings are conducted as thoroughly as possible, and the judges do not find reliable evidence establishing beyond reasonable doubt that the accused committed the offense, they order his acquittal.[489] It is also provided that the judgment must be in writing and delivered within one (1) month of the closing of the hearing.[490] A part from that, disciplinary action is taken against the judge or judges who heard the case.[491] It is important to note that the stage of judging and sentencing are more important in the adjudication of criminal cases, for the reason that a biased, partial and non-independent judge may not render a fair trial. This sometimes could cause innocent persons to spend time in prison, in refuge or be deprived of his or her civil rights. The effective observation of standards of fair trial rights of accused persons in this phase is therefore, essential and important. The impartiality and independence of judges and fair proceedings are the rights for accused persons and for citizens in general. For achieving this goal, the judges must be independent from external and internal influences and they must be seen to be working freely by the Public and the accused persons. In addressing the challenges which can undermine the stage of judging and sentencing as well as other criminal court proceedings stages, an effective criminal justice system is necessary, in order to uphold principles of fair trial under Rwandan domestic law.

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[488] Ibid, Article 3 para 2**.**
[489] Law nº 30/2013 of 24/5/2013 relating to the code of criminal procedure, 165.
[490] Ibid, Article 161.
[491] Ibid.

4.8 Conclusion

In this Chapter, we undertook to explore the foundations and historical evolution of the Rwandan criminal justice system, in particular with regard to the right to a fair trial, more specifically, the right to a fair and public hearing by an independent and impartial court. From this analysis, we have clearly seen that the origins of the Rwandan criminal justice system were Belgium.

As a colony, all early legal frameworks of the Rwandan criminal justice legal frameworks have been adopted by the Belgium Parliament. As it was the case with many countries, these criminal laws at the time, were less concerned with issues of justice. The history of Rwandan judicial system may be divided into three epochs: the pre-colonial, colonial and post-independence epochs. First, during pre-colonial period, all powers, namely executive, legislative and judicial powers were wielded by the King of Rwanda who was the supreme judge and the appellate judge by excellence for all cases decided by Heads of family and their representatives.

The punishments were purely based on custom. There were no judicial police; everyone was supposed to play the judicial police role in his case by collecting physical evidence and testimonies. Second, during colonial epoch, all Rwanda's initial criminal justice legal frameworks were passed by the Belgium Parliament, the King of Belgium (decrees) and in emergency situations, by the Governor-General (legislative orders). These judicial laws were less concerned with issue of the protection of right of accused persons to a fair trial. The right to a fair trial as it is understood in modern administration of justice was largely nonexistent in Rwanda's criminal justice. Written law applied only to those of European origin, whereas customary law continued to

apply to native Rwandans. Third, in post-independence, Rwanda's criminal justice began to improve with regard to the guarantee of the right to a fair trial. During this period, the core International human rights instruments related to the right to a fair trial, namely, UDHR, ICCPR among others, were ratified.

However, the acknowledgment and domestication of fair trial standards in Rwandan national legal system were a big problem; another thing, despite that an insignificant number of those standards have been incorporated in Rwanda's criminal legal system, their enjoyment was challenged by the limitation provisions. For instance, it is provided that the enjoyment of all human rights enshrined in the constitution of 1962 (as well as in the constitution of 1978) could be regulated by Rwanda laws.

An overview of the current structure of Rwanda's criminal justice system reveals that the Supreme Court is the highest criminal court. It is supplemented by the Court of Appeal recently introduced in Rwanda criminal court system. The other courts are High court, Intermediate court, and Primary Court. It has also been established that the Rwandan criminal legal regime is inquisitorial. Importantly, it is clear to note that the stage of judging and sentencing are more important in the adjudication of criminal cases, for the reason that a biased, partial and non- independent judge may not render a fair trial. How the standards of fair trial are enshrined and domesticated in Rwandan positive law? This is the major question that we now proceed to address in the following chapter.

CHAPTER FIVE

RIGHT TO A FAIR TRIAL IN RWANDAN LAW

5.1 Introduction

Principles governing fair trial rights of the accused are "*standard operating procedures*" in both regimes developed by both civil law and common law. In terms of any proceedings, these standards are fundamental rights of the defendant that must be respected at all times during investigations and subsequent trials including the post-trial stages. This chapter provides the right of a fair trial as provided in Rwandan law. Hence, main legislations, which are closely related to the fair trial rights and criminal court proceedings, are to be analyzed, namely, the constitution of the Republic of Rwanda, the code of criminal procedure, law governing the statutes of judges and law related to the civil, labor, commercial and administrative procedure, the general law of the procedure.

5.2 Fair Trial Right in Current Constitution of Rwanda of 2003 as Revised in 2015

The constitution of Rwanda of 2003 as revised in 2015 like many constitutional frameworks in other countries contains an extensive Bill of Rights. The Bill of Rights in Rwanda's constitution is contained in Chapter four which deals with the freedoms and human rights. It is provided that a human being is sacred and inviolable.[492] This means that individual rights of human being are not favors granted by the States or anyone but are entitlements of the person by the fact that she is created as such. The

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

constitution states also that a human being must be respected, protected and defended by the State.[493] The right to a fair trial is one of the non-derogable fundamental rights under the constitution. In fact, the current constitution provides provisions related to the fairness of criminal proceedings. Article 29,[494] titled "right to due process of law", is the operative segment establishing guarantees for people accused of criminal offenses during the court trial.

It is emphatically stated, in this provision, that every person has the right to appear before a competent Court.[495] It provides the presumption of innocence to everyone charged with a criminal offense until proved guilty or until that person pleads guilty before a competent court, the right to legal representation and defense, and be informed of the cause and nature of charges.[496] It also provides that everyone must not be prosecuted, arrested, detained, or punished for omissions or acts that did not constitute a crime under international law or domestic from the time they were committed.[497]

Generally, offenses and their penalties are determined by law. In this context, the Constitution requires that a person should not be responsible for an offense he or she did not commit.[498] As a critical aspect of the right to a fair trial, a person must not be punished for an offense of a severer sentence than the one provided for by the law at

[493] Ibid.
[494] Article 29 of the constitution of 2003 revised in 2015.
[495] Ibid, Article 29, 3.
[496] Ibid, Article 29, 1.
[497] Ibid.
[498] Ibid, Article 29, 5.

the time the offense was committed.[499] Accordingly, a person should not be imprisoned simply for failure to fulfill a contractual obligation;[500] and should not be subject to prosecution or punishment for a crime that has been prescribed.[501]

Additionally, the Constitution also provides provisions related to the impartiality of court and judges. The constitution provides that the justice is done in the name of the people and that no one can judge his own cause.[502] The constitution also provides in its provisions the right to a public hearing. Article 151 (2) provides that court hearings have to be held in public, except, in circumstances provided for by law, when the camera has been ordered by the court.[503] Consequently, court rulings are binding on all parties in the case, whether individuals or public authorities, and can only be challenged through procedures provided for by law.[504]

Moreover, the constitution provides for the court's independence. It provides that the Judiciary is distinct and independent from the executive and legislative branches of state's administration. It enjoys administrative and financial autonomy.[505] Importantly, the incorporation of the international standards related to the fair trial rights may demonstrate the high degree of their consideration and its great value in a legal system; considering that, first, although the constitutions can be revised or amended, the process of its amendments is extremely complex than for normal laws. In Rwanda, the President of the Republic has the power to initiate revision or amendment of the

[499] Ibid, Article 29, 6.
[500] Ibid, Article 29, 7.
[501] Ibid, Article 29, 8.
[502] Ibid, Article 151.
[503] Ibid. Article 151, 2.
[504] Ibid. Article 151, 4.
[505] Constitution of the republic of Rwanda of 2003 revised in 2015, Article 150.

Constitution after approval by two thirds (2/3) of each Chamber of Parliament;[506] moreover the amendment or revision of the Constitution must be accepted after being voted by each House of Parliament by a three-quarters (3/4) majority of its members.[507] Second, the recognition of those safeguards of accused persons at constitutional level ensures that all branches of government, authorities and persons throughout the country, including criminal courts are bound by those rights in their actions, and that legislation must be consistent with them and must respect these rights due to the hierarchal supremacy of the constitution.

Although the constitution guarantees the right to fairness in criminal proceedings, unfortunately some citizen guarantees to the fairness of the criminal court proceedings are not provided in constitution and others are not well expressed. The right to appeal, which is important feature of the modern criminal process, is not provided in the constitution.[508] The right to appeal enables aggrieved party another chance for his case to be heard by another independent judge or judges. Additionally, the right to be compensated for wrongful conviction, right to be tried within a reasonable time, right to the protection against self-incrimination and equality of arms are not provided for anywhere in the current constitution. Likewise, the right to be tried by and an independent court and judge are not well expressed in the constitution.[509] Consequently, the non-incorporation of fair trial standards in the constitution is a great disrespect of the international human rights obligations of State as far as ensuring fair

[506] Ibid, Article 175, paragraph 1.
[507] Ibid, Article 175, paragraph 2
[508] Marchall, P.D, *comparative analysis of the rights to appeal,* Duke Journal of Comparative and International Law, 2011, Vol.22, No.1, at p.1.
[509] Consitution of Republic of Rwanda of 2003 revised in 2015, Article 151 (5).

trial rights are concerned. Moreover, the constitution fails to guarantee in somehow the right to be tried by an impartial and independent court. In this context, the principle of judicial irremovability of judges has been removed in the constitution of 2003.

Normally, the judicial irremovability is considered by international law as one of the main pillars guaranteeing the court's independence,[510] it guarantees the independence of the court because it protects the judges against any arbitrary measurement of suspension, retro gradation, displacement, even in advance and revocation without having freely consented thereto. It is in this regard that Favoreu clearly pointed out that "the judge, not only cannot be revoked, suspended or retired from office without guarantees provided by statute but still it may receive without his consent, a new appointment".[511]

Thus, the judges seem to benefit in this regard of a special guarantee, except in the context of disciplinary proceedings. Unfortunately, in Rwanda, the principle of irremovability has been thwarted by the constitutional revision nº 04 of 17 June 2010.[512] In fact, the article 142 of constitution of 2003 provided that the judges appointed definitively is irremovable, cannot be suspended, transferred, even in progress, retired or dismissed from their functions except in the cases provided for by

[510] UN Human rights Council, 11th session, promotion and protection of all human rights, civil, political, economic, social and development. A/HRC/11/41 of 24 March 2009, para 57.
[511] Favoreu, L, *Droit constitutional*, Dalloz, Précis, Paris, 11e édition, 2008, at p. 523; Manson, S, *La notion d'indépendance en droit administratif*, PhD Thèses, Université de Paris, France, 2008, at p. 378; Pluen, O, *L'inamovibilité des magistrats : un modèle* ? Ph.D. Thèses, Université Panthéon-Assas, France, 2011.
[512] Amendment nº 04 of the 17 June 2010 of the Constitution of Rwanda. In Official Gazette of the Republic of Rwanda nº special of 17 June 2010. Article 31.

law. In the revision of the constitution of 2010, the content of this article has been deleted. Despite other different amendments of Rwandan constitution, no such express provision has been re-inserted in it. Importantly, in contrast to the ordinary official, a judge cannot be the subject of automatic transfer.

As also noted by Mitrofan, a judge should not be transferred to another judicial function without having expressly consented to it,[513] except in cases of reform of the organization of the justice system or disciplinary sanctions.[514] This privilege is not in the own interests of judges but in the interests of the rule of law and protection of individual rights. Consequently, the transfers of judges made by Rwandan HCJ without any known criteria and without the consent of concerned judges have to be challenged because they undermine the independence of judges.

The present observation remains a serious handicap to the freedom of judges, during the decision-making process for fear of not being muted or moved without their agreement. In this respect, the grounds for transfer of judges could be clearly and legally established and be decided in transparent proceedings, without any external influences and whose decisions can be appealed in other instance provided by law. More importantly, even those guarantees of the right to a fair trial protected in the ICCPR and the African Charter are not explicitly provided for or covered in Article 29 of the constitution and are protected by virtue of Articles 168 of the Constitution. The article 168 provides that,

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[513] Mitrofan, F, *The Independence of Judge - a guarantee of the rule-of-law state*, Journal of Law and Administrative Sciences, 2015, Special Issue/2015, pp.94-102, at p.96.

[514]Recommendation no 52, Council of Europe, Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency, and responsibilities. (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies).

> *"Upon publication in the Official Gazette, international treaties and agreements which have been duly ratified or approved have the force of law as national legislation in accordance with the hierarchy of laws provided for under the first paragraph of Article 95 of this Constitution. (Article 95 paragraph 1 : The hierarchy of laws is as follow: 1° Constitution; 2° organic law; 3° international treaties and agreements ratified by Rwanda; 4° ordinary law; 5° orders.)".*[515]

To this extent, the Rwandan criminal courts may cite and apply the international human rights law related to a fair trial, namely for instance, ICCPR, ACHPR, this position has also elucidated in *Akagera Business Group v State of Rwanda.*[516] In this case, the Supreme Court has made reference and considered the international principles and decisions of United Nations human rights committee (UNHRC) in interpreting the right to equality of arms which was not expressed anywhere in the Rwandan constitution.

The Supreme Court held that equality of arms before the court is considered as part or portion of the right to equal treatment before courts as provided for by article 14 of international covenant on civil and political rights which must be respected and observed as part of the constitution of Rwanda. From the foregoing, it can safely be concluded that at least in general, Rwanda's constitution has not sufficiently incorporated the guarantees of the right to a fair trial as understood in international legal frameworks. The guarantees of the right to a fair trial in the ICCPR and the African Charter are therefore, part of Rwanda's domestic law and are binding on all persons and authorities in Rwanda in accordance with articles 168 of the Constitution.

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[515] Article 168 of the Constitution of 2003 revised in 2015.
[516] *Akagera Business Group v State of Rwanda*, Case no RS/SPEC/0001/16/CS of 23 September 2016, Supreme Court, (*Unreported*).

5.3 Code of Criminal Procedure

The law relating to criminal procedure sets rules for the fair trial process and above all protects the rights of the accused during the criminal court proceedings. Rwandan Code of Criminal Procedure has been published in 2013.[517] The objective of the Criminal Procedure code is to govern investigation and prosecution acts constituting a violation of the penal law.[518] The penal code devotes various provisions related to the respect of fair trial rights. It includes provisions, which are related to the time limits that judges must respect. In this connection, a judgment must be in writing and delivered within one (1) month of the close of the hearing;[519] and in case of provisional detention, the judge must render his decision within seventy-two (72) hours from the date of referral to the court, after having heard the public prosecutor and the pleadings of the suspect assisted by an advocate if he wish.[520]

It also asserts provisions related to the principle of non-retroactivity of criminal actions, as well as the obligation to motivate judicial decisions[521] and being informed of charges. Article 38 of the criminal procedure provides that any person detained by the judicial police has the right to be informed of his charges and his rights, including the right to inform his lawyer or any other person of his choice. Furthermore, the code of criminal procedure clearly affords the substantial principles of criminal matters. It states that the criminal cases must be held in public;[522] respect for the right to defense

[517] Law nº 30/2013 of 24/5/2013 relating to the code of criminal procedure. Published in Official Gazette nº 27 of 08/07/2013.
[518] Article 1
[519]Code of Criminal procedure, Article 161.
[520] Ibid, Article 99.
[521] Ibid, Article 162.
[522] Ibid, Article 150, 1.

and to have an advocate;[523] being impartial and fair;[524] equality of parties before the law and adversarial procedure;[525] on the basis of evidence legally found, delivered within the legal time-limits, and judgment and delivered in the language of oral argument.[526] Moreover, the right to a public hearing is also provided. It is provided in article 155 of the Code of Criminal Procedure that the hearing must be conducted in public; however, it is also stated that when the public hearing may be prejudicial to good morals or public order, the court may order that a case be heard in camera. In any case, the judgment on the merits will always be pronounced in public.

Other guarantees provided for in the Code of Criminal Procedure include the presumption of innocence,[527] cross-examination of witnesses;[528] and the right to appeal.[529] It is also stated in article 40 that a person detained by the judicial police must in no case be detained in a prison or in a place other than the place of detention corresponding; those relevant custody facilities must be located in the jurisdiction of the judicial police officer.[530] With regard to the protection of the presumption of innocence, the criminal code places the burden of proof on the prosecutor,[531]an accused is not required to prove his innocence before the establishment of his guilt.[532] Finally, as part of the package of the fair trial rights, the criminal procedure protects the right to legal counsel and right against self-incrimination.[533] The Code provides

[523] Ibid, Article 150, 3.
[524] Ibid, Article 150, 2.
[525] Ibid, Article 150, 4.
[526] Ibid, Article 150, 5.
[527] Ibid, Article 85.
[528] Ibid, Article 153, 6.
[529] Ibid, Article 173, 1.
[530] Ibid, Article 40.
[531] Ibid, Article 85, paragraph 2.
[532] Ibid.
[533] Ibid, Article 38-39.

that no person may be guilty of a criminal offense not defined by law and may not be sentenced to a penalty not provided for by law.[534] In the case of administration of proof, the law on criminal procedure establishes the right of adversarial hearing.[535]

More importantly, in the Rwandan context, fair trial guarantees are extremely important, because they are closely linked to the protection of other rights of citizens, including the prohibition of torture and the right to life. This demonstrates the importance that Rwandan legal system and indeed the people of Rwanda could attach to the fair trial rights. However, some provisions of the code of criminal procedure seem not to be in harmony with the spirit of international law pertaining to the fair trial rights. For example, the criminal procedure limits the principle of freedom of a suspect who is being investigated[536] for offenses punishable by imprisonment for more than five (5) years where the suspect must be in detention without any other condition.[537]

Accordingly, the accused acquitted or sentenced to pay a fine only, shall not be released until the appeal court decides on the motion which could be formed by the Public Prosecution.[538] Furthermore, there is no provision which can protect an accused person during the collecting of evidence in prosecution phases. This is because all pieces of evidence should be collected in the presence of the accused or, when his absence is impossible, in the presence of his lawyer. From the foregoing, it

[534] Rwandan Penal Code, Article 3.
[535] Law nº 30/2013 of 24/5/2013 relating to the code of criminal procedure, Article 86.
[536] Article 89 of the penal code provides that a suspect shall normally remain free during the investigation.
[537] Law nº 30/2013 of 24/5/2013 relating to the code of criminal procedure, Article 107.
[538] Ibid, Article182.

can carefully be concluded that the code of criminal proceedings has incorporated many safeguards of the right to a fair trial as understood in international human rights law. However, it contradicts the principle of fair trial. To limit the liberty and freedom of accused persons is a great challenge to the consistence of criminal code procedure with the legal standards of fair trial, because, the fair trial must be taken as a whole. It is in this perspective that HRC has highlighted that it is not acceptable to make general reservations to the right to a fair trial under article 14 of the ICCPR as a whole.[539] In the same respect, the ACHPR in *Commission Nationale des Droits de l'Homme et des Libertes v. Chad*[540] has held that the right to a fair trial is non-derogable, the state must not make any derogation from their treaty obligations even during emergency situations. Therefore, the failure of criminal procedure to meet the requirements of one element is sufficient to establish non conformity with the right to a fair trial.

5.4 Law Governing the Statutes of Judges and Judicial Personnel

Law governing the Statutes of Judges and judicial personnel was established on 08 March 2013 and came in force on 15/04/2013.[541] The objective of the Statutes of Judges code is to govern the carrier of judges. It sets out, defines and governs the carrier of judge, procedure, and requirements to be appointed judge including Chief justice, the procedure of disciplinary sanctions for judges, security of tenure and retirement of a judge**.** As indicated in chapter III, the above components of law related

[539] HRC General Comment 32 (2007), para.5.
[540] *Commission Nationale des Droits de l'Homme et des Libertes v. Chad*, African Commission on Human and Peoples' Rights, Comm. No. 74/92 (1995), paragraph.21.
[541] Law N°10/2013 of 08/03/2013 governing the Statutes of Judges and judicial personnel, in Official Gazette n°15 of 15/04/2013.

to the career of judges may have an impact on the impartiality and independence of the criminal court, and are all relevant to the independence of individual judges, and can affect the procedural fairness since the absence of any indirect or direct influence, intimidation or pressure from the individual judges is necessary in the fairness of court proceedings.

5.3.1 The Modalities for Recruitment, Appointment, and Security of Tenure of Judges in Rwanda

In regard to the mode of vetting and appointment of the Chief justice, judges of Supreme Court and recruitment of President and Vice-president of the court of Appeal and the High court, the process begins with a recommendation for the Head of State.[542] These recommendations are formulated after the consultation of the high council of the judiciary and the Council of Ministers.[543] Then, a candidate for the post of the judge of the Supreme Court is elected by the Senate with an absolute majority and finally appointed by a Presidential Order.[544] There is no any regulation or other law specifying the ways upon which someone who desires to be appointed judge of Supreme Court and Court of Appeal can make his candidacy. Thus, there are no specific procedures which can be accessed by the public on how judges of Supreme Court and Court of Appeal are vested and selected in practice. Regarding the objective test, the method of recruitment and appointment of the administrators of the judiciary and those judges are debatable as it is notwithstanding inconsistent with the international legal framework on the fair trial. The African Principles encourage that

[542] Law n°10/2013 of 08/03/2013 governing the Statutes of Judges and judicial personnel, Article 20.
[543] Ibid.
[544] Ibid.

magistrates must be chosen through an authority of an independent body.[545] It further states that *this method is preferred so that* the executive does not appoint justice facilitators or judges for inappropriate reasons such as the continuation of the political agenda.[546] Therefore, the issue related to the selection and appointment of the Chief Justice and other authority of the judiciary put the institutional independence and impartiality of criminal courts in Rwanda in serious doubt.

Despite that, there is no better way to choose judges of Supreme Court or judges in general in Rwanda. Unlike Rwanda, some countries have adopted methods of selection of judges, which could be considered as good. In England for example, duty for selected judges to be nominated is vested to the Judicial Appointments Commission (JAC).[547] The USA has also adopted the system of using an independent commission; thus, judicial nominating commissions help in relocation and selection process of judges.[548] From the above experience, despite that there is no best method of selection of judges, an independent commission with the established clear procedure for selection of judge may diminish the injunction in the process. It is, thus correct to affirm with Colquitt[549] that the judicial nominating commissions offer at least one more desirable method of setting up justice workers to vacant places. Therefore, drawing the judicial system upon the relevant experiences of England and

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[545] African principles adopted in 2001 by the African Commission on Human and Peoples' Rights, Principle A para 4(h). [http://www.achpr.org/instruments/principles-guidelines-right-fair-trial], accessed 14 December 201; see also guideline II (1) of the Latimer House Principles which were adopted in 2003 in Abuja, Nigeria, [http://www.thecommonwealth.org/speech/34293/35178/181324/sg_sharma_latimer_house_colloquium.htm], accessed 14 December 2017.

[546] Ibid.

[547] The United Kingdom, Constitutional Reform Act 2005 c 4, sched 12.

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[549] Colquitt, J.A. *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, Fordham Urban Law Journal, 2006, 34 (1), p.123.

USA and then, adapts it to national culture could make a best judicial selection process. This would mitigate political influence in the appointments process and return attention to the qualifications and temperament of potential judges.

In absence of an independent commission, however, authorities with the power of appointment may appoint persons based on their political interests, and no on the ability of individuals. Administrators as written by Colquitt tend to give places or nominate people who have actively participated in political life at the state or local level, especially those who have helped the governor, his party or his allies.[550] In order to avoid such public perceptions, Rwanda's procedure of appointment of judges must respect international standards which require appointment procedures to be clear and to be transparent. Such unclear procedures of appointing judges of Supreme Court can allow the appointment of people without integrity and dignity and undermine the independence of justice.

In regard to the issue related to the recruitment, appointment, and nomination of other judges and court registrars, the law concerning to status of judges provides the method of their selection, examination, and appointment. The commission in charge of personnel in the High Council of the Judiciary draws up the list of the candidates selected for the examinations on the basis of the criteria required for each

[550]Principle A para 4(h) of the African principles adopted in 2001 by the African Commission on Human and Peoples' Rights, [http://www.achpr.org/instruments/principles-guidelines-right-fair-trial], accessed 14 December 2017; see also guideline II (1) of the Latimer House Principles which were adopted in 2003 in Abuja, Nigeria, [http://www.thecommonwealth.org/speech/34293/35178/181324/sg_sharma_latimer_house_colloquium.htm], accessed 14 December 2017, at p.78.

post.[551]Then, it sets, administers and marks the examinations.[552] If necessary, the commission shall hire a professional consultancy firm to conduct this examination process.[553] After being approved, the High Council of the Judiciary publishes the list of the successful candidates.[554] Only the candidates who will have scored at least 70% shall be affected following the decreasing order of success.[555] The successful candidates must be appointed by the High Council of the Judiciary. [556]

From the above analysis, the legal procedures for their selection are clearly established and, mostly in line with international fair trial standards; the executive and legislature have no direct role in their selection, which is a very significant indicator of their independence.[557] However, there are some flaws upon the transparency of the examination of the selected candidates. The Commission in charge of personnel which prepares the examinations, marks and conducts the interviews is the creation of the Chief Justice[558] who is the direct appointee of the chief of the executive power. In order to mitigate the interference of any other authorities and to confirm the selection and recruitments of judges with the international standards thereto, an independent commission is more valuable than the commission of the high council of the judiciary

[551] The requirements for becoming a judge of the intermediate court include the additional requirement of having a four-year working experience in a legal field (two years for those with a doctorate degree).[551] Similarly, the position of a High Court judge requires a working experience of six years (three years for those with a doctorate degree).
[552] Law n°10/2013 of 08/03/2013 governing the Statutes of Judges and judicial personnel,
[553] Ibid.
[554] Ibid, Article 23.
[555] Ibid.
[556] Ibid, Article 24.
[557] I am not the first to make this statement, see Sam RUGEGE, Supreme Court of Rwanda, in Paper presented at the Judicial Independence and Legal Infrastructure: Essential Partners for Economic Development conference, University of the Pacific, McGeorge School of Law, Sacramento, California, 28 October 2005. p.417.
[558] Law Nº012/2018 of 04/04/2018 determining the organization and functioning of the Judiciary, Article 14.

or any other state organ. In regard to the security of tenure of judges, the law governing the statutes of judges provides the mandate of the court leaders. Article 25 states that "the President and the Vice President of the Supreme Court shall be appointed for only one (1) term of eight (8) years;"[559] Its second and third paragraphs state that President and Vice-President of High Court, those of Intermediate Court, President of the Primary Court are appointed for renewable term of five (5) year. Cleary, this time limit is a real threat to the compliance of the law related to the status of judges and international law. Long-term or non-renewable security of tenure is a preferred form according to international standards to ensure the protection of judicial officers.[560] This helps the justice facilitators to not tarnish their independence, in favor of political pressures so that their mandates are renewed. The fearing of losing the job of those heads of Rwandan courts governed by term office can jeopardize or harm the rights of an accused person.

5.3.2 Removal of Judges

Part IX of the law related to the status of judges deals with the disciplinary sanctions. The Parliament is an important organ in the removal of the Chief justice, deputy Chief justice as well as judges of the Supreme Court, Court of Appeal and authorities of the high court. In the provision of Article 42, it is provided that those authorities of higher courts and judges may be dismissed for incompetence, serious professional misconduct and other kind of serious misconduct, by a Presidential Order upon

[559] Article 156 of the constitution of the Republic of Rwanda of 2003 revised in 2015 provides that the President and the Vice President of the Supreme Court are appointed for a five (5) year term renewable once.
[560] See for instance article 8 of the Universal Charter of the Judge, guideline 11(1) of the Latimer House Principles.

approval by the Parliament by two-thirds (2/3) of the votes of each House, and at the request of three-fifths (3/5) of one of the chambers of Parliament.[561] It should be noted that the procedure of dismissing these high judicial officers may be subjected to abuse by the executive and legislator powers because they are so much involved in its procedure. This constitutes a big threat to the consistency of that removal procedure with international standards thereto.

Normally, the procedures for removing judges that can easily be abused by the other arms of government are in contradiction with the international guarantees of fair trial rights. The international standards emphasize that every state has the duty to ensure that the procedures of removal are clearly established and that the reasons for this removal are explicitly indicated.[562] Therefore, with regard to be complied with the international standards of the principle of independence of the judiciary, the removal of these high judicial authorities would not be done without the participation of a court or independent organ which could confirm if there are serious reasons of his dismissal.

For ordinary judges, the procedure of their removal is initiated by the Chief justice and conducted by the committee charge of discipline of the high council of the judiciary. According to the law governing the statutes of judges, the Chief Justice submits to the high council of the judiciary for consideration the facts which justify the possibility for disciplinary proceedings against a judge and which were forwarded by the inspector general of courts or the president of the court to which the judge

[561] Statutes of Judges, Article 42, para 6.
[562] International Commission of Jurists (ICJ) International principles on the independence and accountability of judges, lawyers and prosecutors: A practitioners' guide (2004), no.54.

belongs.[563] A copy of the document containing disciplinary faults against a judge from the president of the court to which he/she belongs shall immediately be sent to the inspectorate general of courts so that it can carry out investigations in case it was not done or partly done.[564] When the matter is submitted before the high council of the judiciary, the accused judge is allowed to consult his file as well as the findings of the investigation where it has been carried out.[565] The Chief justice submits the file to the disciplinary committee for consideration.

On the date indicated on the summons, the disciplinary committee, after the submission of findings, and hearing from the representative of the inspectorate general of courts as the case may be, and hearing testimonies if any, request the judge to give his defense arguments on the facts he is accused of.[566] Moreover, it is provided that in the deliberation, the high council of the judiciary must take decisions in camera with the explanation to their basis. Such decisions have to be taken by absolute majority of the present members in a secret ballot.[567] Finally, it is not allowed to the accused judge to appeal or to bring his case to the administrative courts. It is stated in Article 53 (4) of the law governing the Statutes of Judges that the decision of the High Council of the Judiciary are not subject to appeal and should not be referred to administrative tribunals. Given the above procedure, it seems that the chief justice, as president of the high council of the judiciary remains an important person in initiating the procedure of removal of an accused judge and in taking decision relative to the

[563] Law n°10/2013 of 08/03/2013, article 47.
[564] Ibid.
[565] Law n°10/2013 of 08/03/2013 governing the Statutes of Judges and judicial personnel, Article 49.
[566] Ibid, Article 50.
[567] Ibid.

initiated action. Moreover, the investigation is collected by the disciplinary committee of the HCJ, the hearing is conducted in camera by the members of the high council and the decision is not subject to appeal. In all the same, as provided by UN basic principles, a fair hearing should be conducted an impartial and independent body.[568]The procedures for dismissing judges should be such that they cannot be easily manipulated by other organs of State or the high authorities of judiciary themselves. It is, therefore, an attempt to affirm with Naluwairo that judge shall be adequately protected by law[569]

In some countries, the procedure of removal of judges is made after the investigations and decision of an inquiry court. For instance in Kenya, the Constitution[570] gives the Judicial Service Commission the task of initiating the dismissal of a judge. In this respect, the commission acts at the request of any person or on its own initiative. This request addressed to the Commission must be written and contain all the alleged facts which constitute the reasons for the dismissal of the judge; and must comply with certain formalities.[571]Through an application, the complainant asks the Judicial Commission to address the essential issue, and if the commission finds that there is a ground for revocation, it sends it to the President.[572] This is the beginning of a public inquiry into the complaint against the judge in question. The president must suspend the judge and appoint a commission of inquiry, in accordance with the provisions of

[568] Principle 17 of the UN Basic Principles which provides for judicial authorities to be given a fair hearing as of right; Principle A para 4(q) of the African Principles also provides for fair hearing for judicial authorities who are entitled as of right to choose their own legal representative; Guideline V(1) para (a)(i) of the Latimer House Guidelines requires that a fair hearing be given to the judicial authority by an independent and impartial body.
[569] Naluwairo, p.186.
[570] Constitution of Kenya, 2010.
[571] The constitution of Kenya of 2010, Article 168(2).
[572] Ibid. Article 168(4).

Article 168, paragraph 5[573] of the Constitution. The court conducts its proceedings and makes recommendations to the president on the need for referral or not. The President acts as recommended,[574] unless the judge in question has appealed to the Supreme Court,[575] and if the judge has appealed, the president acts in accordance with the decision of the Supreme Court.

In England, for instance, only Parliament has exclusive power to raise the issue of the dismissal of judges and the maximum age of county court members is 72 years.[576] In the United States, judges of the federal courts are appointed for life by the president with the agreement of the Senate; there is no predicted age to remain in office, which means that recourse to a special procedure called impeachment by Congress is the only way to remove judges (Congressional judicial review in cases of flagrant crimes).[577] In France, except for commercial court staff, the appointment of other judges must be made by the president on the recommendation of the Superior Council of the Magistracy; the maximum age for judicial office is 65 years in the courts of first instance and 70 years in the appeal courts.[578] In Japan, judges cannot be dismissed

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[573] The President shall, within fourteen days after receiving the petition, suspend the judge from office and, acting in accordance with the recommendation of the Judicial Service Commission: in the case of the Chief Justice, appoint a tribunal consisting of the Speaker of the National Assembly, as chairperson; three superior court judges from common-law jurisdictions; one advocate of fifteen years standing; and two other persons with experience in public affairs. In the case of a judge other than the Chief Justice, appoint a tribunal consisting of: a chairperson and three other members from among persons who hold or have held office as a judge of a superior court, or who are qualified to be appointed as such but who, in either case, have not been members of the Judicial Service Commission at any time within the immediately preceding three years. One advocate of fifteen years standing; and two other persons with experience in public affairs.

[574] Ibid (n 419), Article 168(9).

[575] Ibid, Article 168(8).

[576] Irremovability of Judges, http://encyclopedia2.thefreedictionary.com/Irremovability+of+Judges, (accessed 10 January 2015).

[577] Ibid.

[578] Ibid.

without a public hearing as part of impeachment proceedings.[579] In Denmark, Norway, the Netherlands, Sweden, and Belgium, judges are appointed for life by the monarch.[580]Rwandan legislator could learn more to those procedures in order to fulfil international obligations and fight against the inconsistency with them.

From the above analysis, it can be concluded that the procedure of removing a judge in Rwanda is inconsistent with international law and undermine judicial independence; it does not give more protection to the individual judges, by consequence the accused person could be victim of this deficiency, because the independence of judge is not his benefit but it is in the benefit of people whose rights only an independent judge can preserve.[581] In any event, the disciplinary system must be balanced in order that judges do not have to fear an arbitrary dismissal if they make a decision which goes against of the power of the state but protecting an accused person. As provided in internal legal frameworks, judge may be suspended or dismissed only for reasons of incapacity (inability) to perform the functions or behaviour that renders them unfit to perform their duties,[582] in other words, less unprofessional conduct or serious misconduct. The definition, by the Rwandan legislator or other states, of what constitutes misbehaviour, incompetence or misconduct, in the aim to avoid abuse of the international standards could contribute

[579] Ibid.
[580] Ibid.
[581] American Bar Association, An Independent Judiciary a Report of the Commission on the Separation of Powers and Judicial Independence, July 1997, page 3. [http://www.americanbar.org/content/dam/aba/migrated/poladv/documents/indepenjud.authcheckdam.pdf,], accessed 10 January 2015].
[582] Article 18 of the Basic Principles on the Independence of the Judiciary, Adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan from 26 August 1985 and confirmed by the General assembles in resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

to the fight against the inconsistency of relative laws with the international legal frameworks.

5.5 Law Relating to the Civil, Commercial, Labor and Administrative Procedure

Normally the law relating to the civil, commercial, labor and administrative procedure[583] governs the civil matters, could not be analyzed in a criminal study, but in Rwanda, this law is also general law of the procedures in court. Its first Article states that it also governs the procedure applicable to other cases in the event such procedure is not governed by any other specific laws except where their provisions cannot apply to such other cases. It is in this perspective that this law is examined in a study relating to the fair trial rights of defendant in criminal court proceedings.

The code of civil, commercial, labor and administrative procedure was established in 2018 and came in to force on 29 April 1818.[584] The objective of civil procedure code is to govern the civil, commercial, labor and administrative procedure.[585] For purpose of this work the code of civil procedure provides provisions relating to the rights of impartiality of the court. It discusses the protection of accused person when the court seems to be partial. As discussed in chapter III, the impartiality, as well as the independence of the judicial system and of the individual judge, is an important element in securing and upholding the rights of an accused person in the course of the criminal court proceedings. In fact, the law relating to the Rwandan civil, commercial, labor, and administrative procedure as well as other Rwandan law does not define or

[583] Law No 22/2018 of 29/04/2018 relating to the civil, commercial, labor and administrative procedure.

[584] Ibid, See Official Gazette nº Special of 29/04/2018.

[585] Ibid, Article 2.

expressly provide the right to impartiality of court, but it provides the causes of disqualification of judges and other some precautions in order to protect individual accused to be tried by a partial criminal court.

The grounds of disqualification are listed in 103 of the law relating to the civil, commercial, labour and administrative procedure; these causes correspond to cases in which the impartiality of a judge or judges may be questioned; when one of them is established, the challenge is to be admitted. It is provided seven grounds of disqualification of judges. If the judge, spouse or children have a personal interest in the case;[586] where the judge or his/her spouse is a relative or relative by marriage to the fourth degree of collateral lineage with one of the parties to the proceedings, and his attorney or legal representative.[587] The law further states that any judge may be disqualified when one of the parties has an enmity with the judge;[588] if the judge has received a gift from one of the parties since the beginning of the suit;[589] when the judge has already given an opinion on the matter before its referral to the court;[590] when the judge has given his intervention in the case as a judge, a mediator, a prosecutor, a judicial police officer, a party, a witness, an arbitrator, an interpreter, an expert or as a public servant.[591] Moreover a judge may be disqualified if there has been a civil or criminal case between a judge, his spouse or persons who are indirectly or directly related to him by marriage or blood, up to the fourth (4) degree of lineage

[586] Law No 22/2018 of 29/04/2018 relating to the civil, commercial, labor and administrative procedure, Article 103, 1.
[587] Ibid, Article 103, 2.
[588] Ibid, Article 103, 3.
[589] Ibid, Article 103, 4.
[590] Ibid, Article 103, 5.
[591] Ibid, Article 103, 6.

collateral with one of the parties, spouse or relatives to the same degree.[592] Furthermore, the law provides that a judge can voluntary withdrawal from the case. It is provided that if a judge finds any of the disqualification causes applicable to him or when he assesses cases other than those at his sole discretion informs the president of the court thereof in writing and he can write a letter[593] to the president of the court to withdraw from the case.[594]

As explained in Chapter III, the international law commands that the court must also appear to a reasonable observer to be impartial. Thus, to challenge a judge is a particular remedy granted to the accused person against any judge who is missing or could be biased by partiality or hostility to the party to the trial. In this sense, even if the above-listed grounds of disqualification of judges are relevant, and be consistent with international legal frameworks, could not be taken as exhaustive. Thus, the Rwandan law has limited an accused person who can consider other grounds not listed but which can harmful his legal rights relating to a fair trial. The Lawyers Committee for Human Rights has considered that it is also subject to suspicion when the judge has a clearly pre-formed opinion that may influence the decision-making process or when there are other reasons for concern about his impartiality.[595]

Furthermore, the code of civil procedure provides the procedure of disqualification of judges. It is stated that a person who has a reason for suspicion may challenge a judge

[592] Ibid, Article 103, 7.
[593] Ibid.
[594] Law n° No 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, Article 104.
[595] Lawyers Committee for Human Rights, 2000, p.14.

at any stage of the proceedings, and may even raise it during the hearing[596] and the same court immediately examines the admissibility of the application.[597] For some author, allowing the court to which the judge belongs challenged to know the challenge procedure does not facilitate the impartiality of that court;[598] because the disqualified judge frequents their court colleagues every day, he shares, sometimes the same office, sharing as it is in practice, different views on certain judicial records.[599]

It is important to note that the procedure, examination and the admissibility of the application of disqualification of judge is very important points in enhancing the impartiality of court in eyes of citizen, judges and accused person, for this reason, the assessment of the application must be done by an independent judge, examined scrupulously with fair procedures. In addition to the above analysis, in case of inadmissibility of the application of disqualifying a judge, the unsatisfied party shall only appeal jointly with judgments on merits. Judgments declaring inadmissible or rejecting applications disqualifying are not subject to appeal.[600]

In this circumstance, an accused person could be tried by a judge who is considered somehow to be partial. Mukamazimpaka and others qualify that practice as astonishing the fact that the court passes to debate whereas one of the parties appealed

[596] Law n° No 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, Article 106.
[597] Ibid, Article 107.
[598] Habumugisha T., Kavundja T., Mukamazimpaka, M.J, *Problématique de l'impartialité du juge en droit positif rwandais* (Problematic of the impartiality of the judge in Rwandan positive law). Kigali Independent University Scientific Review, 2011, Vol.22, pp. 4-32, at p.11.
[599] Ibid.
[600] Ibid, Article 109.

against the disqualification decision.[601] In any case, litigants or accused should be tried by an impartial judge in the eyes of laws and in the eyes of informed and reasonable observers. Effectively, for limiting the litigants which could abuse the dispositions relating to disqualification of a judge, the criminal sanction may be provided for when the disqualification remains inadmissible or rejected as it is in France.

In France, the law provides the sanction to someone who introduces an application of disqualification of judge or judges which is groundless. The article 353 of the French Code of Procedure states that in the event of rejection of the request for disqualification, the applicant may pay a fine of 15 to 1,500 euro; the action for damages may also be claimed against him.

In sum, the code of civil procedure discusses on the ground of disqualification of the judge which is in the eye of the accused person biased. It has failed to provide that behind the listed grounds of disqualification there could be others not provided but important in the matter of disqualification. For instance, close friendships formed at the collective social works as Umuganda; case of intimate relationship between the ex-teacher judges with former faculty colleagues; case of party contact, etc. It is true that the law evolves day per day and the impartiality and independence of court are the hallmarks of the fair trial and are somehow complementary as pointed out by the Layers Committee of Human rights,[602] while independence relies primarily on mechanisms to

[601] Ibid (n 449).
[602] Lawyers Committee for Human Rights, 2000, p.14.

secure the external position of a court, impartiality addresses its influence and conduct on the ultimate outcome of a particular case.

5.6 Other Rwandan Legal Frameworks Versus Fair Trial Rights

In the Rwandan legal system, there are other laws, which contain some provisions aimed at protecting personal accused to the procedural fairness of criminal court proceedings. The Penal code[603] devotes various provisions in connection with the respecting of rights to a fair trial. As part of fair trial rights, the penal code also provides that it is forbidden to impose a heavier sentence on the accused than that which was in force at the time of the commission of the offense.[604] Further, it is provided that no person may be punished for the same offense for more than once.[605] As part of the package of the fair trial rights, the penal code provides that except for contempt of court, no offense is punished by a penalty that was not prescribed by law before the commission of the offense.[606]

In relation to this, the penal code protected accused against the broad interpretation by the criminal courts of criminal laws and make the judgment by analogy,[607] and also provides that no one may be convicted of an omission or an act which did not constitute an offense under international or national law at the time of his commission.[608] Finally, the law on fighting against corruption[609] provides an incentive for the impartiality of judges. It establishes heavy sentences for judges convicted of

[603] Law Nº68/2018 of 30/08/2018 determining offenses and penalties in general.
[604] Penal code, Article 3, para 2.
[605] Ibid, Article 7.
[606] Ibid, Article 3, para 2.
[607] Ibid, Article 4.
[608] Ibid, Article 3, para1.
[609] Law n° 54/2018 of 13/08/2018 on fighting against corruption, Article 5, para 1and 2.

corruption, accepting or soliciting bribes or using other methods of corruption. In that case, he may be punished by imprisonment between seven and ten years and a fine of two to ten times the value of the illegal benefit solicited;[610] this is different to other any judicial officer, prosecutor, police officer or any other judicial police officer who may be sentenced to imprisonment for not more than seven years but more than five and a fine of two to ten times the value of the illegal benefit demanded.[611] Importantly, the law on the mode of proofs establishes the right of adversarial hearing.[612]

It states that the evidence is based on all legal considerations and facts, but the parties must have the opportunity to present contradictory arguments; the court have to decide on the admissibility and veracity of exculpatory or incriminating evidence. It also provides the assessment of pieces of evidence and prohibits the courts to consider pieces of evidence which have not been legally collected. It, thus, states that a court decides a case before it in harmony with the rules of evidence applicable to the nature of the case,[613] and, it is forbidden to produce evidence based on ordeal, divination, mixture, mythical, superstitious means, witchcraft or any other magical, or esoteric[614] as well as to resort to torture or brainwashing to extort an admission from the parties or the testimony of witnesses.[615]Unfortunately, the recent law determining the jurisdiction of courts[616] prohibits the party to challenge for any reason whatsoever, whole court. Such prohibition is inconsistent to the international legal frameworks. It

[610] Ibid, Article 201
[611] Ibid, Article 201, para 3.
[612] Law N° 15/2004 of 12/06/2004 relating to evidence and its production, Article 119.
[613] Law N° 15/2004 of 12/06/2004 relating to evidence and its production, Article 4.
[614] Ibid, Article 5.
[615] Ibid, Article 6.
[616] Law n°30/2018 of 02/06/2018 determining the jurisdiction of courts.

is a significant limit to the objectivity of the preventive guarantee of being tried by an impartial court in the case where all the judges would be appointed in the disqualification conditions; it constitutes to the litigant a significant obstacle. Another thing, even if the referral of the case to another court for the cause of legitimate suspicion constitutes a preventive guarantee of impartiality of court is not provided in Rwandan law.

Therefore, it will be difficult to enhance and promote the impartiality of the court when the accused suspect a given court to be impartial. Importantly, the influence of international law could also have been applied to Rwandan law by other ways. The structures created by the rules of international law generally have limited influence on how states preserve the right to a fair trial in national law. In this perspective, the general comments made by Human Rights Committee (HRC), as analyzed in chapter III, contain safeguards that States parties must respect, without relying on their domestic law and legal traditions. With respect to restrictions on the enjoyment of this right, international legal frameworks can be used to limit the application of the criteria set out in the law.

5.7 Conclusion

This chapter has critically analyzed the compliance of the Rwandan legal framework with the right to a fair trial. From constitutional framework point of view, it was established that the Rwandan constitution of 2003 clearly provides that the judicial system is separate and independent from the executive and legislative branches of government and it enjoys administrative and financial autonomy. It has however been established that Rwanda's current judicial legal system is in many respects

noncompliant with the right of accused to a public and fair hearing by an independent and impartial court. As far as the right to an independent court is concerned, it was established that Rwanda current justice legal framework falls far too short of guaranteeing the minimum objective conditions for ensuring the independence of the Judiciary and judges. The institutional independence of Rwandan judiciary and independence of personal judge or court are further contestable in that members of the administration of the judiciary are all appointed by the Chief of executive power without any well-known criteria.

The constitution or any other law did not specify the ways for choosing, how to make a candidate and the criteria of their selection. Moreover, the individual independence is inconsistent with the right to independence of judges, in case of suspicion of disciplinary fault, the hearing is not public and is conducted by a non-independent body as provided in international law. Another aspect is that the principle of irremovability of judge has been thwarted by the constitution itself. Consequently, judges could be moved anytime without their prior consent. Concerning the right to an impartial court, it was established that reminiscent of the country's justice during the colonial times, Rwanda's judiciary cannot be said to be impartial as is required by international human rights law. Courts that are institutionally not independent cannot be impartial from an objective point of view. The impartiality of court is in somehow highly questionable. The procedure of the referral of the case to another court for cause of legitimate suspicion is not provided in Rwandan law, the law prohibits the party to challenge for any reason whatsoever, whole court and the law limits an accused person on the grounds of disqualification of a judge which can harm or

prejudice his legal rights to a fair trial. Furthermore, about the constitutional protection of the fairness of procedural aspect of the fair trial, it has been established that Rwanda's constitution framework did not sufficiently incorporate the provisions of the ICCPR and African Charter concerning the right to a public and fair hearing by an independent and impartial court. For instance, the right to compensation for wrongful conviction, rights to appeal, equality of arms, right to be tried within a reasonable time, right to the protection against self-incrimination are not provided for anywhere in the current constitution. The right to be tried by an independent court is not well expressed.

As far as the right to a public and fair hearing is concerned, current Rwandan law devotes several of its provisions in respect of fair trial. The Code of Criminal Procedure and the law on the mode of proofs devote in various provisions on respecting fair trial. However, some provisions seem not to be in harmony with the spirit of international law relating to the good administration of justice. For instance, the Code of Criminal Procedure provides for limitations to the principle of the liberty of the suspect who is the subject of an investigation in the case of an offense punishable by imprisonment of more than five (5) years where the suspect must be prosecuted being in detention without any other condition.

In sum, following on Chapter Two which analyzed the scope and nature of the rights to a fair trial, and Chapter Three which explored the fair trial at international law and Chapter Four relating to the overview of the Rwandan judicial system, this chapter relating to the analysis of right of fair trial as provided in Rwandan law, has firmly established that despite attempts of reforming the constitution and other law,

Rwanda's criminal justice has still, in many ways, fallen too short of complying with international standards related to the proper administration of justice embedded in the right to a fair trial. It is also well known that, although the constitution and national legislation provide for some measure of fairness in criminal court proceedings, their implementation by criminal courts is often inadequate. It is in this spirit that we shall critically evaluate, in the following chapter, the right to a fair trial in the administration of justice in Rwanda.

CHAPTER SIX

THE RWANDAN ADMINISTRATION OF JUSTICE TO THE TEST OF THE RIGHT TO A FAIR TRIAL

6.1 Introduction

In Chapter Five above, it was established that despite attempts of constitutional amendment,[617] by 2015, and legal system reform, Rwanda's criminal justice system was very far from complying with the international legal frameworks as far as the right to a fair trial is concerned. The extent, to which the current Rwandan administration of criminal justice complies with the right to a fair trial, in particular the right to a fair and public hearing by an independent and impartial court, is the major focus of this Chapter.

The analysis provides a critical examination of Rwandan administration of criminal justice. The basic concern is, first, the institutional aspect of fair trial which is, as provided for by the ICCPR, a guarantee of accused for being tried by an impartial and independent court; second, it concerns the fairness of the criminal procedure. This chapter begins with analyzing the compliance of Rwandan administration of criminal justice with the right to an independent court; the right to an impartial court; the right to a public hearing; the right to a fair hearing and finally to the compliance with the post-trial rights.

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[617] Constitution of 1963 (amendment of 12 Jun 1963 - OG 2nd Year nº 14 of 17 July 1963); Constitution of 1991 (amendment of 03/08/1993 - OG 32nd Year, Special Number of August 1993); Constitution of Jun 2003 (Amendment of 2nd December 2003- O.G special of 2nd December 2003, p. 11; amendment of 8th December 2005 -O.G special of 8th December 2005; amendment of 13th August 2008 - O.G special of 13th August 2008; Constitutional amendment nº 04 of 17 June 2010- O. G.no special of 17 June 2010; amendment of 2015 -OG n° Special of 24/12/2015).

6.2 The Institutional Aspect of Rwandan Criminal System and Fair Trial Rights

6.2.1 Compliance with the Right to be Tried by an Independence Court

The right to be tried by an independent court might be considered as the most important guarantee of the right to a fair trial. It is in this perspective that the Office of High Commissioner for Human rights has pointed out that together with the right to an impartial court, the right to an independent court may be the most important canon in the administration of justice in any democratic society.[618] It is further stressed that without it, justice remains illusory.[619] The right to be tried by an independent court should be measured and ensured in both the individual and institutional independence of criminal court in the administration of criminal justice.

6.2.1.1 Institutional Independence of Criminal Court

The principle of institutional independence requires, as extensively explained in chapter III, that criminal court must be free from interference especially from the executive, legislator and the hierarchical administration of court with regard to matters that relate to their judicial function. In this sense, the Executive, Legislatures, as well as other authorities, must respect and bear to the judgments and decisions of the criminal court. However, in Rwandan legal system, some legal provisions contradict clearly this principle of independence of court and disregard this duty. Firstly, the executive power has the right to challenge all final decisions rendered by any Rwandan court.[620] The law on jurisdiction of courts asserts that when, the final

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[618] Office of the High Commissioner for Human Rights *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, United Nations, New York and Geneva, 2003, p.115.
[619] Ibid.
[620] See Law N°30/2018 of 02/06/2018 determining the jurisdiction of courts, Article 59.

decision is made and there is evidence of unfairness, parties to the case inform the Ombudsman's Office,[621] which is institution of the executive power, for the matter. It further states that when the Office of the Ombudsman finds that there is an injustice in the decision, it writes to the President of the Supreme Court asking him to reconsider the case.[622] At this point, the question relating to the constitutionality and the independence of the judiciary arise.

The Supreme Court is thus deprived of certain powers of the courts. It is a serious challenge to institutional independence of the courts, which negates the separation of power enshrined in the constitution. In fact, with respect to a trial, the substance of the case as the exception, including admissibility, must be left to the judiciary which should, in no way, be bound by an appreciation of a foreign authority to the judiciary. Second, the executive power has the power to review the courts' activity.[623] A recent law governing results-based performance management provides that the judiciary prepares a quarterly and annual report indicating, with figures, the results achieved in relation to the expected results in the performance contracts and submits them to the Ministry in charge of planning.[624] It further states that the evaluation of performance contracts of the judiciary is carried out in conformity with the guidance given each year by the Office of the Prime Minister.[625] Manifestly, those legal provisions demonstrate the interference of executive power in the daily activities and

[621] Ibid, Article 59 para 3.
[622] Organic Law n° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, Article 79 al. 4.
[623] See Law n° 18/2017 of 28/04/2017 governing results-based performance management in branches of government which are organs of the Legislature, organs of the Executive and organs of the Judiciary, Article 3.
[624] Ibid, Article 3, 11.
[625] Ibid, article 9.

administration of the Rwandan courts. In any case, the judiciary could not report their activities to the executive power.

Unlike Rwanda, some African countries have enshrined in their constitutions provisions that expressly confer judicial power on their respective judicial systems. The Constitution of Ghana, for instance, provides that the power to judge is reserved to the judiciary; consequently, neither the President, nor the Parliament, nor any body or agency of the President or Parliament has the judicial power.[626] Likewise, the Egyptian Constitution explicitly provides the establishment of independent judiciary,[627] and asserts that all courts are required to be independent of any influence or interference by a representative of the government, government agency or any other source.[628] The South African Constitution provides that the authority to judge of the Republic belongs to the courts and that they are independent; they must only apply the Constitution and the laws impartially and without prejudice, fear or favoritism..[629] These are examples of clearly separated powers.

Another critical aspect for ensuring the institutional independence of criminal court is that the authority that appoints judges must be independent to other branches of government. As extensively explained in chapter four, in the tasks of the high council of the judiciary (HCJ) includes handling of sensitive issues which could endanger independence of criminal courts as disciplinary sanctions and professional promotions, transfer or removal of judges. In its formation, almost 47% which are *ex-*

[626] The Constitution of Ghana, s 125 (3)
[627] The Federal constitution of Egypt (FDRE Constitution), Article78 (1).
[628] Ibid. Article 79(2).
[629] The Constitution of South Africa, s 165 ss (1), (2).

officio of members of HCJ are the appointee of the executive power.[630] This formation obviously does not guarantee the real representation of judges, and the interference of the executive authority in judicial affairs is still noticed. The formation of the high council of the judiciary clearly violates the independence of the court.

Normally, the high council of the judiciary which is responsible for the dismissal, discipline and appointment of judges[631]should be composed only by judges elected by their peers, as it is in Egypt,[632] where the higher judicial council is formed by judges only. In this regard, there is no reason for maintaining, the ministry of justice and the Ombudsman, in the high council of the judiciary. Sincerely, the presence of the members of the executive powers and maintaining other direct appointees of the executive powers in the high council of the Judiciary clearly entails the risk of the executive power affecting the debates and choices made by the judicial order and may effectively constrain the openness of debate, discussions and can affect decisions of criminal. With respect to the question of financial security as another essential condition for guaranteeing the right to an independent court,[633] financial security requires that judges must enjoy sufficient financial security; it ensures that their salaries and other financial remunerations and benefits are not subject to arbitrary interference by the executive or other authority. Notably, the Constitution of Rwanda provides that the judiciary enjoys administrative and financial autonomy.[634] Unfortunately, no any act or law goes far in explaining how this financial autonomy is

[630] Law nº012/2018 of 04/04/2018 determining the organization and functioning of the Judiciary, Article 6.
[631] Ibid. Article 157 And 158.
[632] Egypt, Law No 17/2007 amending Judicial Authority Law No 46/1972.
[633] Generally the right to an independent court was pointed out in Chapter Three.
[634] Constitution of the republic of Rwanda of 2003 as revised in 2015, Article 140 (3).

brought in practice. The judiciary is totally dependent on the executive in its budgetary needs. The General Secretary and other support staffs who are all the direct appointees of the executive power execute the budget allocated to the judiciary. They oversee annual operating budgets and monitor their implementation in accordance with public finance rules and procedures[635] which ask to deal, monthly and quarterly, with the ministry of finance for the permission of paying salaries and doing other courts activities like going to the scene of crimes.[636]

This situation may undermine judicial independence. The danger is that the executive may wish to follow the funds of the judiciary closely, and may even keep them if it is not satisfied with the decisions of the criminal court. Moreover, in execution of the budget the Secretary General follows also the regulations instituted by the Ministry of Finance.[637] The legislator fails to place the administrative and budgetary authority with judiciary as it clearly states that such responsibilities lie within the executive.[638] These provisions and regulations created by the legislative power could be counterproductive since the executive can reintroduce the system through control or influence by the executive thus compromising the intended financial autonomy of the judiciary that are desirable. There is some kind of lack of financial autonomy because of the interference from the Ministry of finance. All in all, the judicial independence

[635] Organic law n° 12/2013/OL of 12/09/2013 relating to the State finances and property, Article 19.

[636] Ministerial Order N°001/16/10/TC of 26/01/2016 relating to financial regulations, Article 36 and 48.

[637] The article 42 of Organic law n° 12/2013/OL of 12/09/2013 relating to State finances and property provides that after the submission of the Finance Bill to both Chambers of the Parliament, the Secretary to the Treasury shall require the secretary general of Supreme court to prepare and submit to the Ministry of finance on the basis of the draft budget, provisional annual expenditure plans broken down by month and quarter consistent with the public entity procurement plan. Upon the adoption of the annual budget, the Minister shall inform him or her of its approved budget and request for a detailed final annual expenditure plan based on the approved budget.

[638] Ibid.

could usually involve judicial autonomy, thus the judiciary shall control its own finances from funds budgeted from its capital and recurrent service and should become completely self-reliant.

Unlike Rwanda in some African countries the constitution establishes the real financial autonomy. For instance, in Kenya, the constitution creates the fund of the judiciary, which must be managed by the Chief Registrar of the judiciary.[639] The judiciary uses this fund in its administrative expenses and for other purposes necessary for the performance of its functions.[640]Each year, the Chief Registrar prepares estimated expenditures for the following year and submits them to the National Assembly for approval.[641] Upon approval by the National Assembly, the expenses of the Judicial system becomes a direct charge on the Consolidated Fund and the funds are paid directly into the Judiciary Fund.[642] Even though the executive power executes, controls and audits its budget, the budgetary allocations to the judiciary are also meagre and inadequate. The amounts allocated to the judiciary are inferior to one percent of the budget of the country. During the budgetary year of 2015/2016, the budget allocated to the judiciary was 0.77%;[643] in 2016/2017 was 0.64%,[644] while that in 2017/2018 is 0.53%.[645] This situation affects greatly the delivery of justice; it can also inhibit judicial efficiency and undermine the independence of the Rwandan courts. Chibesakunda, rightly pointed out that the judiciary should be afforded opportunities to influence the amount of money allocated to it by the legislature and

[639] Constitution of Kenya, Article 173(1).
[640] Ibid.
[641] Ibid, Article 173(2).
[642] Ibid, Article 173(3).
[643] See Law n°33/2015 of 30/06/2015 determining the State finances for the 2015/2016 fiscal year.
[644] See Law n° 31/2016 of 30/06/2016 determining the state finances for the 2016/2017 fiscal year.
[645] See Law n° 30/2017 of 29/06/2017 determining the state finances for the 2017/2018 fiscal year.

executive arms.[646] The inadequate funding inhibits judicial efficiency, in particular access to justice and can undermine Institutional Independence.[647]In such cases, the institutional capacity to protect collective and individual rights and personal competence of judges are also compromised.

6.2.1.1 Personal Independence of Judges

As far as the question of personal independence is concerned, this requires that judges must enjoy a status or have sufficient safeguards which guarantee their independence from the executive power and other states authorities with respect to matters that relate directly to their exercise of judicial function. A critical analysis of Rwanda's criminal justice legal framework however reveals that the executive and the hierarchical administration of the judiciary can actually determine or influence certain administrative aspects of criminal courts that relate directly to the exercise of their judicial function. For instance, the President, Vice President and judges of the Supreme Court and these of court of Appeal, the President and Vice President of the High Court are appointed on recommendation of the Chief of the executive and elected by the senate.[648] Even the law on statutes of judges discusses the appointment of those judges, there is no other law or regulation that sets clear criteria and advanced mode of their selection.[649] Justice Rugege criticized this mode of selection and appointing of the chief of the judiciary. For him, it is difficult to understand that the

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[646] Chibesakunda, L.P, Judicial Independence: The Challenges of the Modern Era, the 2014 Annual Conference of the Commonwealth Magistrates' and Judges' Association, Livingstone, Zambia, 7-11 September 2014, http://www.cmja.org/downloads/confreports/Conference%20Report%20Zambia.pdf, (accessed 29 November 2017).
[647] Ibid.
[648] Law n°10/2013 of 08/03/2013 governing the Statutes of Judges and judicial personnel, Article 20.
[649] See discussions in chapter Four, part 3, Law governing the statutes of Judges.

Senate and the executive are involved in the appointment of the judges of the Supreme Court considering that the Supreme Court determines the policy and direction of the judiciary.[650] It is clear that this situation jeopardizes the judiciary's independence and personal independence and integrity of judges are likely to be compromised.[651]

Furthermore, for other courts managerial post, the president of the Supreme Court, on his side, has a great role in their selection and appointment. In this perspective, the Decree of Chief Justice provides that all presidents, vice presidents and all chief registrars of all courts are appointed without examination;[652] they are assigned by the president of the Supreme Court, after consultation with the high council of the judiciary.[653] This Decree does not set any criteria and mode of selection of those judges who are charged to manage courts of justice. Thus, this mode of selection and appointment are challenged in different manners. The interviewed people underline that there is no transparency in the appointment or the recruitment of managerial posts; it remains under the control of the politicians.[654] From the above analysis, the appointment procedure may jeopardize the independence of individual judge; judge could make decisions that please the one who holds the power to deciding on that promotion.[655] Normally, the promotion of judges should be based on objective factors

[650] D'Ambrosio, D.R. (2015). The Human Rights of the Other - Law, Philosophy and Complications in the Extra-territorial Application of the ECHR. *SOAS Law Journals*. 2(1):1-48, at p.21.
[651] Oseko, J.O, judicial independence in Kenya: Constitutional challenges and opportunities for reform, PhD Thesis, University of Leicester, England, 2011, at p.36.
[652] Decree of the president of the Supreme Court nº 048/2012 of the 24/04/2012 laying down the procedures for the recruitment, placement and appointment of judges and clerks, Article 3 and 27.
[653] Ibid.
[654] Interviewees, People, at Nyanza High Court Chamber on 20 February 2015.
[655] Avocats Sans Frontières. The crime of genocide and crimes against humanity before the ordinary courts of Rwanda, Vade Mecum, Kigali and Brussels, 2004, p.24.

such as integrity, ability, and experience.[656] Judges who stand out and aggressively challenge the ideas of their superiors might find themselves stagnating and or deployed in stations that are not of their liking and may spend a good time of their career without achieving any prominent position or promotion. Such legal culture certainly works against the judges' independence thereby affecting their efficiency and jeopardize the independence of the criminal court.

In addition, there are also other issues that put the independence of judges in Rwanda in serious doubt. One such issue relates to the application of principal of removability of judges in Rwanda. One of the important safeguards in ensuring personal independence of courts or judge is the requirement of respects of that the principles of judicial irremovability of judges. This principle is one of the main pillars which guaranteeing the independence of the court.[657] It generally protects the judges against any arbitrary measurement of suspension, retro gradation, displacement, even in advance and revocation without having freely consented thereto. Nonetheless, in Rwanda, as it has been pointed out in Chapter Five, the principle of irremovability has been thwarted by the constitution itself. It is apparent from the examination of Rwanda's criminal justice that members of criminal courts suffer the displacement or transfer without having freely consented. For instance, in July 2014 the Rwandan high council of the judiciary, has done various transfers of judges without their prior

[656] 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 in Milan from 26 August to 6 September 1985 and confirmed by the General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, § 10.

[657] UN Human rights Council, 11th session, promotion and protection of all human rights, civil, political, economic, social and development. A/HRC/11/41 of 24 March 2009, para 57.

consent; 29% of High Court's judges and 46% of judges of Intermediate Courts have been transferred or moved in different courts, without their consent.[658]

It is submitted that given the above framework, Rwanda's criminal legal frameworks are not sufficiently guarantee the right to an independent court as is required in international law. In contrast to the ordinary official, a judge cannot be the subject of automatic transfer or removal in the interests of the service. It is argued that a judge should not be transferred to another judicial function without his or her express consent,[659] except in the case of reform of the organization of the judicial system or a disciplinary sanction.[660] This privilege is not in the own interests of judges, but in the interests of the rule of law and protection of individual rights of accused person. Consequently, the transfers of judges made by Rwandan HCJ without any known criteria and without consent of concerned judges are really challenged and undermine the independence of judges. The present observation remains a serious handicap to the freedom of judges, during the decision-making process for fear of not being muted or removed without the need to seek their agreement. In any case, the grounds for transfer of judges could be clearly established and be decided in transparent proceedings, without any external influence whose decisions can be subject to appeal.

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[658] Rwandan High Council of the judiciary, "changements des Juges et Greffiers (the transfers of the judges and court registrars), the resolutions of High Council of the Judiciary of July 2014.

[659] Mitrofan, F, *The Independence of Judge - a guarantee of the rule-of-law state*, Journal of Law and Administrative Sciences, 2015, Special Issue/2015, pp.94-102, at p.96.

[660]Recommendation no 52, Council of Europe, Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities. (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers and Deputies).

6.2.2 Compliance with the Rights to Impartial Court

The test for impartiality of courts is both objective and subjective. It is objective in a sense that a court must appear to reasonable observers to be impartial[661] and it is subjective in a sense that a court must be free of personal prejudice or bias.[662] Normally, from the conclusion that Rwanda's criminal courts cannot be said to be independent as analyzed in Section 6.2.1 above and Chapter Five, it is very unlikely that a court which is not independent can be impartial. Court which is not institutionally independent from the executive and the judiciary hierarchy; which does not have sufficient security of tenure and financial security cannot be impartial in the eyes of informed and reasonable observers.

Other criticism of impartiality of criminal courts concerns the legal frameworks and practice of disqualification of judge when an accused person presumes that the court could not be impartial. In Rwandan legal practice, when the impartiality of the judge is challenged, the examination of the application is done by a judge of the same court. For instance, in *Prosecutor v. Mutsindashyaka,*[663] a challenge for this case made by an individual was directed against the president of that court. A judge of the same court has considered the request and decided that the challenges were not proven. This is more evident because a court must rule on the disqualification of its president or its judge. From the foregoing analysis, the impartiality in examining the application, disqualification case becomes questionable. The analysis of cases law of disqualification in all Rwandan courts, first, between 2016 up to September 2018,

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[661] HRC General Comment 32 (2007), para.21.
[662] Ibid.
[663] *Prosecutor v Mutsindashyaka*, Case n° RP 0117/09/TB/KCY of 28/09/2009, Primary Court of Kacyiru, (*Unreported*).

shows the lowest level of the admissibility of the applications of disqualification of judges in Rwanda. In 88 applications for disqualification of judges, only 2 (2.27%) has been confirmed.[664]

Second, in a period of eight years, 26[665] officials of the judiciary include judges, have been prosecuted and convicted of corruption. This undoubtedly indicates that there shall be some kind of partiality in the criminal court process. In this regard, the judiciary needs to become more vigilant. From that point of view, the lowest level of the confirmation of the application can be associated with the court or judge who is competent to examine the case arising from his court. Therefore, as also pointed out by Habumugisha, Kavundja and Mukamazimpaka, at least the challenge should be the responsibility of the immediate higher court. [666] Even if the percentage of the confirmed applications is very low, the number of all applications shows that the public confidence of judges is questionable. In any case, the judges could maintain and promote public confidence in the community, and shall avoid corruption and appearance of it. The imperatives of safeguarding judicial impartiality and the fairness of the Rwandan judicial process are highly desirable. Judges should sit and determine cases assigned to them in accordance with the ordinary arrangements for disposing of the business of the court.

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[664] Disqualification of judges [https://iecms.gov.rw/en/main/2016-2018], accessed 09 October 2018.
[665] Reports of the judiciary of Rwanda 2012-2017.
[666] Habumugisha T., Kavundja T., Mukamazimpaka, M.J, *Problématique de l'impartialité du juge en droit positif rwandais* (Problematic of the impartiality of the judge in Rwandan positive law). Kigali Independent University Scientific Review, 2011, Vol.22, at p.17.

In case of establishing that there is reason of disqualification judges may disqualify themselves in a court audience, as it was in case of *Bugingo v. Gahutu and Other*,[667] where an assigned judge was deported at the second hearing, on the pretext that he has come to know that he has rented the house of the sister of one of the parties to the trial. The taking of an extra step in consolidation and reinforcement of the legal dispositions related to strengthening the impartiality of judges, particularly in combatting the corruption, and fairness in assessing case related to disqualification of a judge, by putting in place special mechanisms thereto. It is submitted in this regard that guaranteeing the independence and impartiality of judges as discussed above involve considering factors that can help in reinforcing the impartiality and independence of Rwanda's criminal courts system.

63 The Procedural Aspect of Rwandan Criminal System with the Right to a Fair Trial

6.3.1 Compliance with the Rights to a Public Hearing

In Chapter III, it was established that the right to a public hearing requires that as a general rule, judicial proceedings before criminal court must be open to the public including the press and that decisions counterparts must be in writing, containing at least a statement of the grounds for the decisions and should generally be available to public. In this perspective Rwanda's current justice legal framework explicitly provides that the hearing of cases shall be conducted in public.[668] It was also established that the right to a public hearing is subject to exceptions. If the court, at the

[667] *Bugingo v Gahutu and Other*, Case No RCA 0458/13/TGI/KGI of 29 January 2015, Intermediate Court of Karongi, (*Unreported*)
[668] Law No 22/2018 of 29/04/2018 relating to the civil, commercial, labor and administrative procedure, Article 70.

request of the parties or on its own initiative, considers that the public hearing may be dangerous to morality or public order, may be detrimental to the privacy and rights of individuals, the court may decides that the hearing must be held in camera.[669] The advocates in that particular case are not concerned with this decision.[670] Moreover, the violation of the principle of publicity of hearing, in Rwandan legal system, allows the admissibility in appeal on the second instance.

It is provided that the High Court hears appealed criminal cases heard on the second instance by the Intermediate courts when such cases were not tried in public and no hearing in camera was ordered,[671] and in the same cases, the court of appeal also is competent over cases from the High Court and the Military High Court heard and decided in the second instance.[672] While the consideration of the above quoted provisions seems to be compliant with the right to a public hearing as provided for in international law, there are some aspects that call for the compliance of the said provisions with international standards of a fair trial. First, in international law, the allowable exceptions to the right to a public hearing are qualified in a way that they must be justifiable or necessary in a society governed under a system of democracy.[673]

In Rwanda legal system, the questions concerning the recording of sounds and photography are authorized by the judge. But there is no regulation on the way in which the media may report on court proceedings. Second, the European Court of Human Rights concluded that the duty to secure the criminal defendant's right to be

[669] Ibid.
[670] Ibid.
[671] Law N°30/2018 of 02/06/2018 determining the jurisdiction of courts, Article 41 para 6.
[672] Ibid, Article 52 para 9.
[673] Article 14 (1) of the ICCPR

present in the court hearing is one of the essential requirements of the public hearing.[674] In this regards, the Rwandan criminal procedure states that an accused must appear in person in court and can be assisted by an advocate or his legal counsel.[675] An accused may appear through his legal counsel, only in case of a petty offence and misdemeanor. The defendant may be represented by his lawyer if he gives serious reasons which prevents him from comparing himself to his person in case of a misdemeanor.[676]

The content of this article can be criticized, in the first instance in case of appearing through the counsel, because without being present in the court, it is difficult to see how that person could exercise the specific rights set out relating to the rights to a fair and public hearing, i.e. to have examined or examine witnesses, the right to defend himself in person, to have the free assistance of an interpreter if he cannot speak or understand the language used in court. A part the above legal critics, the legal practice reveals the divergent on the right to a public hearing. It was established that Rwanda's criminal justice system is still in many ways non-compliant with the fair trial rights as guaranteed in international ICCPR. The non-compliant legal practice can be used to violate and abuse the rights and fundamental freedoms of accused persons. For example, in the case of *Rukundo v. Nshimiyimana*,[677] one of the party asked to the court the permission to read the minutes, he said that he wants to verify the conformity of the minutes to his pleadings. The court refused to him to read the minutes before

[674] *Hermi v. Italy*, ECtHR, judgment of 18 October 2006, application no. 18114/02, 2006-XII, §58-59.
[675] Law nº 30/2013 of 24/5/2013 relating to the code of criminal procedure, Article 147.
[676] Ibid.
[677] *Rukundo v Nshimiyimana and Others*, Case No. RC 0046-0048/16/TGI/NGOMA, Intermediate Court of Ngoma, court audience of 13/09/2016.

signing and closed the hearings.[678] This practice has led me to interview different persons working in the judiciary on that situation.

The interviewees stated that the parties to the trial do not know their right to verify if their statements are really well written; the judges take advantage of this ignorance and refuse the verification.[679] If the judges respect all rights of parties in the court hearing, then the justice will be fair. Therefore, it is suggested that before closing the hearings, judges should remind to the accused persons that they have the rights to verify if their declarations are well written. Judges have to act as protectors of individual rights, particularly accused persons, in this perspective, in the legal practice, the respect of rule of law and other legal principles would be helpful, because to have the best written bill of rights, without the commitment of the courts to pay attention to them, imply that the rights guaranteed, remains without any value. It is true that the law on civil procedure allows the parties and witnesses to verify the conformity of the minutes with their statements before signing or fingerprinting copies of the minutes of the hearing, reading them or asking a person to read for them, to check if what he said or other parties or witnesses corresponds to their statements at trial,[680] however, it does not provide any punishment in case of its disregard. Moreover, the right to a public hearing integrates the principle that justice should not only be rendered, but also to be seen to be rendered, by subjecting judicial proceedings to public scrutiny. The UN Human Rights Committee has noted that

[678] Ibid.
[679] Interviews with advocates, registrars and parties, after the hearings, 13 September 2016 at Intermediate Court of Ngoma and High Court, Rwamagana Chamber.
[680] Law No 22/2018 of 29/04/2018 relating to the civil, commercial, labor and administrative procedure, Article 77.

under the ICCPR, the courts must make available to the public information about the place and date of the hearings and make available to the interested public adequate premises, within reasonable limits.[681]

In Rwandan legal system,[682] the hearing takes place at the place and date fixed by the court. It may be continued after working hours or adjourned to the next hearing date with the agreement of the parties. In practice, hearings would generally begin at 8h00' A.M.[683] However, the Courts frequently decides to start at 9h00' A.M. due to the distance, accessibility and emplacement of the courts.[684] On the website of the Supreme Court of Rwanda there is a place reserved for the programs of hearings in all courts, but the information on this site is still not updated. In May 2015, it was found that at this website, the last hearings program in Supreme Court was the hearings of September 2013;[685] in High Court, criminal hearings were in November 2014.[686]

Normally, updating those hearing information can help the public, accused persons and different organisations which want to go in the court hearings. As pointed out by Velicogna, the use of information and communication technology (ICT) is taken as one of the essential factors that significantly progress the administration of justice.[687] Thus, given the nature and importance of the judiciary as the third power, using an

[681] UN Human Rights Committee, General Comment No. 32, para. 28
[682] Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, Article 65.
[683] See Summons used by Rwandan Court, in Primary Court, Intermediate court and High Court, and Supreme Court; However in supreme court the summons shall precise different times according to the cases on program.
[684] Statement of the Judges, Court registrars and advocates at the Courts visited : High Court, Musanze Chamber, High Court Rusizi Chamber;
[685] Supreme Court of Rwanda, Judicial Power of Rwanda, http://www.judiciary.gov.rw/case proceedings/hearings, (accessed in several times in January, February, March, April, and May 2015)
[686] Ibid.
[687] Velicogna, M, *Justice Systems and ICT, what can be learned from Europe?* Utrech Law review, 2007, Vol. 3, No 1, pp.129-147, at p.129.

Updated ICT seems more valuable or successful, can offer the possibility of opening the court to the public by providing specific and general information about its activities, thus strengthening its legitimacy. In this case, the judiciary have to improve and implement not only the updated scheduled hearings and pronouncement dates, but more online court services such as e-payments for court fees, criminal files, and other services.

6.3.2 Compliance of Rwandan Criminal Law with the Right to a Fair Hearing

In Chapter Three, it was established that the right to a fair hearing requires that all the specific guarantees for fair trial rights are protected, respected and upheld, and should not negatively affect the fairness of a particular trial. As pointed out by Naluwairo, the right to a fair hearing is at the heart of the notion of a fair trial.[688] In order to determine the fairness of a particular hearing therefore, recourse has to be made not only to the specific guarantees of the right to a fair hearing, but also to the conduct of the trial as a whole. Regarding the former, it has already been established that Rwanda's current criminal justice legal framework is in many ways noncompliant with the right to an independent court, the right to an impartial court and the right to a public hearing. The next paragraphs therefore only highlight some of the other areas where Rwanda's criminal legal framework is still lacking in terms of complying with the right to a fair hearing as understood in international human rights law.

[688] Naluwairo, R, Military justice, human rights and the law: an appraisal of the right to a fair trial in Uganda's military justice system. PhD thesis, University of London, England, 2011, p.203

6.3.2.1 Equality of Arms

The principle of equality of arms requires a fair balance between the parties. As it was established in Chapter Three, the equality of arms demands that each party to the proceedings must enjoy every reasonable opportunity to present his case in conditions which do not put him at a disadvantage position compared to his opponent. An analysis of Rwandan's criminal justice system reveals that notwithstanding article 66 of law related to commercial, civil and administrative procedure, which protects the right of equality of arms, and provides clearly that the parties are heard in a contradictory manner and answer each other; if they deem it necessary, they may submit additional written arguments and conclusions. The laws allow for situations where accused persons can suffer from inequality of arms. In this connection, under code of criminal procedure, there is no provision which obliges the appearance of witnesses of the prosecution in court hearing.

The issue where the accused persons can suffer from inequality of arms arose in *Prosecutor v Sibomana*[689] and *Prosecutor v Twagirumukiza*.[690] Firstly, in case of Sibomana, the prosecutor alleged that on 05 July 2014, Sibomana has raped a child of 14 years old in the parental home of the child. The prosecutor's evidences are mainly based on the statements of the witnesses who accused Sibomana of committing the crime of rape. The accused alleged that the problem results on the land's dispute in their family. In this case, even if the evidences of the prosecutor are the statements of different witnesses, no witness appeared in the court; the court has condemned

[689] *Sibomana v. Prosecutor*, Case No. RP 0426/14/HC/RSZ High Court/Ruszi, judgement of 16 December 2014, p.3.
[690] *Prosecutor v. Twagirumukiza J. Claude*, Case No. RPA 0611/15/HC/RSZ, High Court/Ruszi, judgement of 29 February 2016

Sibomana to life imprisonment without giving him a chance to cross examine those witnesses and to call his witnesses to testify in his favor.

Second, in *Prosecutor v. Twagirumukiza,* during the court audience, the accused and his council have insisted several times to have the presence in the court of his defense witnesses and the appearance of witnesses of the prosecutor. However, the court without responding to those allegations of the accused, has based its decision on the statements of witnesses made in prosecution and has condemned him to an imprisonment of seven years. In those cases, as in others different cases observed in High Court[691] where the evidences are only the statements of the witnesses, the Prosecutors present the facts and the statements of their witnesses, but those witnesses do not appear in the court hearing. Unfortunately, the courts based their decisions on the statements of the witnesses of prosecution who have not appeared in court audience. It is in this worth point that the law allows situations where accused persons can suffer from the non-equality of arms. Rwanda's criminal justice system is therefore non-compliant with the right to equality of arms.

Moreover, in a judicial system, where the preliminary investigation was conducted in non- contradictory manner[692] and where the Public hearing is the only opportunity for

[691] *Prosecutor v. Nsengiyumva,* Case No. RPA 0260/15/HC/MUS, High court of Musanze, judgment of 23 October 2015.

[692]The Law Nº 30/2013 of 24/5/2013 relating to the code of criminal procedure, provides in his several articles, the cross examination in the investigation, Article 62**:** If necessary, the Prosecutor in charge of case file preparation shall, either on his/her own initiative or upon request of any interested party, organize cross-examination between the suspect, between witnesses or between the suspect and witnesses. Every cross-examination shall be recorded in a statement. Article 63: The Prosecutor may urgently conduct interrogation or cross-examination if he/she has reason to believe that a witness is facing imminent death or that some serious grounds can disappear. The causes of urgency shall be

the defendant to submit the elements of the investigation for cross examination of witnesses, the law, at least, has to provide the adversarial principle, in particular, by reinforcing the possibility for the accused to proceed with a cross examination of witnesses in the hearing and by encouraging the attendance of defense witnesses in the court. Thus, the trial in which the evidence of witness is a direct element for the result, if the parties don't apply to witnesses' declarations the equality of arms principle will not find field of application. Normally, during the trial, the parties to the proceedings must have a procedurally equal position and must also be treated in the same way by the court. It can be concluded that in Rwandan Criminal legal system, the prosecutor and accused aren't on equal footing.

The other major area where Rwanda's criminal legal system, falls short of complying with the right to a fair hearing relates to the right of examining and cross examining witnesses who are protected by international legal frameworks. General Comment 32 noted that the right to equality before the courts guaranteed equality of arms and that the principle of equality of parties applied to all proceedings and required that each party be given the opportunity to discuss all issues. the arguments and evidence presented by the other party.[693] The Rwandan criminal legal system reveals that the parties in criminal proceedings are not treated equally; therefore, this non-compliancy of criminal system with fair trial rights highly violates and abuses the rights and fundamental freedoms of accused persons. For instance, in *Prosecutor v.*

recorded in a statement. But this practice is not used by the Prosecutors, Judicial police or others agents who are ability for doing preliminary investigation.

[693] General Comment 32, paragraph 13.

Hakizimana,[694] the accused, who is in prison and not represented by a lawyer, has received a summoning of a party with promptness. On the hearing date, he explained that it was impossible for him to communicate the new hearing date, to his family and his witnesses. He insisted that among their witnesses, there was one who had written the letter on which his application for review was based and that witness should be heard by the court. Despite the insistence of the accused, the judge decided that he must plead his case.

Even if the judge is not bound to follow the arguments of the parties, in *Prosecutor v. Hakizimana*, the judge could allow to the accused the apparition of the defense witness who was his only evidence, taking into account that he was already in jail. Given that the Cross-examination of witnesses virtually unknown in civil law is provided in Rwandan legal system,[695] those witnesses would appear in court, and should be cross examined by the parties, in asking questions themselves or in refuting their declarations which can prejudice their interests. Unless if the court qualifies those witnesses as whistle-blower[696] who can be summoned before a judicial body with the help of a code and without revealing their identity.

In sum, as it has been observed in *Prosecutor v. Twagirumukiza*,[697] cited above, and in *Prosecutor v. Hakizimana*, the cross examination is provided for by the law, but in

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[694] *Prosecutor v. Hakizimana, Case* Nº RP 0033/11/TGI/RSZ of 30 March 2011, Intermediate Court of Rusizi, (*Unreported*)

[695] Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, Article 68 Al. 2 (11).

[696] According to Article2 nº 5 of of Law n° 35/2012 of 19/09/2012 relating to the protection of whistleblowers: "whistle-blower": a civil servant, an employee of a public or private entity and any other person who discloses to the relevant organ any information in his/her possession or which has been brought to his/her attention in connection with offenses, illegal acts and behaviors.

[697] *Prosecutor v Twagirumukiza*, Case No. RPA 0611/15/TGI/KGI, Intermediate Court of Karongi, judgment of 29 February 2016.

practice it is rarely used in the court hearing. The legal practitioners asserted, while I was conducting my research, that the cross examination is provided for by the law of criminal procedure, but in practice, it is almost non-existent in Supreme Court; in High Court it is used only in Chamber of International Crimes.[698]

Normally, the right to have the case examined by the interrogation of witnesses has been guaranteed in international standard of good administration of justice.[699] Furthermore, the ACHR also states that the accused or his counsel has the right to examine or have examined the witnesses against him and those of the defense in proportion to the environments applied to the witnesses of the prosecution.[700]The Rwandan people, particularly accused persons must have all the facilities to examine witnesses and obtain the appearance of other witnesses in court. Such a problem has drawn attention to the general quality of the verdicts rendered. However, to overcome this problem, the approach adopted is to adopt strong legislation with an enforcement mechanism to reduce any potential during testimony and to protect the rights to equality of arms. The Rwanda's criminal legal system does not also comply with the right to a fair hearing related to the right of equality of arms in phase of preparation of criminal hearings. Generally, the purpose of the preparation the case for the hearing is to ensure that all parties are ready to go to trial, if necessary, and to discuss other options for resolving the dispute before proceedings. It has been established by the

[698] Interviews with advocates, registrars and parties, after the hearings 16 December 2014 at High Court, Rusizi Chamber; Intermediate Court of Rubavu at 27 and 28 December, 2017. High Court of Musanze. Interviews with Judges of High Courts and Supreme Court in "judicial retreat 2017" at RDF Combat Training Centre of Gabiro, Gatsibo District, Eastern Province; interviews with advocates, 19 December 2017, at Kigali Convention Center, Kigali.
[699] ICCPR, art 14(3)E.
[700] ACHR, art 16(5).

Strasbourg Court that failure to disclose to the defense material evidence containing items which could allow the accused to exonerate him or to see his sentence reduced may constitute a denial of the facilities essential to the preparation of the defense, and thus a breach of the right to a fair trial.[701] In Rwandan criminal law when a case file is ready for hearing, parties are immediately summoned by the court registrar to appear for a hearing.

According to article 151 of code of criminal procedure, the summons must state the court seized of the action, the date, the place, and the time of the hearing and the alleged offense, and the law that punishes it. Contrary to civil proceedings, where summons could be accompanied by the submissions of the plaintiff, in criminal matters the accused or his counsel shall only come to court to read his case file or to prepare the defense.[702] The Public prosecutor does not communicate to the accused persons the proofs or indictment. This practice is a great challenge to the fair trial rights. Normally, the communication of the proofs to the accused could help to have adequate facilities to prepare for a defense; the prosecution should disclose and send to the defense all material evidences in their possession for or against the defense, in advance of the hearing. This is another important area which requires reform to ensure compliance of Rwanda's criminal justice system with international obligations of country as far as ensuring the right to a fair trial is concerned.

[701] European Court of Human Rights, guide on article 6, right to a fair trial, p.273, 2014 (*Natunen v. Finland*, no. 21022/04, § 43, 31 March 2009).
[702] Declaration in interviews with Courts registrars of High Court of Musanze, Karongi, Rusizi, (March-August 2015), Prosecutors at Intermediate Court level of Rubavu, Musanze, Karongi and Muhanga. Declaration of prisoners (15/09/2015).

6.3.2.2 The Right to Legal Representation and Defense

The right to legal representation by an lawyer of one's choice is constitutionally provided to accused persons[703] and protected by international law as part of the right to a fair trial by Article 14 (4) of ICCPR. The Rwandan criminal procedure, however, fails to provide the scope of its application and its level of consideration by the criminal court. In fact, this denies the accused persons tried by Rwandan criminal courts their internationally guaranteed right to legal representation; and leads to great injustice in the person of the accused.

In *Prosecutor v. Ntakirutimana,*[704] the accused who was prosecuted to commit a crime of murder has alleged that the lower court had denied to him the right to have a legal representation. The Supreme Court found Ntakirutimana's allegation baseless. The court held that no right to legal assistance or defense was denied to Ntakirutimana by the previous court, instead, the decision was motivated by the accused's behaviour, unwilling to plead the case after being adjourned 11 times. The court also stated that the right to legal assistance and defense should not be seen as violating any one's right and delaying judicial procedure.

In this case, due to the gap of the code of criminal procedure, the Supreme Court of Rwanda failed to uphold the fundamental and absolute aspect of the right to legal representation and defense of the accused person, which is protected by the constitution as an absolute right to be observed at all levels and degrees of

[703] Constitution of Rwanda of 2003 revised in 2015, Article 29,
[704] *Prosecutor v Ntakirutimana*, Case No. RPA 0197/10/CS of 21 November 2014, Supreme Court, (*Unreported*).

proceedings.[705] Normally, the right to legal representation and defense is one of the most fundamental rights of accused persons; it is thus important far more than preventing the conviction of innocent. The Supreme Court has not observed that without the assistance of a lawyer, the accused may be tried for an improper offense and sentenced on insufficient evidence, or for unrelated evidence with the issue in question or otherwise inadmissible.

More importantly, in case of serious crimes such as that one prosecuted in *Prosecutor v. Ntakirutimana,* which could be punishable to life imprisonment, some African countries have put in place special regulations in order to protect accused persons against the denying of their right to legal representation. For instance in Uganda, in the case of an offense punishable by death or life imprisonment, the accused must have the right to be represented by a lawyer at the expense of the State; to benefit, without remuneration from this person, from the assistance of an interpreter if this person does not understand the language used during the trial,…;[706]

In Kenya, an accused for murder must always be represented during trial, in need be suspects must be given free legal aid.[707] These examples illustrate the importance of the accused persons' right to have a legal representation, since the accused persons could face the danger of conviction because they do not know how to establish their innocence. Importantly, even if the right to legal representation is not only confined to serious offences, there is no reason to deny such rights to any accused persons due to

[705] Constitution of the republic of Rwanda of 1978, Article 14.
[706] The constitution of Uganda, Article 38.
[707] Kenya, Court of Appeals Rules 2010, article 24.

the daily works of courts or advancing judicial procedure. The special regulation in this matter could be helpful for a given country in complying with the international obligations on the respect and protect the right to legal counsel and defense. In this perspective, from the onset of the first hearing, as well as in investigation phases, before asking the accused person if he pleads guilty or not guilty, the court should inform him that he has the right to counsel.

The other area where Rwanda's criminal justice fails to comply with the right to a fair hearing relates to the right to choose the legal counsels to indigent accused. The Rwandan criminal procedure does not have any provision for free assistance during criminal court hearing for those who do not have the ability to hire lawyers of their choice. Only law relating to transfer of cases from abroad to the republic of Rwanda provides this right for those transferred.[708] It stated that the accused person in the case transferred by ICTR, by the Mechanism or by other States to Rwanda shall be guaranteed the right to the assistance of a counsel of his choice during any interrogation; it further stated that he shall be entitled to legal representation if he has no means of payment.

Even if the law cited above, provides for the free legal representation to those accused, the absence of special regulation or guideline in this matter creates legal challenges to the compliance with international norms. In *prosecutor v Uwinkindi,*[709] the accused has appealed to the decision of high Court which he criticised to be in breach with her right to legal counsel and defense; he argued that he was compelled to plead without

[708] Law n° 47/2013 of 16/06/2013 relating transfer of cases to the republic of Rwanda, Article 14, 6.
[709] *Prosecutor v Uwinkindi,* Case No RPA 0011/15/CS of 24 April 2015, Supreme Court (*unreported*).

advocate in hearing of 5 February 2015, and was compelled to accept a lawyer who arrived without his understanding in his case because he had no opportunity to choose them; he also criticizes stating that those advocates do not have the ability to plead in his case because they do not have enough experience and the capacity to plead in such cases. The Supreme Court of Rwanda has qualified the allegations of accused as baseless.[710] It stated that indigent accused has no basis to criticize the competence of the allocated advocates, because, they were appointed in the interests of court;[711] the court further stated that only the defendant who has the financial capacity to pay has the right to choose his lawyer, but the defendant who does not have this capacity, in the interest of the court, the competent bodies appoint him without his participation;[712] the court, therefore, stated the principle that although the accused has the right to legal counsel, it does not offer him the right to choose his advocate.[713]

The developments highlighted above demonstrate that the absence of guidelines in appointing legal counsel to the indigent person may affect the compliance of domestic law with the international standard aimed at protecting accused persons. In addition to what is provided for in laws and international conventions there are other cases rendered by international courts, especially the International Criminal Court for Rwanda, on the issue of legal assistance of the defendant who is unable to pay the fees for an advocate. In *Prosecutor v. Akayesu*, regarding this issue, the court has decided that the registrar of the court appoints the advocate of the indigent accused, he must choose him from the list of available lawyers and meets the conditions required by the

[710] Ibid, para 12.
[711] Ibid, para 14.
[712] Ibid, para 16.
[713] Ibid, para 17.

court.[714] It further stated that, the indigent accused must choose the lawyer in those on this list and the registrar must consider his choice.[715]

More importantly, despite that the accused person does not have sufficient means to pay for legal assistance, receive it for free when the interests of justice so require could not be interpreted as to be only with an advocate in criminal court hearing. The interest of justice must be in favour of the accused persons. Thus, the relation accused advocate would be in good condition and advocates must not work in the interest of court but must help in the interest of accused person and justice. Because the defense lawyer persuasively on behalf of the client throughout the process, the accused relies on a lawyer to make a thorough investigation of the facts, to file and plead necessary application or petition, to research the law, to explain the legal system and development in the case, to present whatever evidence there is in defense of the charges. For that reason, the indigent accused would choose the legal counsel on a list given as it was in *Prosecutor v. Akayesu*.

With this in mind, it can be concluded here that the right to be represented by a criminal justice lawyer in Rwanda has a number of challenges: first, the challenge for complying with international standard of fair trail, particularly in regard to legal aid; and second, the challenge of implementing of the constitutional guarantees of legal representation in law of criminal procedure before courts of justice, and making them effective in practice. Therefore, passing rules relative to legal representation of accused person and putting in place a legal policy of free aid legal assistance could

[714] Case n° ICTR-96-4-A, the *Prosecutor v. Jean Paul Akayesu*, Para. 62.
[715] Ibid.

highly help Rwandan criminal justice or other country in complying with international fair trial standards.

6.3.2.3 Access to Justice and Accessibility of Courts in Rwanda

The other area where Rwanda's criminal justice fails to comply with the right to a fair hearing relates to the accessibility to justice and courts. The right to access to justice is protected by international law and is also part of fair trial rights by article 14 of ICCPR. It has been established that when a proceeding requires an unfair expense, particularly in complex cases, it becomes a denial of access to a court in violation of provision related to a fair trial.[716]

The Rwandan criminal justice denies some accused persons the right to access to justice. In this context, the law on procedure provides, inter alia, that the court registrar must not register a request of the accused in the court register when he did not paid the court fees.[717] This could not have effect in denying the right to access to justice when the court fees are affordable; however, in 2014 the government of Rwanda has taken a decision of increasing court fees. It has increased to 1250%. According to the Ministerial Order[718] deposit court fees has been determined as follow:; Primary Court: twenty-five thousand Rwandan Francs (25,000 Frw);[719]

[716] *Airey v Ireland* (1979) 2 EHRR 305 para 26.
[717] Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, Article 18, 360.
[718] In 2014, the court fees were raised more than ten-fold. "Lodging a complaint in the primary court was Frw 2,000 but with the new order it is Frw 25,000," ; the cost of lodging a complaint in the Intermediate Court have risen from Frw 4,000 to Frw 50,000; while fees deposits in the High Court and the Commercial High Court was increased to Frw 75,000 from Frw 6,000. A complainant has to deposit Frw 100,000 to lodge a complaint in the Supreme Court, from the current Frw 8,000.
[719] Ministerial Order[719] n°001/08.11 of 11/02/2014 on court fees for criminal matters, Article 2.

Intermediate Court: fifty thousand Rwandan Francs (50,000 Frw);[720] High Court: seventy-five thousand Rwandan Francs (75,000 Frw);[721] Supreme Court: one hundred thousand Rwandan Francs (100,000 Frw).[722] This situation of increase court fees or cost of litigation in Rwanda has been a subject to much preoccupation and was documented by Non-governmental organizations.

The NGOs have noted insufficient progress in promoting access to justice in Rwanda. A study conducted by AJPRODHO- JIJUKIRWA, in 15 different districts of Rwanda, has concluded that the majority of low-income earners, or 78%, strongly believed that the government's decision to increase court fees was ill-conceived, not affordable and that the citizens were not consulted. The report indicates also that the cost of cases has discouraged some citizens from going to court.[723] The report of Transparency Rwanda[724] of July 2015 shows that 30% of citizens do not have access to court because of the increase of court fees. With respect to denying accused persons, specifically in appeal, those reports indicate that in Rwandan some accused person cannot make appeal because of they cannot afford court fees. Thus this situation shall make access to justice impossible for some people, as it also has been highlighted by Streeter that access to justice may also be influenced by the existence of court fees

[720] Ibid.
[721] Ibid.
[722] Ibid.
[723]AJPRODHO-JIJUKIRWA Kigali, "Impact of Court fee and Access to Justice" The report, which was published on February 03, 2015, was of a survey conducted in 15 of the 30 districts in the country (Gisagara, Nyanza, Huye, Gatsibo, Kayonza, Nyagatare, Muhanga, Ngoma, Gicumbi, Bugesera, Burera, Kirehe, Rwamagana, Gasabo and Rulindo). [The Youth Association for Human Rights Promotion and Development (AJPRODHO – JIJUKIRWA) is a non-profit youth organization working to improve the rights of youth and children in Rwanda through human rights promotion, protection, research, advocacy, economic empowerment and civil society strengthening].
[724] Rapport of TPR of 14th August, 2015.

that could become obstacles to initiating judicial proceedings.[725]The denial of the right to access to justice to the accused persons is therefore also a clear violation of international law related to the right to a fair trial.

Importantly, access to justice is an indispensable factor in promoting empowerment and securing access to equal legal protection of human dignity. Under principles of proper administration of justice, the justice system should be fair and accessible for everyone, including those who are financially or otherwise disadvantaged. For a well-functioning justice system, access to justice should not be dependent on capacity to pay; vulnerable accused person should not be disadvantaged. The increase of court fees in criminal matters[726] has made Rwandan courts inaccessible, stating that the vast majority of individuals have difficulty in accessing the courts. Sometimes accused persons are forced to abandon their criminal cases because of higher court fees.

Another area where Rwanda's criminal justice is still challenged of no complying with the right to a fair trial relates to the accessibility of the criminal courts. Access to the court is an important obligation of a state in providing the access to justice. The distribution of the courts geographically which is not balanced can limit physical access to justice depending on the part of the country in which a person is located. According to the statistics of Rwanda, the most populated province is the Eastern Province with a cumulative population of 2,595,703. [727] It is closely followed by the

[725] Streeter, P. A, fair trial in Lithuania: from European convention to realization, PhD Thesis, University of Leicester, 2012, at. p.123.
[726] See Ministerial Order n°001/08.11 of 11/02/2014 on court fees for criminal matters.
[727] National Institute Of Statistics Of Rwanda**,** the fourth Population and Housing Census, Kigali, 2012. According to the President of the Republic of Rwanda for the Presidential Order No. 02/01 of 07/02/2011 organizing the 4th General Population and Housing Census and the Minister of Finance and Economic Planning, the Chairperson of the National Census Commission, for the Ministerial Order No.

Southern Province with 2,589,975 inhabitants.[728] The Western Province has 2,471,239 inhabitants. Kigali City is the least populated province with 1,132,686.[729]

With a population estimated at 11.689.696,[730] considering 24 judges of High Court,[731] there is approximately 1,948,283 individuals for one judge, a ratio that suggests remarkably questionable access to justice. In this case, if access is considered in terms of distance a person needs to travel to access a judge, the number also looks not satisfactory. For instance, the Eastern Province has one high court[732] and two intermediate courts[733] inhabited by 2.595.703 people. The average of the Northern Province is 1.265 square kilometres.[734] This means that citizens travel more than 1.200 Squares kilometres to access the High Court. In this regards, the Rwandan legislator and other actors in the justice sector would re-examine the justice system and put in place appropriate structures in order to guarantee that justice is made accessible to all and complying with international standards relating to the right to a fair trial.

001/12/10/TC of 19/01/2012 determining the administrative structure and technical organization of the 2012 Population and Housing Census.

[728] Ibid.

[729] Ibid.

[730] See Northern Province website, http://www.northernprovince.gov.rw/index.php?id=21 (accessed 3 October 2015).

[731] Republic of Rwanda, Report on the achievements of judiciary of Rwanda for the past ten years (July 2004- June 2014), August, 2014, http://www.judiciary.gov.rw/fileadmin/Publications/Reports/Achievements2004-2014SupremeCourt.pdf, (accessed 3 October 2015).

[732] High Court, Chamber of Rwamagana.

[733] Intermediate court of Nyagatare and Intermediate court of Ngoma.

[734] CIA, The World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/rw.html, (accessed 3 October 2015).

6.3.2.4 Avoiding Delays in Administration of Criminal Justice

Another aspect that makes Rwandan criminal justice system to fail as far as compliance with the right to a fair trial is concerned relates to the issue of delay in administration of criminal justice. As discussed in Chapter Three, the ICCPR has stressed that every accused person charged with a criminal offence has the right to be tried without undue delay.[735]It is provided that the reasonable time is the period between the laying of the charge and the imposition of the sentence.

According to established ECHR case-law, the date of filing of charges shall be the formal notice to the individual by the competent authority alleging a criminal offense committed by him/her.[736] Inconsistent with the right to a trial without undue delay, Rwanda's criminal justice legal framework has absence of formal prohibition in the legal framework against delays in criminal justice. From that absence, the Rwanda's criminal court legal practice depicts that from the end of January 2015, the average time for processing a case from his entry to judgment was 3.5 years in Supreme Court,[737] and almost one (1) year in High Court.[738]

A comparison made between Rwandan law and international human rights standards shows that under Rwandan law there is no direct reference to the right of defendants to be tried without undue delay; in this regard the non-compliance with article 14(3c) of ICCPR, in some cases, creates a great injustice to the person of accused. It can be seesn that the trial may be extended for more than five years. For instance, in case

[735] ICCPR, Article 14(3) (c),
[736] For the purposes of Article 6 ECHR
[737] Supreme Court of Rwanda, Annual report of 2015-2016, Kigali, 2016.
[738] Ibid.

Ntawiniga v. Prosecutor,[739] the accused was prosecuted of rape of a minor of 16 years. He had been arrested and detained provisionally in prison. Thereinafter the Public Prosecution has brought a complaint to the court (TPI Kigali). The latter in its judgment of 09 July 2003, has convinced and sentenced to the accused an imprisonment of 25 years. The accused appealed to the High Court of Kigali. After three years in 2006, the date of the first hearing, the court took a decision to make a descent on ground to know the real age of the victim. After other three years, the court has gone on plot and the hearing has reopened. The judgement has been pronounced in 2009, Ntawiniga was acquitted and the court ordered his release.

Apart from the above case, it is observed that it has taken more than 6 years, after his appeal, and afterwards was acquitted by the High Court. It is understandable how an innocent can stay in prison for six years. Importantly, I am thus tempted to affirm with Al-Subaie[740] that throughout the criminal proceedings, one of the most significant and important rights is the right to be tried within a reasonable time, because the right of the accused, throughout the criminal process, may be affected by the time spent in-trial process.

It is also important to consider the case *Gakwandi v. Prosecutor.*[741] The accused was prosecuted of Embezzlement of public property. He was put into provisional detention in 2002 by the court (TPI of Kigali). The accused appealed to the Court of Appeal of Kigali, which in turn, confirmed his detention. In March 2002 the accused has asked

[739] *Ntawiniga v. Prosecutor,* Case No. RPA 0130/06/HC/KIG, High Court.
[740] AL-Subaie,S.M, The Right to a Fair Trial under Saudi Law of Criminal Procedure : A Human Rights Critique, PhD Thesis, Brunel University, United Kingdom, 2013, at p103.
[741] *Gakwandi v Prosecutor,* Case No. RPA 0056/05/CS, Supreme Court.

the Supreme Court to quash the order for his provisional detention. The public hearing was held in July 2009. In the court hearing, Gakwandi has said that he has no interest in pursuing its action regarding its provisional detention, because he has made this appeal when he was imprisoned, but on the day of the hearing, he is no longer in prison due to the judgment on the merits of the case which has acquitted him.

In the above case of Gakwandi, it can be deducted that Gakwandi who requested his provisional release, it called for the period of 7 years and 5 months for the court to take decision; secondly, the judgment in custody was made after the judgment on the merits of the case. In all those situations, the court has not shown if the delays have been done following the behaviour of the accused in court proceedings. It was only done on the behaviour of gaps of the criminal laws which are not consistent with the international standards of fair trial rights. In fact, while the reasonableness of delays is determined on a case-by-case basis, the Human Rights Committee considered that the following delays were too long in a capital case; holding the accused in provisional detention for sixteen (16) months before the trial; and a delay of thirty one (31) months between trial and dismissal of the appeal.[742] The imprisonment of 6 years (72 months) for an innocent as was done in case of Ntawiniga and imprisonment of 89 months in case of Gakwandi is a great injustice. In this case, I attempt to affirm with William that delays have been more injurious than direct injustice,[743] and for Wytsma, who pointed out that there is nothing just in justice so long as it delays.[744]The analysis of Rwandan judicial reports shows that delays are mainly related to the large number

[742] *McLawrence v Jamaica*, HRC, UN Doc. CCPR/C/60/D/702/1996, (1997) §5.6, 5.11.
[743] William, P, *Some Fruits of Solitude*, Headley, London, in Harvard College Library, 1693, at p. 86.
[744] Wytsma, L.A, *The fierce urgency of now*, The National Law Journal, 2013, ed. ALM (formerly American Lawyer Media), New York.

of cases that are brought before the Higher Courts, in the first instance and in appeal, and the insufficient number of judges. Such a constant is especially true in the High Court and the Supreme Court, which lists to the High Court, 4 510 applications entering in 2014/2015 on only twenty-four judges to civil, administrative, social and criminal sections. This situation can result in the disregard of Rwanda of the duties provided in ICCPR. As developed in Chapter II, the state has to take adequate measures in order to fulfil its obligation of protecting accused persons to all sort of the arbitrariness within their territory and jurisdictions.[745] Therefore, taking specific measures in this regard may be a good way of every state in effectiveness of protection of the accused persons against the non-observation of rights to a fair trial as enshrined in international legal frameworks.

6.4 Compliance of Rwandan Criminal Justice with the Protection of the Post-Trial Rights

As discussed in chapter III, there are two freedoms to be safeguarded in the post-trial phase: the right to lodge an appeal in higher court and the right to receive compensation when a person has been convicted wrongly. Each of these is discussed below. Further, the rights to compensation resulting from a miscarriage of justice will be emphasized through different case studies rendered by Rwandan courts. The primary argument in this section is compatibility of domestic law with international standards of proper administration of justice.

[745] Limburg Principles, the Maastricht Guidelines on violations of Economic, Social and Cultural Rights January 22-26, 1997 point 6.

6.4.1 The Right to Appeal in Rwandan Legal Proceedings

Generally, the right to appeal gives all parties an additional chance to reconsider the case by a higher court. According to criminal procedure, any person who was a party to the trial at first instance may appeal against the judgment if he was not satisfied, except where the law provides otherwise.[746] The appeal time limit shall be one (1) month.[747] That time shall begin from the day on which the final judgment was pronounced in the presence of both sides or when the party did not appear after the date of the pronouncement was notified.[748] The time limit for appeal has been interpreted in different decision of Supreme Court. In *Discentre Sarl v. Huye District*,[749] and in *prosecutor v. Ntawiringiribyisi*,[750] the Supreme Court has discouraged the party to the trial who want to create the delays in court proceedings.

The Supreme Court has declared that the time for appeal begin to run from the day when the final judgment was made,[751] because even the litigant or accused who is not in prison did not appear after having been notified of the day of the pronouncement, the notification of the decision, done on his interest could not have any effect on the time of appeal. If the appellant is imprisoned, he may appeal by writing a letter to the Chief registrar of the court through the prison director. The director of the prison must

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[746] Law nº 30/2013 of 24/5/2013 relating to the code of criminal procedure, Article176.
[747] Ibid.
[748] Ibid.
[749] *Discentre Sarl v. Huye Distric*t, Case No. RADAA 0008/09/CS of 27 November 2009, Supreme Court.
[750] *Prosecution v. Ntawiringiribyisi,* Case No. RPA 0258/08/CS of 30 November 2009, Supreme Court.
[751]The same decision was taken in different judgments of Supreme Court: *Niyonsaba v EWSA,* Case No.RADA 0008/09/CS of 27 November 2009, Supreme Court; *Prosecution v. Ntawiringiribyisi,* Case No. RPA 0258/08/CS, Supreme Court of 30 November 2009; *Association Umwungeri v Mushayija,* Case No. RADA 0034/09/CS, Supreme Court of 12 February 2010; *Nyirahabyarimana and Other v Nteziryayo,* Case No. RCAA 0086/11/CS of 30 January 2015, Supreme Court; *Maersk Rwanda Ltd v Sonarwa SA,* Case No. RCOMA 0134/11/CS of 03 May 2013, Supreme Court.

indicate on the letter the date of reception which will be considered as the date of the appeal. The director of the prison must immediately submit the appeal to the court that should hear it.[752] However, in the case of decisions made in the lack of one of the parties, that period shall begin to run from the date of notification.[753]

Furthermore, the Supreme Court has extensively interpreted the role of the Prosecution authority in administration of evidence when it has been satisfied by the court's judgment. Normally, in criminal matters, the right to appeal is exercised by the following personalities: a person responsible for damages, a person convicted, a person claiming for damages solely for their civil interests and the public prosecution.[754] Sometimes, when the Prosecution has not made an appeal, the prosecutors had an intention to do not appear in the court, and in case of their appearance he told to the court that he does not have any clarification or comment on the case.

In *Prosecutor v. Nsengiyumva,*[755] the Supreme Court has declared that, in criminal proceedings, when an individual who claims damages or is automatically indemnified make an appeal, the prosecution must appear in the court for some clarifications if necessary. This landmark decision has given to the courts of the land and the National prosecution the line to follow; in the case the civil party has only made an appeal. In that circumstance, the court has also held in *Gatera v. Prosecutor, Mbonera and*

[752] Law nº 30/2013 of 24/5/2013 relating to the code of criminal procedure, Article 177.
[753] Ibid (n 500).
[754] Ibid (n 503), Article 124.
[755] *Prosecutor v. Nsengiyumva,* Case No. RPA 0024/09/CS of 12 December 2013, Supreme Court; Rwanda Law Reports / Recueil de jurisprudence du Rwanda nº 21, vol.2, April, 2014, pp. 66-68.

Others,[756] the Court of Appeal shall review the entire case on its merits. Those decisions have great contributions to the implementation of rights to effective remedies or solutions and rights to due process of law, because in different decisions, for instance, in the case *Nzabarantuma v. Prosecutor and Nzitakera*[757] and in the case *Raïna Luff v. Prosecutor, Gasana and Others,*[758] some courts have refused to hear the case in merits when the appeal was made by the civil party.

As a manner to compare the law within the criminal procedure and international standards of good administration of justice, it can be seen that, theoretically, the right to appeal in the higher court highlighted in the Rwanda legal system some non-compliance. The phenomenon right to appeal was directly regarded and protected in the ICCPR, which stipulates that any person found guilty of a crime has the right to have his conviction and sentence reviewed by an immediately superior court in accordance with the law.[759] However, the Rwandan judicial system provides different situations where an accused could not have the right to appeal.

According to the Rwandan constitution, the Supreme Court have exclusive jurisdiction to try in criminal cases, in the first and last instance, the President of the Republic, the Speaker of the Chamber of Deputies, the President of the Senate, the Prime Minister, the President of the Supreme Court[760] and their co offenders or

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[756] *Gatera v Prosecutor, Mbonera and Others,* Case No. RPA 0029/08/CS of 27 January 2012, Supreme Court.
[757] *Nzabarantuma v Prosecutor and Nzitakera,,* Case Nº RPA 0449/12/HC/MUS of 21 Jun 2013, High Court, Musanze Chamber,.
[758] *Raïna Luff v. Prosecutor, Gasana and Others,* Case No. RPA 0313 and 0344/11/HC/NYA of 22 March 2013, High Court, Nyanza Chamber.
[759] ICCPR, art 14(5).
[760] The constitution of Rwanda of 2003, Article 145.

accomplices. In this sense, the Supreme Court has jurisdiction to try all criminal offense against those five personalities, and shall sentence them to the highest penalty of life imprisonment with special provisions[761] which prevents a convicted person from enjoying the right to all kinds of mercy, pardon or parole without having served at least twenty (20) years of imprisonment.[762]

Different international bodies have qualified the regulations which did not permit the accused to submit an appeal against the decision of first instance, to constitute a great violation of human rights and violation of the right to appeal. The African Commission on human and people rights held in the case of Constitutional Rights *Project v. Nigeria*[763] that an established Decree which prohibited appeals to the verdicts issued by special courts and allowing defendants to only seek pardon by the Governor who had the power to confirm or annul the verdict, is violating the right to appeal (this is due to the fact that initial special courts were not sufficient to be courts of law to which even an initial petition could be brought). More importantly, the Commission held in another case, in which the applicants were sentenced to death under a special court decree, and were not permitted to submit an appeal against that

[761] Organic Law N° 01/2012/OL of 02/05/2012 instituting the penal code provides different crimes which can punishable to life imprisonment with special provisions. Among them there are Punishment of the crime of genocide (article 115); crime against humanity (article 121); Homicide committed by degrading acts or preceded by another felony (145); torture, if results in the death of the victim (article 177); Sexual torture (187); child defilement (article 191); Violence or assault against the Head of State, if it causes death or is committed with intent to cause death (article 541); Terrorism for religious or any other ideological purposes, if it causes death of one or more persons or damages infrastructure (article 525).

[762] The provision of article 39 of penal code provides that the penalty of life imprisonment with special provisions is imprisonment which shall prevent a convicted person from being entitled to any kind of mercy, conditional release or the rehabilitation unless he/she has served at least twenty (20) years of imprisonment.

[763] *Constitutional Rights Project (in respect of Wahab Akamu, G. Adega and others) v. Nigeria*, Case 60/91, 8th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1994-1995.

decision.[764] It held that by using these codes to exclude any attempt of appeal to competent national bodies in criminal cases is considered a violation the rights to appeal. The first and last instance of criminal as well as civil court was a subject in the case *Bisengimana v. State of Rwanda.*[765] In this case, the complainant filed at Supreme Court a petition regarding repeal or nullification of article which limits the right to appeal after the judgment was rendered in first and last instance. The Supreme Court has considered the petition as baseless.

Although until now no judgment in criminal matters[766] in the first and last instance has been rendered by the Supreme Court of Rwanda, the Supreme Court could not enjoy the jurisdiction of first instance. Such a procedure affects the right to appeal of the accused in the trial. In order to effectively protect the right to appeal, provisions which limit the appeal on the decision made in first instance could repeal. In fact, as pointed out by Dugard, [767] there is an argument which is considered as pervasive that it is not ordinarily in the interests of justice for a court to sit as a first and last instance in which cases are decided without any chance of appealing against the judgment. In sum, although some case-law seem to be valuable in interpretation of rights to appeal, the denial of the right to appeal to the President of the Republic, the Speaker of the Chamber of Deputies, the President of the Senate, the Prime Minister, the President of

[764] *Constitutional Rights Project (in respect of Zamani Lekwot and 6 others) v. Nigeria*, case 87/93.
[765] *Bisengimana v. State of Rwanda*, Case No.RS/CONST/CIV 0001/11/CS of 30 November 2012, Supreme Court.
[766] Register of "Role Penal" (Criminal Role) of the Supreme Court since in April 2016, Judgments of Supreme Court, Interviews with Supreme Court Registrars, 18 and 19 April 2016.
[767] See, for example, *Bruce v Fleecytex* Johannesburg CC 1998 (2) SA 1143 (CC) para 8; Dugard, J. Court of first instance? towards a pro-poor jurisdiction for the south African constitutional court, *South African Journal on Human Rights*, 2006, Vol. 22, pp. 261-282, at p.278.

the Supreme Court and their co-offender or accomplices is also a clear violation of international law relating to the right to a fair trial.

6.4.2 The Right to Compensation for Wrongful Conviction in Rwanda

As discussed in chapter III, the award of compensation due to a miscarriage of justice is a notion that is widely recognized in international law, as demonstrated in Article 8 of the UDHR, which emphasizes the establishment of an effective solution. Moreover, by provisions of article 14(6) from the ICCPR,[768] the right to compensation shall be retained with the declaration that when a person has, by a final judgment, a criminal offense was sentenced and if his conviction was eventually reversed or he was forgiven on the ground that a new element or reality indicates that a miscarriage occurred a person who has suffered punishment as a result of such conviction shall be compensated in accordance with the law, unless it is demonstrated that the failure to disclose the unknown fact in due time is attributable to him in whole or in part.

In fact, the right to compensation for wrongful conviction are quasi inexistent in Rwandan criminal justice system. It is only provided in the case of application for review. The Code of Criminal Procedure provides that, at the request of the party requesting the review, where the case under review shows that a person has been wrongfully convicted, the court may award him damages for non-pecuniary damage resulting from the sentence imposed on him.[769] If the person convicted of a miscarriage of justice is dead, the right to claim moral damages shall be transferred to

[768] See also European Convention of Human rights, Article3 of protocol7, and American convention, Article10, General comments 13, supra note 16, para18.
[769] Ibid (n 503), Article 197.

his heirs under the same conditions. Even though this article provided the moral damages to the accused or his heir, there is not any other regulation, procedure and the person who is responsible for paying those damages.

Moreover, the issue for compensation of wrongful conviction has been raised by the litigants in Supreme Court. In *Nkongoli John v. State of Rwanda,*[770] Nkongoli filed a complaint against the Republic of Rwanda in order to ask for material and moral damages of Frw 100,000,000 (133,333 USA Dollar) for his illegal and arbitrary detention. He argued that he was imprisoned and has been acquitted after more than 5 years of imprisonment; thus, for him, the Rwandan government has to compensate him for moral and material damages due to this injustice.[771] Unfortunately, the Supreme Court of Rwanda has compensated to him neither for material damages nor for moral damage. It held that the applicant has been jailed because he was accused to commit serious crimes and the authorized bodies have not pursued him with bad intention and bad faith. A part from this analysis, it is incomprehensive to an innocent to serve years, even decades in prison for a crime he or she didn't commit, to spend much money in the legal counsel, representation in the court, and bad impact in family without any form of compensation when he is finally exonerated and released.

With respect to the compensation for wrongful conviction the International Criminal Tribunal for Rwanda has drawn attention on this point. For example, in the case of the *Prosecutor v. André Rwamakuba,*[772] the defendant Rwamakuba was acquitted of all charges against him and released. At that time, he had been detained for nearly eight

[770] *Nkongoli v State of Rwanda,* Case No. RADA 0012/07/SC of 27 March 2009, Supreme Court.
[771] Ibid, paragraph 70.
[772] ICTR, *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44C-T, 31 January 2007.

(8) years. On 31 January 2007, based on its finding that Rwamakuba's right to counsel had been violated, the Trial Chamber awarded him two thousands United States dollars and ordered the Registrar to apologize to him and to use his good offices in resettling him with his family and in ensuring his children's continued education.[773] This ICTR Appeals Chamber decision could inspire domestic regional courts, including Rwandan criminal courts, on the issue of compensations in case of wrongful convictions.

Furthermore, there are experiences from a number of countries that can be suggested to directly incorporate into domestic legislation the system of compensation of wrongfully convicted people. For instance, the United Kingdom, has directly incorporated into its national law an article on compensation in case of miscarriage of justice, pursuant to section 14 (6) of the Criminal Justice Act 1988 (United Kingdom), s .133. A person wrongly sentenced must address a request to the Secretary of State who decides on this claim for compensation on the basis of the criteria set out in Article 133.[774] If the criteria are met, he refers the claim to an appraiser who sets the

[773] Ibid.

[774](1)Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted. (2) No payment of compensation under this section shall be made unless an application for such compensation has been made to the Secretary of State. [Before the end of the period of 2 years beginning with the date on which the conviction of the person concerned is reversed or he is pardoned. (2A)But the Secretary of State may direct that an application for compensation made after the end of that period is to be treated as if it had been made within that period if the Secretary of State considers that there are exceptional circumstances which justify doing so.]; (3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State. (4)If the Secretary of State determines that there is a right to such compensation, the amount of the compensation shall be assessed by an assessor appointed by the Secretary of State. (5)In this section "reversed" shall be construed as referring to a conviction having been quashed (a) on an appeal out of time or (b) on a reference - [F3 (i) under the Criminal Appeal Act 1995; or] (6) For the purposes of this section [F10and

amount of compensation to be paid using principles similar to normal civil damages. Even though United Kingdom has incorporated this article into its legislation, it has not resulted in a significant increase in the amount of compensation paid to persons wrongfully convicted, nor has it been an "opening of doors" since it was implemented 20 years old.[775] New Zealand offers compensation on an ex gratia basis to the wrongfully convicted.

This technique has been justified as a manner of ensuring that each case can be regarded in its entirety, and one must consider all the facts." In 1998, New Zealand set up a committee to evaluate whether the wrongly convicted person should be compensated and suggest a systematic means of doing so, if needed.[776] The Compensation and Ex Gratia Guided Discretionary System has been implemented the payment for people incorrectly incarcerated and convicted.[777] Compensation is always made by ex gratia payments, there is therefore no real right to compensation. However, the choice as to whether and how much compensation should be paid is based on rules that are accessible to the public. The Minister of Justice must refer the case to a Queen's Council which, in turn, determines whether compensation should be paid and, if so, suggest how much should be paid to the Minister.[778] In United Stated of American, most jurisdictions in the United States use ex gratia payments to offset

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section 133A] a person suffers punishment as a result of a conviction when sentence is passed on him for the offence of which he was convicted. (7) Schedule 12 shall have effect.

[775] Costa, J, *Alone in the world: the United States' failure to observe the international human right to compensation for wrongful conviction*. Emory International Law Review, 2005, Vol. 19, No 3, pp. 1615- 1654; Taylor, N, *Compensating the wrongfully convicted*. Criminal law journal, 2003, Vol. 67, No 3, pp. 220-236.

[776] Kaplan, I, *The case for comparative fault in compensating the wrongfully convicted,* University of California Law Review, 2009, Vol.56, No 1, pp.227- 269, at p.266.

[777] New Zealand, POL Min (01) 34/5, 12 December 2001.

[778] Hoel, A. (2008). *Compensation for wrongful conviction.* Trends & issues in crime and criminal justice series, 2008, Vol 356, pp. 1-6.

individuals wrongfully sentenced.[779] Beyond above mentioned experiences, generally, individuals who were wrongly imprisoned need to be compensated due to the moral, material and financial consequences which the family of the accused and accused person suffered. Kahn, in his article, deliberates that however, the implications of wrongful conviction are not of a monetary nature alone. The wrongly convicted person is suffering significant mental, psychological and physical damage while in prison.[780]

On family, the impact of incarceration creates the problem of financial, emotional and psychological burden and pressure on inmates' partners and family members, as well as stigma and nibbling of social relationships with friends and family members.[781] In addressing this issue, Rwanda, like other countries, as a signatory of ICCPR where the right to compensation due to miscarriage of justice is recognized, could learn more to those countries, and undertakes reform of judicial law in aim to provide effective measures to safeguard the accused person who has unlawfully detained or imprisoned. Indeed, Rwanda's criminal justice system is therefore non-compliant with the right to compensation in case of wrongful convictions. This is an important area which requires reform to ensure the compliance of Rwanda's criminal justice system with the countries' international human rights obligations as far as ensuring the right to a compensation for wrongful conviction. Importantly, to regulate this system of

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[779] Ibid. at p.2.
[780] Kahn D.S, *Presumed Guilty until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims under State Compensation Statutes*, U. Mich. J. L. Reform, 2010, Vol. 44, pp.123-129, at p.129.
[781]Roguski M. and Chauvel, F. The Effect of Imprisonment on Inmates' and their Families' Health and Wellbeing. Litmus Ltd, Wellington, 2009, [https://nhc.health.govt.nz/system/files/documents/publications/effects-of-imprisonment.pdf], accessed 08 December 2015.

compensation in a Rwanda, like other country could highly protect and safeguard the accused persons to the infringements of authorities in charges of arrest, for instance judicial polices, prosecutors will pay attention in taking decision to arrest someone without serious grounds for suspecting an offender and judges will pay attention in their decision making.

6.2 Conclusion

This Chapter has critically analyzed the compliance of the administration of Rwanda's criminal justice with the right to a fair trial as understood in international law. The judiciary has a pivotal role in the interpretation, implementation and protection of individual rights in the country. The court may ensure to the citizen that the right to appropriate legal proceedings has been given to them. It has established that Rwandan constitution guarantees the rights to a public and fair hearing.

Regarding the right to a public hearing, it was established that Rwanda's criminal justice explicitly provides for the right to hold a public hearing. But the manner in which it is provided for still falls short of compliance Rwanda's international obligations in the field of human rights. First, as it is required in international human rights law, in Rwandan criminal legal framework, issues of recording and photography should be permitted by the judge. But there are no regulations on how the press can report the on proceedings. This renders admissible exceptions to the right to a public hearing susceptible to abuse by criminal courts. Secondly, by allowing an accused to appear through his legal counsel, in case of a petty offence and misdemeanor, in neglect to the physical appearance of accused person in court required under international human rights law, Rwanda's criminal justice legal

framework gives more grounds for courts to disregard the right to fundamental rights to a public hearing and appearance of accused person in court hearing which excludes to him some rights as the right to examine and cross-examination of witnesses, right to defend himself in person, (…), provided in international law. Thirdly the legal practice reveals the divergence on the right to a public hearing.

With respect to the right to a fair hearing, it was emphasized that in order to determine the fairness of a particular hearing, recourse has to be made not only to the specific protection of the right to a fair trial but also to the conduct of the entire trial. Regarding the former, it was established that similar to Rwanda's criminal justice during the colonial times, Rwanda's current criminal justice legal framework is noncompliant with international law in many respects. Firstly, the Cross-examination of witnesses virtually unknown in civil law is provided in Rwandan legal system. But the practice reveals the contrary. In practice the cross-examination is almost non-existent in all courts, except in Chamber of International Crimes of high court. Secondly, the increasing of court fees done in 2014 has discouraged some citizens from going to court. Thirdly, the equality of arms, adequate facilities and time for preparing their defenses, cross examine witnesses of the prosecution have also looked as one's significant intrinsic elements and protected in international human rights law but the Rwandan judicial system fails to comply with those international standards.

The Public prosecution does not communicate to the accused the proofs or indictment. In court hearing, the Prosecutors present the facts and the statements of their witnesses, but those witnesses do not appear in court for the cross examination or confrontation. It is difficult to an accused to get the presence of their witnesses before

the court. Fourthly, the right to a legal representative in Rwanda faced with a number of problems: the challenges of the compliance with international standard of good administration of justice, particularly in regard to legal aid; and the implementation of the constitutional guarantees of legal representation in procedure's law before the courts of justice, and make them practically efficient. The courts failed shortly to uphold the fundamental and absolute aspect of the right to defense and legal representation of the accused person.

Furthermore, various problems with respect to the right of the accused to be tried without undue delay may be problematic. It was noted that in Supreme Court, the average time it takes to proceed with a case is to 3.4 years, in High court almost 1 year. However, the trial may be expanded for more than five years in some cases. Those delays are mainly related to the large number of cases that are brought before the Higher Court, in the first instance and in appeal, and the insufficient number of judges.

As a manner to compare the law within the Rwanda's criminal justice system and international standards of good administration of justice relating to post-trial rights, it can be noted theoretically that the right to appeal in the higher court highlighted in the Rwanda legal system some non-compliance. Rwandan judicial system provides different situations where an accused could not have the right to appeal; the Supreme Court has exclusive jurisdiction to try all criminal offense against the President of the Republic, the Speaker of the Chamber of Deputies, the President of the Senate, the Prime Minister, the President of the Supreme Court, and their co offenders or

accomplices, and shall be sentenced them the highest penalty of life imprisonment which prevents a convict from enjoying any type of mercy. Finally, the compensation due to a miscarriage of justice or for wrongful conviction widely recognized in international law on human rights, are quasi inexistent in Rwandan legal system and Supreme court has failed to protect it.

It is for these reasons, inter alia, that it is of utmost importance that criminal justice should conform to the minimum international human rights standards for the proper administration of justice embedded in the right to a fair trial. It is in this respect that we now turn to proposing possible recommendations that can help to ensure compliance of Rwanda's criminal legal frameworks with the right to a fair trial.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.1 Introduction

This chapter presents and discusses the conclusion, suggestions, and recommendations of the study related to the critical analysis of the administration of justice in Rwanda. It is divided into three parts. The first part summarizes the main insights that emerged from different chapters of this study. In part two, the legal and policy implications of the contributions made are highlighted and the third party contains the suggestions for future research.

7.2 Conclusion

This study had the opportunity to assess the compliance of Rwanda's criminal justice with the international standards related to the proper administration of justice, particularly the right to a public and fair hearing by an independent and impartial court, embedded in right to fair trial, with the view of providing recommendations that can help to ensure that the country's criminal justice complies with the international legal standards for the administration of justice.

The study has analysed the existing Rwandan criminal justice legal system. It proposes suitable measures and mechanisms to ensure compliance of Rwanda's judicial system with the right to a fair trial. The right to a fair trial constitutes the most important guarantee for ensuring justice in any democratic society. There can be no justice from a system whose legal framework and courts do not protect and guarantee the right to a fair trial. As long as Rwanda's judicial system exercises judicial power

over criminal offenses, then, in line with Rwanda's international human rights obligations, it must comply with the right to a fair trial. The main focus of the study was to address the increasing potential risk of losing effective justice to the person of accused through the poor administration of justice by Rwanda's criminal legal system.

The study was guided by the following research questions:
First, to what extent is the existing Rwandan law adequate in administering justice? Second, to which extent does the Rwandan legal practice implement and enforce fair trial in administration of criminal justice; and third, which strategies and mechanisms should be considered by Rwanda in ensuring proper administration of justice.

The traditional doctrinal legal research and empirical research method were the main approaches used in pursuing the study. In its opening chapter, the thesis provided its context which also served to justify the need for undertaking a study of this nature from the effective and fair administration of criminal justice by the courts of justice. It was argued in this chapter, and consistently proved in subsequent chapters in the course of reviewing the literature, that although a substantial body of literature has been developed in recent years in the area of administration of justice by the judicial system on an international level but this scholarship has been lacking in a perspective from Rwandan judicial system perspective. The preoccupation of the thesis, therefore, was to provide this viewpoint from Rwanda's perspective.

The theories and concepts, importance and scope of the right to a public and fair hearing by an independent and impartial court and discussion made in chapter two reveals that when States ratify treaties or international conventions, they agree to both

refrain from violating specific rights and to guarantee the enjoyment of those rights by individuals and groups within their jurisdictions. Thus States have the duties to protect, respect, promote and fulfil the enjoyment of the right to fair and public hearing by the impartial and independent court, embedded in the fair trial, within their territory and jurisdictions. It was confirmed that the right to a fair trial applies in full to all courts, in all proceedings and circumstances without exception. Therefore, the accused persons who play a central role in any criminal court proceedings must be protected at the highest standards of fairness starting from trial to the court judgment.

A review of fair trial standards under the international instruments in chapter three revealed that the international fair trial rights standards are the cornerstones for any criminal proceedings. Countries are required to adapt their domestic laws on those standards and must adopt concrete measures and specific measures at national level to implement their obligations, and to respect their obligations to protect the right to a fair trial. International instruments reveal that originally, the fair trial standards in criminal proceedings were established for ensuring the protecting and promoting the rights and liberties of accused persons and individual people in general; therefore, the accused persons must always be assumed to be innocent until the final court decision proves guilty.

Accordingly, such rules have developed numbers of institutional and judge's safeguards and procedural safeguards with the purpose of securing accused persons in an effective criminal justice. With the content of the right to a fair trial, the judiciary must be independent to other government's branches and this independence must be extended to the financial and administrative autonomy, second, individual judge must

show integrity with appropriate training and its independent, impartiality, tenure and financial aspects must be protected legally from all sorts of undue influence. The fairness of procedural is also safeguarded; the international legislation provides that the court proceedings must be fair and public. Therefore, in the protected rights including equality of arms, adequate opportunity to prepare a case, the right to be assisted by an interpreter; examination of witnesses, the right to determine their rights and responsibilities without undue delay and with appropriate notice of the choices and reasons for decisions; right to appeal, etc.

The examination of the Rwandan judicial law was undertaken in chapter four. It was observed that in the pre-colonial period everyone was supposed to play the judicial police and prosecutor role in his case by collecting physical evidence and testimonies. During the colonial period, the right to a fair trial like that is understood in modern administration of justice was largely nonexistent in Rwanda's criminal justice; it is plausible to argue that Rwanda criminal court during the colonial era was not court in sense of the words as it is understood in international law relating to the good administration of justice by the judiciary.

Nevertheless, in post-independence, Rwanda's criminal justice has started improving as far as guaranteeing the right to a fair trial was concerned. However, it remains established to the colonial scheme. The analysis and discussion of fair trial rights in Rwanda under chapter five found that the existing judicial legal system frameworks are in many respects noncompliant with the accused person's rights to a fair trial. The research found that the failure is due to insufficient incorporation of international standards and safeguards of the rights to a fair trial in domestic order and failure of

taking appropriate measures thereto. For instance, first, the rights to appeal, right to compensation in case of miscarriage of justice, equality of arms, the right to be tried without undue delay, the protection against self-incrimination are not provided in anywhere in the current constitution. Second, other factors including that some provisions seem not to be in harmony with the spirit of international law related to the proper justice administration. For example, the Penal procedure limits the principle of liberty of a suspect under investigation for offenses punishable for more than five (5) years of imprisonment.

In addition, there is no provision which can protect the accused persons during the collecting of pieces of evidence in prosecution phases. These discrepancies lead to the conclusion that the existing judicial legal system as enshrined in Rwanda is inadequate in protecting the accused persons in the discourse of criminal proceedings.

Chapter six examined the Rwandan administration of justice at the test of rights to a fair trial. It was found that current Rwanda's criminal justice system is in many respects noncompliant with the right to a fair trial. From an institutional perspective, it was established that Rwanda's justice legal framework does not guarantee the institutional independence of the judiciary. First, executive power has the right to challenge all final decisions and request the chief justice to re-adjudicate the case. Second, executive power has the power to review all judiciary's activity. Thirdly, in the high council of the judiciary, there are official of executive power. Fifth, even the budget allocated to the judicial system are meagre and inadequate[782] the judiciary is

[782] The amount allocate to the judiciary are inferior to one percent of the budget of the country.

totally dependent on the executive in its budgetary needs and the chief budget manager is a direct appointee of the executive power. Moreover, the institutional independence of Rwandan judiciary is further contestable in their direction. The Chief Justice, Deputy Chief Justice, judges of the Supreme Court and the heads of High Courts are appointed by the Chief of executive power without any objective criteria. The procedures of recruiting and removing the judges of Supreme Court may be subject to abuse by the executive and legislative powers because they are so much involved in the removal procedures.

Also, inconsistent with the right to independence of judges, which generally requires that a judge must be irremovable, the principle of irremovability of judge has been thwarted by the constitutional itself. Thus judge of high court could be moved anytime without his prior consent. Therefore, the right of accused persons to independent court is not really protected.

An evaluation and examination of the current Rwandan criminal justice with the right to a fair and public hearing in the pre-trial, trial or hearing and judging and in post-trial phases as understood in international law are also undertaken in chapter six. It has established that Rwandan constitution guarantees the right to due process or rights to a fair and public hearing. The criminal legal framework explicitly provides for the right to a public hearing. However, the manner in which it is provided for still falls short of complying with Rwanda's international obligations. First, the judge shall authorize matters relating to recording and photography, but there is no regulation on how the media can report on court proceedings. Second, by allowing an accused to appear through his legal counsel, in case of a petty offense and misdemeanor, in neglect to

the physical appearance of accused person in court required under international human rights law, Rwanda's criminal justice legal framework gives more grounds for courts to disregard the right to fundamental rights to a public hearing and appearance of accused person in court hearing which also exclude to him some rights as the right to defend himself, examine, reexamine and cross-examine witnesses, (…). Third, the criminal legal practice reveals the divergent on the right to the publicity of hearing. For instance, the courts do not allow the accused person or party in court proceedings before signing the minutes to verify the conformity of their pleadings with what has been written by the Registrar.

In addition, it was observed with respect to the right to a fair hearing that Rwanda's current criminal justice legal framework is noncompliant with international legislation on human rights many respects. First, the Cross-examination of witnesses virtually unknown in civil law is provided in the Rwandan legal system, but in practice, it is almost non-existent in all courts, except in Chamber of International Crimes of the high court. Second, the increasing court fees done in 2014 have discouraged some citizens from going to court. Different reports show that 30 % don't have access to the court because of the increased court fees and some accused persons cannot make an appeal because of the non-affordability of court fees. Third, the Rwandan judicial system fails to comply with equality of arms, adequate time and facilities to prepare their defenses, cross-examine witnesses of the prosecution.

The accused person or his lawyer has no clear right to cross-examination of the prosecution witnesses, and their witnesses are not taken in the same conditions applied to the witnesses of the prosecution. The Public prosecution does not communicate to

the accused the proofs or indictment. Four, the right to have a legal counsel in Rwanda faces many challenges, particularly in regard to legal aid and in the implementation of constitutional guarantees of legal representation in legislation of court procedure and their practical efficiency. The courts failed shortly to uphold the fundamental and absolute aspect of the rights legal assistance and defense of the accused person.

The other insight from chapter six is related to post-trial rights, and the right to be tried without undue delay. First, the right to appeal in the higher court highlighted in Rwandan legal system some non-compliance. Rwandan judicial system provides different situations where an accused could not be entitled to appeal. For instance, the Supreme Court has exclusive jurisdiction to try all criminal offense committed by the President of the Republic, the President of the Supreme Court, the Speaker of the Chamber of Deputies, the President of the Senate, the Premier and their co-offenders or accomplices, and shall be sentenced them the highest penalty of life imprisonment. Second, the compensations due to a miscarriage of justice or for wrongful conviction are quasi-inexistent in Rwandan legal system and Supreme Court has failed to protect it. Lastly, the right to be tried without undue delay is not fully protected. It has been observed that in Supreme Court, the average time it takes to proceed with a case is to 3.4 years, likewise, in some circumstances can be seen to extend for more than five years.

7.3 Recommendations

The analysis in Chapter Three about the examination of the right to fair trial at international law, Chapter Four about the overview of the Rwandan judicial system, Chapter five, right to a fair trial in Rwandan law, and Chapter Six regarding the

compliance of Rwandan administration of justice with the Right to a fair trial calls for immediate reform of the country's system of criminal justice. This section proposes major recommendations that can help to ensure the compliance of the system of criminal justice in Rwanda with the right to a fair trial, specifically the right to a public and fair hearing by an Independent and impartial court. The major challenge in that regard is how to ensure that Rwanda's criminal judicial system complies with the right to a fair trial. It is from this perspective that we now make the following recommendations.

7.3.1 Ensuring the Right to an Independent

7.3.1.1 Institutional Independence of the Court

One major concern that clearly came out of our analysis in Chapters of this study as far as the institutional independence of Rwandan judicial system is concerned is the failure of Rwandan legal framework to guarantee the independence of the judicial system from the legislative and executive. There is no clear separation of powers. To address the above-mentioned shortcomings, it is, firstly recommended that due to the tasks of the high council of the judiciary, there is no reason for maintaining, the Ministry of justice and the Ombudsman in the high council of the judiciary. It should be composed only with judges elected by their peers. It is recommended that the legislative and the executive should not be involved in the appointment of the leadership of the judicial power and Supreme Court judges of Rwanda. Secondly, when, the final decision is made by the court, parties to the case would not inform the Office of the Ombudsman for its review as is provided by the law. It is inconceivable how an executive body can be competent to challenge court decisions. It would be

better to establish the best judicial proceedings relating to the application for review of a final decision due to injustice without involving the foreign authority to the judiciary in the appreciation if the judgment can be reviewed by the Supreme Court.

Thirdly, the Chief Justice and Deputy Chief Justice should not be appointed without any objective and transparent procedure; in case of recruitment of those high authorities of the judiciary, appointing an *ad hoc* independent commission is highly recommended. In all the same, the President of the High Council of the Judiciary would not be necessary the president of Supreme Court. It is suggested the change of the law on the matter.

Another recommendation concerns the financial independence of the Rwandan Judicial system. As established in chapter six, even if the budget which is allocated to the judiciary is meagre and inadequate; the legislature has failed to place the administrative and budgetary authority to the judiciary. The budget manager and other supporting staff are the direct appointees of the Executive power. The budgetary procedures that exposed the judiciary to be manipulated by the executive could be removed with the shortened process.

It is recommended that the judiciary should have economic budgetary independence, draw up its own budget and deal with Parliament directly then place it under its control. In this case, the State should be required to provide appropriate funding to allow the judiciary to carry out its tasks efficiently. The Call for immediate control of the judiciary's finances and adapt Rwandan laws to the constitutional guarantee of financial autonomy of the judiciary.

7.3.1.2 Independence of Individual Judges

Before recommending the specific measures that can guarantee the impartiality and independence of judges, it is important to first briefly reflect that the executive and legislative participate in choice process of the judges of Supreme Court without any known and objective procedure. For the High Court judges, the commission in charge of their examination is not independent. Rwandan judicial system would adapt its laws to international standards and create the best judicial selection process possible.

Therefore, it is recommended to establish an independent nominating commission, in order to mitigate political or other influence in the appointment process and return attention to the qualifications and temperaments of potential judges. The commission could locate, recruit, and investigate judicial applicants, prepare, correct the exam, conduct the interviews, and present a slate of candidates to the President or competent organ to be considered for nomination. It should be noted that the removal procedures of those judges may be subject to abuse by the executive and legislative powers because they are also much involved in the processes for removal of the judges of the Supreme court and High court president and vice president. Likewise, judges for the high court could be removed on the recommendation of the non-independent commission. There is no law which defines the misbehavior or misconduct.

This constitutes a big threat to the independence of the judiciary because, as human beings, being appointed by the executive and removed by the same authority or being removed without fair procedure can jeopardize the independence of these judges. It is with the above considerations in mind that it is recommended that the Rwandan judicial legal system shall adopt the system of inquiry court or special court; it is

advised that if the president of the Supreme Court receives a case, after the recommendation of the disciplinary commission, he should appoint or institute a special court to investigate the conduct of a judge, the complaint should be resolved through a regulated court process and the court's decision remains subject to appeal in Supreme Court.

In the event of such appeal, the high council of the judiciary shall take action in compliance with the Supreme Court's decision. Otherwise, in any event, the disciplinary system must be balanced in order that judges do not have to fear an arbitrary dismissal if they make a decision which goes against the power or individual. Thus, it is recommended that the Rwandan legal system should define what constitutes misbehaviour, incompetence or misconduct, in the aim of avoiding abuse of the same. Other observations, as discussed in chapter IV, show that Rwandan judges do not have sufficient security of tenure and inadequate judicial salaries; judges can be removed for the interest of justice without their consent. To address those loopholes, other policies and legal measures which should be included in the national legislation are:

Firstly, Article 49 to Article 53 of Law n ° 10/2013 of 08/03/2013 governing the Statutes of Judges which provide that the decisions of the High Council of the Judiciary shall not be subject to appeal either shall it be referred to the administrative courts which clearly violates due process rights guaranteed by international law should be amended.

Secondly, the principle of irremovability of Rwandan judges should be respected. The Rwandan constituent should reincorporate the principle of irremovability in the

constitution and repeal the provision of article 38 of law n ° 10/2013 of 08/03/2013 governing the Statutes of Judges with the aim of protecting judges against non-consensual movement outside the jurisdiction in which it performs duties of office.

Thirdly, Rwandan judge should not be moved and transferred to another court without his or her consent, except for disciplinary sanctions or reforms of the organization of the judicial system. In any case, the grounds for transfer of judges should be clearly and legally established and be decided in transparent proceedings, without any external influences and whose decisions should be appealed in other instance provided by law.

Fourthly, Rwanda has to amend the provisions which provide the terms of office of the Supreme Court President and Vice-Chairman and High court and high court and pass legislation which secures the security of tenure of those judges.

7.3.2 Ensuring the right to an Impartial Court

The imperatives of safeguarding judicial impartiality of Rwandan judicial system and judges are highly desirable. Rwanda has to take an extra step in consolidation and reinforcement of the legal dispositions related to strengthening the impartiality of judges, particularly in combatting the corruption, by putting in place special mechanisms thereto. The procedure, examination and the admissibility of the application of disqualification of the judge shall be very important points in enhancing the impartiality of court in eyes of the citizens. It is with the above considerations in mind that the following policies and legal measures are recommended:

Firstly, the disqualified judge frequents their court colleagues every day, he shares, sometimes the same office, sharing as it is in practice, different views on certain judicial records. Therefore, it is recommended that the examination of the application for challenging a judge should be the responsibility of the immediately higher court.

Secondly, given that the fairness and effectiveness of the judicial system are for the benefit of the litigant, people and the public, not for the judiciary itself. The legislative should be essential to reintroduce in the Rwandan legal framework the referral of the case to another court for the cause of legitimate suspicion in Rwandan law.

Thirdly, the legislative should introduce in Rwandan law sanctions of Applicant when a challenge was rejected as it is in France, without excluding the possible claim for damages.

Fourth, the legislative should extend the grounds of the challenge by introducing another ground or cause that would bring together different challenge assumptions not listed in article 171 of law establishing organization, functioning, and jurisdiction of courts and article 99 of civil procedure.

7.3.3 Compliance with the Right of Public Hearing

In order to fully comply with the right to the public hearing, it is proposed that Rwanda's criminal justice legal framework, as it is required by the publicity of hearing as understood in international human rights law, Rwanda's criminal justice legal framework, should qualify the allowable exceptions to the right to a public hearing on the issue concerning recording and photography which must be authorized

by the judge. Due to the importance of the recording of the statement of accused in the trial, it is necessary to regulate and update the provisions related to the conduct of the hearing.

Finally, not least, the use of updated information and communication technology in the communication of court hearing date and other relative information should highly be considered in Rwanda. In this viewpoint, there is a need for establishing regulation on how the press can report the court proceedings. This could be based on subjective reasoning and in the interest of accused. Because, exclusion the media in the court hearing or prohibit the media to report, to take photography on certain issues give more ground for courts or court to exclude the public from court proceedings than what is acceptable in international standard of administering justice.

It is also suggested that the provisions which govern the conduct of hearing by judges or court trial should be updated. Thus, it will be better to include that before closing the hearings, judges should remind the parties that they have the rights to verify if their declarations are well written. It is advisable to the judiciary to always update the hearing information, providing general and specific information on its activities in the aim to help the public, litigant, accused and different organizations which want to go or assist in the court hearing.

7.3.4 Complying with the Right to a Fair Hearing

As the right to a fair hearing shall include protection and respect of all guarantees the fair procedure and specific guarantees of a fair trial, it is submitted that all the recommendations made above in this section will contribute to ensuring the

compliance of Rwanda's criminal justice and legal practice with the right to a fair hearing. But in addition, in Chapter Five, I identified other areas where Rwanda's criminal legal framework and legal practice is lacking in terms of fully complying with the right to a fair trial.

I also pointed out instances in which Rwanda's criminal justice legal framework falls short of complying with the right to have facilities and adequate time to prepare their defenses, right to examine and cross-examination of witnesses and appearance in court the witnesses of accused and those for the prosecution, right to legal representation and defense, the right of appeal and right to get the damages and interests for victims of miscarriages of justice. To address these deficiencies, firstly, it is recommended to Rwandan legislator to pass an act or introduce in Rwandan law, the provisions which protect the right to have facilities and sufficient time for the accused to prepare their defenses with aim to guarantee that the accused can satisfy the prosecution side with some parity. In this case, the prosecution should disclose and send to the defense all material pieces of evidence in their possession for or against defense, in advance of the hearing. Secondly, the judge should strictly respect the adversarial principle, in particular, by reinforcing the possibility for the accused to precede a cross-examination of witnesses in the hearing and by encouraging the attendance of defense witnesses in the court. It is recommended to update and change the criminal legal procedure and to actualize the principle of equality of arms in Rwandan criminal jurisdiction. Thirdly, given that the Cross-examination of witnesses virtually unknown in civil law is provided in Rwandan legal system, those witnesses would appear in court and cross-examine by the Parties. It is recommended to implement bearing in

mind this issue being overcome to adopt strong legal measures with a mechanism for application with the aim of reducing any opportunity during the course of testimony.

Practice directions of chief justice are recommended as an immediate and achievable measure to address this gap; it could serve as the guideline to judges. Due to the importance of the right to a legal representation, defense and to avoid and prevent the conviction of an innocent, it is advisable that from the onset of the first hearing, before asking the accused person if he pleads guilty or not guilty, the court could inform him that he has the right to counsel. It is also recommended to Rwandan legislative to put in place a legal policy of free aid legal assistance for those accused persons of offenses punishable to life imprisonment. It also strongly suggested to the Rwandan legislative to pass rules which provides the consent of the accused person to legal representation as a requirement, since some accused cannot appreciate the State's imposition on them of advocates.

Furthermore, the Supreme Court could not enjoy the jurisdiction of the first instance. This kind of procedure affects the right to appeal of the accused person. In order to effectively protect the right to appeal, provisions which limit the appeal on the decision made in the first instance could be repealed. Other things, it is established that the people wrongly convicted suffer significant mental, psychological and physical ham. On family, the impact of incarceration, creates the problem of the financial, emotional, and psychological burden and pressure experienced by the partners and family members of the prisoners and the resulting stigma and erosion of the social networks of the partners and family members.

In addressing this issue, Rwanda as a signatory of ICCPR where the right to compensation due to the miscarriage of justice is recognized could undertake reform of the judicial law in the aim to provide effective measures to safeguard the accused persons who have unlawfully detained, imprisoned or convicted. In this regards, the system of compensation in Rwanda should be established by legalization and implementation of an independent public body in charges of compensation for those wrongly convicted or imprisonment.

It is also recommended the following policies and legal measures:

Firstly, access to a properly functioning justice system justice should not be dependent on the capacity to pay; vulnerable litigants should not be disadvantaged. Legal measures and serious social policy shall help in handling of this problem. The Rwandan legislative and other stakeholders working in the sector of justice would take a second look at the criminal Justice system and putting appropriate structures in place in order to make justice accessible to all.

Secondly, even if there is an improvement in filing a claim, the judiciary has to design and implement more online court services such as e-payments for court fees, criminal files, and other services;

Thirdly, a law must be passed allowing the Supreme Court to give their judgment only in most important matters, other matter should be solved only by others courts.

Fourth, it is recommended the continuous judicial training, specifically on the application of international judicial guarantees of accused persons in Rwandan domestic courts.

Though the suggestions towards ensuring compliance of Rwanda's criminal justice system with the right to a fair trial made in this thesis relate to the context of improving the administration of criminal justice in Rwanda, they are likely to be very useful and relevant for improving criminal justice systems in Africa and beyond. For Africa, this is particularly because a number of countries share many things in common as far as the administration of criminal justice is concerned. The analysis, observations, conclusions, and recommendations made in this thesis are therefore very important for improving the administration of criminal justice not only in Rwanda but in Africa and beyond.

7.4 Suggestions for Future Research

Future research may be taken by considering the following: first, similar research can be conducted in Rwanda by suggesting alternative to guarantee the right to a fair trial in investigation and prosecution phases. Second, similar research may be taken in other countries other than Rwanda.

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APPENDICES

Appendix I: Questionnaires

A. ***Mode of recruitment of judges***

1. Do you know the mode of recruitment of ordinary judges and recruitment of the heads of the courts?

   a. Yes b. No

1. If yes, what do you think about the procedure of recruitment of judges, heads of courts?
2. If no, explain
3. What do you think about the independence of individual judges in Rwanda?
4. What do you suggest in order to improve the mode of recruitment?

B. ***Interview with people and accused persons***

1. Do you have fears for your safety when attending this criminal court hearing?
2. After attending or being party in this criminal court hearing what do you think about the respect of your right to cross examination of witnesses of the prosecution and equality of arms?
3. Consequences and advice.

C. ***Statements of the advocates after the criminal court hearings***

1. After assisting the accused in this criminal court hearings, what do you consider on the safety of the court proceedings?
2. Do you consider this court to respect all procedural guarantees of fair and public hearing?

3. If yes, explain
4. If no, explain
5. Consequences, advice or suggestions.

D. *Interview with judges and court registrars after the criminal court hearings*

1. How Rwandan judges consider the standards of fair trial in different phases of criminal court hearings?
2. Why the witnesses of the prosecution do not appear in the criminal court hearing?
3. How the court protects the right to equality of arms, cross-examination, and attendance of the witnesses of accused?
4. In which manner the prosecution and accused communicates between them the indictment, pieces of evidences, and submissions?
5. Suggestions.

Appendix II: Published Papers

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Enforcement of Women' Property Rights by Rwandan Courts: Battle of Equality before the Law

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Abstract: *Gender equality is essential for the achievement of human rights for all. Women are entitled to live with dignity and must enjoy the rights to equal protection by the law. The Judiciary remain the guardian of human rights and freedoms. The paper analyses the enforcement, by the judiciary, the women' property rights on the proof of gender equality and written law in Rwanda where the customary system treated a woman like second class citizen; it evaluates the implication of these judgements in fight against women in Rwanda. The recently decisions of Supreme Court have declared the customary laws and practices which deny women inheritance rights as unconstitutional, have also developed some protection of women involved in customary marriage. This is particularly important, because these decisions have provided further interpretation and clarification for the actual enforcement and execution of women' property rights. This contribution commends socio-policing, legislative enactment and court based advocacy in these cases for the protection of women's rights in Rwanda. It therefore calls for judicial activism in the protection of women's rights.*

Keyword: *Judiciary, Equality, Customary Law, property Rights, Women Rights, Rwanda*

1. Introduction

The expression equality before the law at once means that all laws must apply to everyone, including those who enact and/or sanction them, and that the law so enacted or sanctioned cannot be used to apprehend or isolate a group of individuals for discrimination [1]. Equality before the law is not only a human rights issue but also an economic or property issue. Most countries still have gender-based legal differences, constraining women's ability to access to the property of their family or make independent decisions in important areas of their lives.

Women are generally considered inferior to men and discriminated against in so many ways [2]. In some communities, women cannot own property nor do they have any formal property rights. The customary law in some places does not recognise the concept of matrimonial property as the woman is regarded as part the estate of the man. They cannot inherit property including their husband's property [3].

Some decisions of Rwandan Tribunals and Courts reveal that the Rwandan custom did not allow the women and girls to succeed their parents. In the cases *Dushimimana v. Usabumubeyi and Others,* in the same line with other decisions taken by different courts [4], the court has held that before 1999 women could only rely on customary law that stipulates that only sons can inherit from their father and provides only weak and unpredictable inheritance rights for married women [5]. The women had no direct claims on land and were forced to rely on association with male members of their birth family, husband and in-laws. By contrast, in the case *Kamagaju v. Mukagahima and Others* [6], the court has ordered the equal inheritance between sons and daughters for their parents who have died before 1999.

This contrary views of Rwandan Tribunals and courts on the same issue relating to interpretation of Rwandan custom, can create in one way or another an injustice based on gender inequality and discrimination against women. It is within this context of reactions against gender discrimination against women that this contribution analyses the enforcement and protection of women rights in Rwanda, especially in the area of inheritance and in land property; it contributes to the existing scholarship by suggesting alternative measures that could be adopted to achieve the effective realization of these women's rights.

Apart from the introduction, the paper starts by highlighting the legal and policy framework upon which the protection and enforcement of women's rights in Rwanda is advocated. It analyses the judgements rendered by the Supreme Court which is the highest court in the Country [7]. It discusses

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their implications for the protection of women's rights in Rwanda. The paper therefore calls for the sustainability of the other tribunals and courts based advocacy in the protection of women's rights in Rwanda.

2. Legal and Policy Framework

Women are human beings just as much as men are, and they are guaranteed the same rights as men by the 1948 Declaration on Human Rights and other international conventions.

Rwanda has made a strong commitment to gender equality and has ratified and domesticated most international and regional laws that promote the rights of women, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) [8]. To consolidate the commitments already undertaken towards the elimination of all forms of discrimination against women, Rwanda signed and ratified the Optional Protocols in 2008.

Rwanda is a State Party of some major international and regional human rights instruments like the International Covenant for Civil and Political Rights and International Covenant for Economic, Social and Cultural Rights. Rwanda is also signatory to regional instruments like the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on the Human and Peoples' Rights on the Rights of Women in Africa.

CEDAW supports a dispute on equal property rights [9]. Regional instruments, such as the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (also known as the Maputo Protocol), offer thorough protection of women's property rights. But most notably are the provisions on women's property rights during and after marriage [10]. The Maputo protocol specifies that widows have the right to have an equal share of their husband's inheritance. Moreover widows have the right to stay in the matrimonial house [11]. However, there is concern that the provisions of international laws are not well known by the legal profession [12] and that the full text of the ratified treaties is not published in the Official Gazette and therefore not easily accessible to law professionals and citizens more generally.

At the national level, Rwandan law generally, provides for gender equality in line with these international laws [13]. The Constitution incorporates the principle of equality by providing as follows in article 15 and article 16: "*All persons are equal before the law. They are entitled to equal protection of the law. All Rwandans are born and remain equal in rights and freedoms. Discrimination of any kind or its propaganda based on, inter alia, ethnic origin, family or ancestry, clan, skin colour or race, sex, region, economic categories, religion or faith, opinion, fortune, cultural differences, language, economic status, physical or mental disability or any other form of discrimination are prohibited and punishable by law*".

To further demonstrate its determination to fulfil the obligations under the various treaties mentioned above, the Rwandan government, under the auspices of the Ministry of Gender and Family Promotion, adopted a *Vision 2020* [14], and the Economic Development and Poverty Reduction Strategy (EDPRS) [15]. Rwanda has a National Gender Policy [16] and specific policies include ones for girls' education [17], women in agriculture [18], Gender-based violence [19] and sexual and reproductive health [20], each with its own implementation strategy. The national gender machinery is comprised of the Ministry of Gender and Family Promotion, the Gender Monitoring Office and the National Women's Council (NWC).

Progressive inheritance and land laws give women equal rights with men to own and inherit property, including land, and to the joint ownership of property in legal marriage [21]. The Land Law reaffirms the principle of equality set forth in the constitution and applies this principle to land rights: "*All forms of discrimination, such as that based on sex or origin, in relation to access to land and the enjoyment of real rights shall be prohibited. The right to land for a man and a woman lawfully married shall depend on the matrimonial regime they opted for*" [22].

The discriminatory provision which was in civil law that husbands are heads of the household and that wives have to live in the matrimonial home has been replaced by non-discriminatory provisions in 2016 in law nº 32/2016 of 28/08/2016 governing persons and family [23]. Therefore, there is no provision in domestic law that prohibits direct and indirect discrimination or specifically requires the state to ensure equal development for women in rural areas.

The results in the present paper are based on data from the decision of Supreme Court. Rather, they will provide insights on inequalities existing based on gender and the view of Rwandan courts and tribunals. As such, they could provide guidance relevant for the implementation of the gender equality on land property and other assets of

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household, as well as a point of reference for future court decisions.

3. Judicial enforcement of women rights on land property

Enforcement can be understood as acts or process of compelling compliance with International agreements duly ratified, constitution and laws of a country. Without effective enforcement mechanisms, the later will generally have no impact. Enforcement transforms the *de jure* into the *de facto* and enables both women and men to enjoy rights and resources.

Land is one of the most important and fundamental natural resource in Rwanda, and is the most important asset for both production and survival. Customary law figures prominently in the day-to-day functioning of family law and land rights, with large impacts on women. Women who were widowed, divorced, or separated had no ownership rights to marital property.

In case *Mukansanga v. Umutoni and Others* [24], Cakadende who has 4 children include Umutoni, has legally married with Mukansanga, they bore two children. Cakadende has deceased in 1997. After 3 years Umutoni and her relatives file a claim in Intermediate Court of Gicumbi requesting inheritance of their father Cakadende. The Intermediate Court ordered the equal sharing of all properties of Cakadende between his children; it ordered also that Mukansanga has only the power of administration of her two minors' property. Mukansanga who reclaim her rights to the property of the household, appealed to the High Court which decided that her appeal has no merit and sustained the judgment. Again, Mukansanga was not satisfied with the ruling and appealed to the Supreme Court. The council of Mukansanga states that Cakadende has legally married with Mukansanga and they jointly acquired the assets and material support to the household as well as its maintenance. He argues that is understandable how the court has ordered Mukansanga to quit the house and other property of her household. The Supreme Court ruled that pursuant to the Rwandan culture, a woman would not have right to a property, she would be given proportional alimony when the husband dies, then the remaining property would be administrated in the interests of the children.

In this case, even the Supreme Court, has ordered that Mukansanga could have a small share in the property of her household, she would be thrown out of her matrimonial home, where she had lived with her late husband and children, on the ground that she is a woman, is indeed very barbaric, worrying and flesh skinning.

The Supreme Court has made a small contribution to the fight against discrimination based on sex, but does not arrive to interpret and confront the Rwandan custom to the international instruments legally ratified by Rwanda. The customary ideal where the women were not unprotected remain the same, for this if a widow is not on good terms with her family in-laws, or when a woman divorces or is abandoned, she will be forced to return to her biological family.

This custom reduced a widow as a chattel and part of the husband's estate, constitutes, the height of man's inhumanity to woman, his own mother, the mother of nations, and the hand that rocks the cradle, it would be avoided. In any case a woman is a human being, she must be equally treated and enjoy the same rights as those of man. This gender equality would contribute, as noted by Israel NE Worugji and Rose O Ugbe [25], to the development strategy for reducing poverty level among women and men, improving health and living standards and enhancing efficiency in public investment. The attainment of gender equality is not only seen as an end in itself and human right issue, but as a prerequisite for the achievement for sustainable development.

The earliest cases concerning gender equality and custom was the case of *Ntahonkiriye and Other v. Icyitegetse* [26]. The Supreme Court took a judgment which analyse, explain and interpret Rwandan customary law. Mporebucye has legally married with Mukampuguje, they died childless respectively 1997 and 2004. Their assets have been taken by the heirs of the husband. Ntahonkiriye with others heirs of Mukampuguje filed a claim in Primary Court of Muzo requesting to inherit the assets of their daughter. The primary court ruled that when Husband Mporebucye has died in 1997, the Rwandan customary law did not allow Mukampugije who were widowed to have ownership rights to marital property, if a woman became widowed without having borne her husband any children, she was denied any rights to her husband's land only the husband's family could give it to the widow as usufruct, however when widow died all assets return to the husband family.

Through the applications for review of a final decision due to injustice, the Supreme Court has reviewed the case *Ntahonkiriye and Other v. Icyitegetse*. The council of Ntahonkiriye states that the legitimate heirs of Mukambuguje have the right to succeed their child who died in 2004. He argued that the Primary Court could not be bound by the custom which has the discrimination based on sex.

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In applying the constitutionality test of the custom which provides that if a woman became widowed without child, she could be granted only the right of usufruct on the conjugal house and the land of her husband, the Supreme Court has declared it unconstitutional. The Supreme Court found that the article 5 (a) of Convention on the Elimination of all Forms of Discrimination against Women of 1 May 1980 ratified by Rwanda at 02 March 1981 [27] ensures governments strive to eliminate cultural and traditional practices that perpetuate discrimination and gender stereotyping of women. In the respect of this engagement Rwandan has incorporate in the constitution of 1991, in force when MPOREBUCYE died, in article 16 [28] that all citizen shall be equal before the law, without any discrimination, especially in respect to sex.

The Supreme Court held that: "*denying Mukambuguje the right to have a share to the assets of her household shall be to contribute to the discrimination based on sex and to enforce the unwritten customary system, based on the principle of masculinity and patrilineal heritage, where daughters and women were considered to own land only through their fathers or husbands, who were the holders of primary land rights*".

The decision of the Supreme Court in this case was innovative and would play a great role in avoiding the discrimination based on gender in whole country. The Court upheld the plaintiff's claim and declared the Rwandan customary law which excluded female children from inheritance and to have the right to own land in 1997 was in breach of article 16 of 1991 Constitution, a fundamental right provision guaranteed to every Rwandan. The said discriminatory customary law is void in the time of the execution of succession of MPOREBUCYE, as well as it conflicts with paragraph 2 of article 98 of the 1991 Constitution which provided that the Custom shall remain applicable in as much as it was not replaced by laws or is not contrary to the Constitution, laws, regulations, public order or morals. The Supreme Court of Rwanda decided that the culture that contradicts the State's principle of equality of people before the law is vacuum, thus the court further ruled that a woman has right on the property even if the culture states otherwise.

Gender equality is essential for the achievement of human rights for all. This judgment has a great significance in gender equality, it can be safely said that it is a landmark decision in this area of human rights, has a pivotal role to play in the interpretation, implementation and protection of gender equality in particular, and human rights in general, in the country. The Supreme Court showed a great appreciation whatsoever for the fundamental human rights and the equal protection of the law.

4. Protection of the rights to property of women unlawfully married.

A consensual or informal union is a simple consensus between partners without the recognition of society. In Rwanda, consensual unions are still frequent. In 2015, combined with customary unions, they still represented 24% [29]. In Rwandan legal system there is no legal recognition of consensual cohabiting and customary unions. It is not surprising that the legal system excludes almost a quarter of women. Women who are informally married have no legal protection of their rights to property and inheritance. When it comes to rights on their spouse's property, they are not entitled to retain a share of the property upon divorce or their husband's death. They are also at risk of being forced to leave the land of the husband without being able to claim rights to it.

Whereas social recognition of the female partner's entitlements in an informal marriage may vary according to whether the marriage is monogamous or polygamous or whether it is a traditional, community-recognized marriage or simply co-habitation [30], in cases of separation or death of the husband, women in these *de facto* unions are frequently evicted by the husband or his relatives, losing land, house, furniture, even bank accounts and business stock [31].

Government of Rwanda has passed a different Gender-sensitive laws [32], only Law n°59/2008 of 10/09/2008 on prevention and punishment of gender - based violence (hereinafter GBV), offers a little protection to some of property rights in one situation namely when a person in a polygamous relationship wants to officially marry one of his/her partners or another [33]. Even if this situation is arguably a form of discrimination due to its negative impact on the property rights of men who are living in consensual unions, some persons have criticized this article to be unconstitutional. In *Gatera, Kabalisa v. State of Rwanda* [34], Gatera who lived together with Kiza, has taken a decision to legally marry another woman called Kabalisa. Kiza has instituted a legal proceedings against her partner Gatera at the Intermediate Court asking the equal share of their house where they lived. The court has based its decision on article 39 of GBV Law and ruled in favor of Kiza. Gatera and Kabalisa have brought a petition in Supreme Court asking to repeal the article 39 of the law mentioned above, on account of non-conformity with the Constitution.

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The Supreme Court has interpreted the questionable article, and argues that the consequences on the property of people entertaining unlawful marriage when they separate are different from the consequences that come as a result of divorce, because if the spouses are married under the regime of community of property or the property acquired after the marriage and later divorce, the right on the property derives from the contract without any other evidence; whereas for those entertaining unlawful marriage a right to share the property depends on whether it was acquired after marriage or co-owned and each party must prove it.

This court decision interpreting this law has however set a precedent ruling in favour of a woman who claimed a share of the common property when her former consensual partner abandoned her and married another woman in a legal marriage or when her relationship failed. In *Ngangare v. Mukankuranga* [35], Mukankuranga has filed a claim in Intermediate court requesting the sharing of the assets jointly acquired with her partner Ngangare. The court decided that they share the assets and apportioned a half of those assets to each one. It also decided that everyone shall retain the movable assets in his or her possession. Ngangare appealed to the High Court which decided his appeal to be without merit. He appealed again to the Supreme Court stating that the court relied on the GBV Law, while the assets have been acquired after the year 2000 should not be shared. He further argues that even if that law was to be applied, its article 39 would not be relied on since it relates to the sharing of assets of concubines of whom one of them intends to get married.

A cohabitating woman was especially vulnerable under customary rules, under which a cohabitating woman is not allocated any rights to her partner's land. If her relationship fails, a cohabitating woman will be forced to return to her natal home with her children, where she may find that her rights to natal land are denied by her brothers or other family members. The right on the property for each one of those partners *in de facto unions* must be protected because of the contribution he or she made in aim of promoting their common household. Supreme Court has contributed a lot in this matter.

Even if the GBV Law of 2008 offers implicitly limited protection for informally married persons in one rare situation, when a person in a polygamous relationship intends to formally marry one of his/her partners, in *Ngangare v. Mukankuranga,* the Supreme Court has set an interesting precedent that can have a positive impact on land rights for women who are involved in *de facto* unions. The Supreme Court ordered an equal share of their house and other assets. It has clarified the consensual union [36] as the people entertain unlawful marriage for a certain period of time working together in various activities to promote the welfare of their family, uniting all efforts to stimulate the increase of their property as those married in accordance with the monogamous principle. It stated that no one shall enjoy the property exclusively since each of the spouses played a role in acquisition of the property [37]. In addition that, having the right to a property does not rely only on the cohabitation of partners but it must be evident that there exists a property they jointly own or acquired.

The contribution made by the Supreme Court is relevant but not sufficient. Women in consensual unions remain unprotected in some cases when this union fails, in the case of death of her partner or when the couple separates. Accessing on assets other than houses and land, as livelihood, movable property, bank accounts and the fruits of all activities together acquired is almost impossible. In *Rwanda Development Board (RDB) v. Successions of Mubumbyi* [38], case relating to succession of Mubumbyi, Kantegwa, who lived with Mubumbyi as a wife and husband for a long time, intervened requesting that RDB gives her 30% of the proceeds of the debt accruing from the cement that they would gain in this cases, he requested so basing on the minutes of the meeting of Mubumbyi's family which indicates that the family accepted to pay her that amount of money due to the fact that they took from her the vehicle that she was bequeathed by her husband and twenty thousand United States dollars (USD 20,000) she was bequeathed in the will made by Mubumbyi Manasseh in 1996 which she was not given by the heirs of Mubumbyi. The court has stated that Kantengwa does not have status to intervene in the case *RDB v. succession of Mubumbyi* because she was not legally married with Mubumbyi Manasseh and they did not give birth to any child.

In this case, a woman who has valuable contributed to household production and maintenance of farmsteads, has producing marketable products for the profit of his household has, as stated in this case, no legal claim to any of their possession on one reason of being a woman without child with deceased Mubumbyi. The assets gained through vehicle of Kantengwa (woman) and 20.000 USD contributed in the project has been succeeded by the heirs of Mubumbyi. All this work went uncounted in the eyes of Rwandan law. In all the same, women in consensual union would have the same legal and judicial protection as a man which

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is in this same state, the assets gained in her daily work would be protected by the country.

Regardless the recent progressive precedent, as shown in *RDB v. successions of Mubumbyi*, and noted by Justice Sam Rugege, women face difficulties to prove their contribution to the household assets, which is de facto co-owned by the ex-partners [39]. In addition, even the question of proving cohabitation remains problematic for women, cohabitation can be proven by testimonies, however, one must keep in mind that community relations are influenced by patriarchy. When it comes to sharing or dividing assets, there seems to be a male boycott to include women [40].

5. The Implications of court decisions in Protection of Women's Rights

A judiciary that understands the varied and complex manifestations of women's inequality is a key to rapid advancements of women's human rights. The adverse impact of a judiciary that is not able to appreciate the sources of women's inequality is often to confirm and further entrench discriminatory laws that exacerbate women's inequality [41]. The problem of this discriminatory based to sex could be affiliated to concept of legal pluralism that exist in Rwanda. The Rwandan society operates with two different systems of law that operate simultaneously. The consequence of this legal pluralism is the interplay between written law and customary law, which in most instances had resulted in serious conflict of law issues domestically with regards to women's right to land property and rights to household assets in Rwanda.

Rwandan customary law frequently treated a woman as a second-class citizen, less than fully human. Female child and Women could not have rights to inherit and rights to land property. The fight against this discrimination against woman was begun with King Mutara III Rudahigwa [42] in 1956. In Case of *Kagwenyonga v. The sons of Rwubusisi* [43], relating to succession of Rwubusisi. The Royal Court, analysed the case and put into consideration the common human values, the improvement and adjustment of the national culture and custom towards justice and equity, decided to put on the same level the sons and daughters of Rwubusisi in succession procedures, thus the daughters Kagwenyonga and Mukasona were given shares equal to the ones given to their brothers. This relevant decision did not have a great influence in the different regions of country due to the character of custom which, as noted by William, calls the evolutionary construct. This allows it to reform itself over time, depending largely on extensive education to facilitate the process [44].

The Supreme Court judgment in *Mukansanga v. Umutoni and Others* has put to rest these lingering conflicts of customary law and written issues on the subject of succession from the first constitution of *Rwanda* dates back on 24 November 1962. The Court declared that the Rwandan customary law which excluded female children from inheritance and to have the right to own land was in breach with the Constitution. This landmark decision is in particular Rwandan customary law but could be a cornerstone of different African countries in general where such practices are held.

The Supreme Court in *Gatera, Kabalisa v. State of Rwanda* has not only declared constitutional the equal share of land property when a person in a polygamous relationship wants to officially marry one of his/her partners or another as provided for article 39 of GBV Law. It cleared the uncertainty in the application of this provision and defined largely a consensual union by an earlier Supreme Court opinion in *Ngangare v. Mukankuranga,* as the people entertain unlawful marriage for a certain period of time working together in various activities to promote the welfare of their family, uniting all efforts to stimulate the increase of their property.

The national jurisdictions would be bound by those decisions in protecting the women rights to property or common assets, given that the judgements and decisions of the Supreme Court shall be binding on all other courts of the country [45]. This situation can also be applicable to a husband when a woman involved in polygamy or in consensual union wants to be legally married with other husband. This is where the court becomes relevant. It is through the active participation of the courts that the issue of protection of women's rights can be taken beyond law making and policy formulation. The judiciary in some other African countries have also relied on their national Constitutions and influenced by the international human rights standards to protect women's rights in their national jurisdictions [46].

6. Conclusion

It has been shown that the principle of gender equality has a fundamental position in the Rwandan Constitution and Rwandan laws. Only monogamous marriages are recognized within the confines of law in Rwanda. Almost a quarter of women are involved in consensual unions and customary marriage, their rights to property are not equal to the ones of their husband. When their unions fail they are at risk of being forced to leave the land, house and other assets of the household without being able to claim rights to it.

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Despite the legal framework is largely silent on the property rights of women which are involved in customary marriage and in consensual unions, the decisions of Supreme Court recently developed, have a valuable contribution in protecting the women in those situations. In case a husband in consensual union wants to celebrate a legal marriage with another woman, he must first share the assets with his partner. If a husband in consensual union dies, a woman is forced to leave the land and other assets of the household, the heirs of *Decuyu*s inherit all assets. When she has children of the *Decuyus* she lives in assets of household as an administrator of her minors' property, and can have claim through those minors. This is worse in case she is childless; woman has not a claim to her share, as it was in *RDB v. succession of Mubumbyi,* she is forced to leave all assets of her household and return to her family or going elsewhere.

The Supreme Court decisions in these cases remain a fundamental step in the protection of women's rights in Rwanda. Using constitutional parameters, it has contributed to protection and safeguard of women's rights in Rwanda, especially those involved in polygamous and in consensual unions. The issue of protection of inheritance rights of women or female child from promulgation of the 1962 Constitution of Rwanda, the rights to equal share in case of polygamous and consensual unions when a husband wants to be legally remarried or in the case of failure of those unions, does not need a specific law as the Supreme Court has cleared the customary law inhibitions and enforced the enjoyment of property rights to women in consensual unions. What is needed now in those situations, is to institute a national policy framework in the field includes the creation of awareness in respect of the existence of such rights. The animators of justice could always take in account this contribution of Supreme Court and enforce and execute such rights in case of any violation or threat thereof.

Even if the official Rwandan policy to solve the problem of women living in de facto unions is to encourage them to enter into an official marriage, these appear to be short-sighted solutions and women remain victims. Law, policies and programmatic interventions to protect women in consensual unions in case of failure of this union, about her rights on movable property, bank accounts, the fruits of their works jointly acquired, and how could she enjoy her rights on share of the property of household in the case of death of co-partner is also necessary.

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[21] Law n° 22/99 of 12/11/1999 to supplement the Civil Code and to institute Part Five regarding matrimonial regimes, liberalities and successions (Replaced by Law nº 27/2016 of 08/07/2016 governing matrimonial regimes, donations and successions) and Law n° 43/2013 of 16/06/2013 governing land in Rwanda.
[22] Article 4 of Law n° 43/2013 of 16/06/2013 governing land in Rwanda.
[23] Article 209 of law nº 32/2016 of 28/08/2016 governing persons and family provides that spouses jointly provide management of the household including moral and material support to the household as well as its maintenance. One of the spouses performs those duties alone if the other is unable to do so. In case of disagreement, competent authorities take the decision.
[24] *Mukansanga v. Umutoni and Others,* Case nº RCAA 0022/11/CS, Supreme Court, Judgment of 23 May 2014.
[25] NE Worugji I., O Ugbe R., The Supreme Court has cleared the customary law inhibitions on the inheritance rights of women in Nigeria, *International Journal of Law*. 2016, 2(3):27-32.
[26] *Ntahonkiriye and Other v. Icyitegetse,* Case nº RS/REV/INJUST/CIV 0015/14/CS, Supreme Court, Judgment of 31 July 2015.
[27] Republic of Rwanda, Presidential Order nº 431/16 of 10 November 1980.
[28] Article 16 of 1991 constitution of Rwanda provides that all citizens shall be equal in the eyes of the law, without any discrimination, especially in respect to race, color, origin, ethnic background, clan, sex, opinion, religion, or social status.
[29] National Institute of Statistics of Rwanda (NISR) [Rwanda], Ministry of Health (MOH) [Rwanda], and ICF International. Rwanda Demographic and Health Survey 2014-15. Rockville, Maryland, USA: NISR, MOH, and ICF International. 2015.
[30] Santos, F. et al., An intra-household analysis of access to and control over land in the Northern Province, Rwanda, Landesa, Rural Development Institute, paper for presentation at 2014 *World Bank Conference on Land and Poverty, Washington DC*, March 24-27, 2014, 10-14pp.
[31] Katrijin, V., Property Rights for Women in Rwanda: Access to land for women living in de facto unions, 2014, p.84.
[32] Republic of Rwanda, Law n° 22/99 of 12/11/1999 to supplement the Civil Code and to institute Part Five regarding matrimonial regimes, liberalities and successions and Law n° 43/2013 of 16/06/2013 governing land in Rwanda. Law n°54/2011 of 14/12/2011 relating to the rights and the protection of the child.
[33] Article 39 of law n°59/2008 of 10/09/2008 on prevention and punishment of Gender- Based Violence provides that if a person entertaining unlawful marriage was living with many husbands/wives, he shall first of all share the commonly owned belongings with those husbands/wives equally before getting married in accordance with the monogamous principle.
[34] *Gatera, Kabalisa v. State of Rwanda,* Case nº RS/INCONST/Pén.0003/10/CS, Supreme Court, Judgement of 07 January 2011.
[35] *Ngangare v. Mukankuranga,* Case nº RCAA 0022/13/CS, Supreme Court, Judgment of 25 July 2014.
[36] *Ngangare v. Mukankuranga,* Case nº RCAA 0022/13/CS, Supreme Court, Judgment of 25 July 2014; *Gatera, Kabalisa v. State of Rwanda,* Case nº RS/INCONST/Pén.0003/10/CS, Supreme Court, Parapraph 15.
[37] *Ngangare v. Mukankuranga,* Case nº RCAA 0022/13/CS, Supreme Court, Judgment of 25 July 2014; *Gatera, Kabalisa v. State of Rwanda,* Case nº RS/INCONST/Pén.0003/10/CS, Supreme Court, Judgement of 07 January 2011 Paragraph 11.
[38] *Rwanda Development Board (RDB) v. Succession of Mubumbyi,* Case nº RADA 0050/12/CS Judgment of 28 November 2014.
[39] Rugege, S. "Women and Poverty in Rwanda: The Respective Roles of Courts and Policy" *Oxford Human Rights Hub Working* Papers. 2015.
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[41] Mmadu, Rufus, A., and Akomolafe, Rotimi, J., An assessment women's rights in international law: of Nigeria's obligation and compliance, *Sacha Journal of Human Rights*, 2013. 3 (1): 27- 46.
[42] Mutara III Rudahigwa (March 1911 – 25 July 1959) was King of Rwanda between 1931 and 1959.
[43] *Kagwenyonga v. The sons of Rwubusisi,* Royal Court Rwanda, Judgment of 02 February 1956.
[44] Willaims, S. Nigeria, its women and International Law: Beyond Rhetoric. *Human Rights Law Review*. 2004, 4 (2): 229-255.
[45] Article 47, 6 of Organic Law n° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court.
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1. Introduction

Principally pieces of evidence are the basis of justice. This principle is often referred to as the free assessment of evidence and is seen as a corollary of the search for material truth.[1] Rwandan law provides that judges decide cases according to the pieces of evidence[2] and basing their decisions on the relevant law or, in the absence of such a law, on the rule they would have enacted, had they to do so, guided by judicial precedents, customs and usages, general principles of law and written legal opinions.[3] Decisions regarding the admissibility of evidence are left entirely to the discretion of the judge, who determines both the admissibility and the weight of the evidence presented.[4] The Rwandan criminal law provides that evidence shall be based on all the facts and legal considerations provided that parties are given an opportunity to present adversary arguments. The court decides at its sole discretion on the veracity and admissibility of incriminating or exculpatory evidence.[5] They are produced using papers or documents, witness testimony, confessions, scientific evidences, and physical proofs.[6]

A confession is the best evidence that can be produced in a court. Before a confession can be received as such, it must be shown that it was freely and voluntarily made.[7] A confession is worthless if it relates to matters outside of that knowledge or experience.[8] As point out by Murray,[9] at least in theory, all countries agree that involuntary confessions must be excluded. Beyond that the rationales, evaluative standards and the rigor of exclusionary practices vary greatly. Rwandan tribunals have different views on the values of extrajudicial confessions. In *Prosecutor v. Tumusime,*[10] the accused, charged of the rape of a minor, has confessed before an official of police that he has violated a minor. In the trial court,

[1] Murray, J. (2010). Assessing Allegations: Judicial Evaluation of Testimonial Evidence in International Tribunals, *Chicago Journal of International Law*. 10 (2): 769-797. at p.792.
[2] Law N° 15/2004 of 12/06/2004 relating to evidence and its production, Article 4.
[3] Law n° 21/2012 of 14 Jun 2012 relating to the civil, commercial, labour and administrative procedure, Article 6.
[4] Ibid, (n 1).
[5] Law nº 30/2013 of 24/5/2013 relating to the code of criminal procedure, Article 86; Law N° 15/2004 of 12/06/2004 relating to evidence and its production, Article 119.
[6] Law N° 15/2004 of 12/06/2004 relating to evidence and its production, Article 9.
[7] Tajudeen, O., I. (2013). The Relevance of Confessions in Criminal Proceedings. *International Journal of Humanities and Social Science.* 3(21):291-300, at p.291.
[8] Ibid, p.292.
[9] Ibid, (n 1) at 769.
[10] *Prosecutor v. Tumusime,* Intermediate Court of Nyagatare, Case RP 00049/2016/TGI/NYG, Judgement of 24 April 2017.

the accused has retracted his confession. He was alleged to have threatened with further torture including being beaten during interrogations by officers of police, in order to make a confession. The judge has based his decision on the confession made in police and convicted to him to imprisonment for 15 years. In the same vein, in *Prosecutor v. Sekamana,*[11] the case of rape, even the accused has told to the court that he had been induced and beaten to confess in the police. The court has recognized the challenged confession as true and sentenced to him to life imprisonment. In those judgements, the courts considered the contents of the extrajudicial confession before determining whether it is admissible or non-admissible. This consideration can, in some cases, create potential prejudice to the accused. The court would find his decision to the prescribed requirements for admission of the confession and extrajudicial confession as valuable evidence.

It is not intended that this paper will put an end to the enormous challenges of the inadmissibility of pieces of evidence by the Rwandan courts and tribunals. Nevertheless, this study aims to contribute to the existing scholarship by suggesting alternative legal analyses that could be used by criminal courts and tribunals in the admissibility of confessional statement, particularly in the case of extrajudicial confession in Rwanda. Ultimately, this paper examines the provisions governing the admissibility of extrajudicial confessions made in the phase of investigation, their judicial considerations and how their application should be efficiently evaluated in aim to safeguard the rights of the accused person. This article begins with the introduction. It proceeds to examine the legitimacy of confessions in Rwanda, the admissibility and evidentiary value of statements made in police and prosecution amounting to the confession.

1. The legitimacy of confessions in Rwandan criminal law

A confession is defined as an unequivocal acknowledgment [by an accused or suspect] of his guilt, the equivalent of a plea of guilty before the court.[12] The confessions could be made freely and voluntarily by accused, without any undue influence. The suspect should not be subjected to fear, prejudice or hope of advantage exercised by a person in

[11] *Prosecutor v. Sekamana,* Intermediate Court of Nyamagabe, case no RP 0094/15/TGI/NYBE, Judgment of 25/09/2015.

[12] Victor Cole, R.J. 2010. Equality of Arms and Aspects of the Right to a Fair Criminal Trial in Botswana. PhD thesis, Stellenbosch University.

the accused has retracted his confession. He was alleged to have threatened with further torture including being beaten during interrogations by officers of police, in order to make a confession. The judge has based his decision on the confession made in police and convicted to him to imprisonment for 15 years. In the same vein, in *Prosecutor v. Sekamana,*[11] the case of rape, even the accused has told to the court that he had been induced and beaten to confess in the police. The court has recognized the challenged confession as true and sentenced to him to life imprisonment. In those judgements, the courts considered the contents of the extrajudicial confession before determining whether it is admissible or non-admissible. This consideration can, in some cases, create potential prejudice to the accused. The court would find his decision to the prescribed requirements for admission of the confession and extrajudicial confession as valuable evidence.

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[11] *Prosecutor v. Sekamana,* Intermediate Court of Nyamagabe, case no RP 0094/15/TGI/NYBE, Judgment of 25/09/2015.

[12] Victor Cole, R.J. 2010. Equality of Arms and Aspects of the Right to a Fair Criminal Trial in Botswana. PhD thesis, Stellenbosch University.

authority.[13] Tajudeen point out that a confession is the best evidence in criminal proceedings if made in court hearing is of greater force or value than all other proofs.[14] Rwandan law refers confession to the statements of accused makes before the court and such statements serve as plaintiff arguments.[15] When there are two or several co-accused any judicial or extrajudicial confession by one of them is a confession on his side only and does not bind the other co-accused.[16] A judicial confession may be taken in whole and may be conclusive and absolute evidence against the suspect or accused, confined to him, and would be binding to a court or tribunal. According to article 110 al 2 of 2004 Rwandan Evidence Act, it is prohibited to the court to retract portions of statements and to use them as counterarguments against the party.

The confession of guilty has many benefits in Rwandan criminal proceedings, in judging and on the accused himself. Firstly the processing of those criminal cases are accelerated thus the court must try the case on merit within fifteen (15) days of receipt of the case file.[17] Secondary, it absolves the court from having to provide evidence against the accused and allows it simply to determine the penalty after verifying the legality and sincerity of the confession. Lastly, the penal code provides it as a cause of mitigating circumstances. The judge may reduce penalties when the accused, at the outset of the trial in the first instance, the accused pleads guilty in a sincere confession.[18] In *Ruramugaruye v. Prosecutor,*[19] the Supreme Court has interpreted and enlarged the benefit of confession in appeal. The Supreme Court has pointed out that the reduction of penalties could be done also in appeal when an accused sincerely confesses to have committed a crime.

Even if judicial confession may be simplified and accelerated court procedures, judges have to evaluate the credibility of confessional statements for its veracity and its relevance to the matter at issue. A voluntary false confession may appear before the trial court. Ottmar wrote that one can speak of a false confession when a person falsely admits to having committed or abetted a crime, or falsely

[13] Ibid.
[14] Ibid, (n 7), at p.293.
[15] Law N° 15/2004 of 12/06/2004 relating to evidence and its production, Article 110.
[16] Ibid, Article 111.
[17] Ibid, Article 35.
[18] Organic Law N° 01/2012/OL of 02/05/2012 instituting the penal code, Article 77, 3.
[19] *Ruramugaruye Eric v. Prosecutor,* Judgement N° RPAA 0024/14/CS of 19 May 2017, Supreme Court, at paragraph 17.

incriminate others.[20] As it has been experienced in Gacaca courts,[21] people can make voluntary false confessions when he happen feelings of guilt over past transgressions, the inability to distinguish fact from fiction and to help or protect the real criminal.

A false confession can quickly lead to a wrongful conviction if not handled with a great attention. A judge may not refer only to his sovereign appreciation but should look at the totality of the circumstances surrounding the infringement acts or offense and other pieces of evidence which corroborate the confession. An Extrajudicial confession is referred to confession made to a police officer, prosecutor or to any other person. Anisuzzaman and Jahan Efat suggested that the rules of prudence would be used in the admissibility of an extra-judicial confession, thus it should not be the basis of conviction unless corroborated materially.[22]

In Rwandan legal system, there is not a provision as to whether an extra-judicial confession can be the basis of conviction or not. Even though, the fair trial guarantees, respect for human dignity and privacy, protection against inhumane or degrading treatment and the right to remain silent or not to incriminate oneself must be respected in court as well as in criminal investigation process. The Rwandan legal system provides the extrajudicial confession as only a motif of mitigation of penalties when before the commencement of prosecution, the suspect pleads guilty and sincerely seeks forgiveness from the victim and the Rwandan society and expresses remorse and repairs the damage caused as much as expected and in the case of the accused reports himself to a competent authority before or during the investigation process.[23]

[20] Ottmar, K. (2015). True and False Confessions under Interrogation. *Journal for Police Science and Practice, International Edition,* 5: 39-55. at p.40.

[21] During Gacaca court, some accused voluntary confess falsely without any external pressure but in aim to protect the real or the co accused. This has knew on the term "*Kugura agasozi (To buy a hill)"* where a suspect who recognized himself to commit a crime of genocide, with the desire to aid and protect the real perpetrators, group of criminals, the co-accused or in aim to conceal the truth, confess to have committed alone the crime. Those co accused or real perpetrators of crime promised him the aid of his family, to help him in the court or other benefit. (Icyizere News Paper, a newspaper of National Commission for the Fight against Genocide, CNLG) n° 34 of July 2013, p.12.

[22] Anisuzzaman, S, Efat S.I.J. (2015), Admissibility and evidentiary value of confession: conflicts and harmony between rules of law and rules of prudence in Bangladesh, India and Pakistan, *South East Asia Journal of Contemporary Business, Economics and Law,* 7(4):54-62, at page 48.

[23] Organic Law N ° 01/2012/OL of 02/05/2012 instituting the penal code, Article 77, 1, and 2.

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The extrajudicial confession statements made in police and before prosecution authority are frequently retracted by the suspect. This situation would be motivated by different causes as treats, torture, inhuman or degrading treatments, inducement, promise or any other improper method, take account that those confessional statements are made while the suspect is in police custody governed by those police officials.[24] Even if the legislator has provided it as a mitigating circumstance, the Rwandan law does not provide the value of the extrajudicial confession of guilty made in the investigation phase, and how those statements would be evaluated by the courts on the decision of his admissibility as valuable evidence. The following analyses are focused on how the Rwandan courts consider and evaluate the extrajudicial confession.

2. Admissibility and Evidentiary value of statements made to Rwandan police and prosecution authority amounting to confession

Rwandan law provides that a Judicial Police Officer[25] and prosecutor[26] have the primary responsibility to conduct a preliminary investigation. In this perspective, a Judicial Police Officer interrogates a suspect and make a written record of the statement made by the suspect.[27] When preliminary investigation is completed, the judicial police immediately submit a case file to the Public Prosecution.[28] In this phase, a suspect may confess to committing a crime before those authorities and then, in the court trial, reverse his statement alleging different reasons which have motivated him or her to confess.

3.1. When accused raised that the extra judicial confession has been obtained through torture or other mistreatments

Generally, a retracted confession is always open to suspicion; the court must be careful and make a great attention to the

[24] Article 2 of Ministerial Order No 01/Mininter/14 of 28/05/2014 Determining judicial police custody facilities provides that Judicial Policy custody facilities are established at Police stations and posts. Any person the judicial Police decides to prosecute while under detention must be detained in Judicial Police custody.

[25] Law n° 30/2013 of 24/5/2013 relating to the code of criminal procedure, Article 21 paragraph 2.
[26] Ibid, Article 21 paragraph 3.
[27] Ibid, Article 25.
[28] Ibid, Article 43.

evaluation of those questionable confessions. However, in all the cases a confession cannot be regarded as involuntary simply because it has been retracted afterward.

As provided in Convention Against Torture, the torture is defined an act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for with purposes to obtaining from him or a third person information or a confession inflicted by or with the consent or acquiescence of a public official or other person acting in an official capacity.[29] A suspect who is happened to be arrested by police has difficulty to prove that he has been tortured. In *Akimana and Other v. Prosecutor,*[30] a case of rape of a minor, two accused have retracted their confessional statements made in the police. They raised an issue that they have confessed of guilty with the aim of saving their lives because they had been tortured and maltreated by officials of police. The High Court has recognized the challenged confession as true and sentenced him to life imprisonment. The court held that the accused did not prove that they have been tortured or maltreated by any person. In *Ndabaruzi Emmanuel v. Prosecutor,*[31] the Supreme Court has rejected the plea of the accused who asked to do further investigations when he raised that his confessional statements in the police have been obtained through torture against him. The Supreme Court held that it is not necessary to do other investigations because the accused has confessed in police and has explained how he has committed the crime.

In those judgements, the accused stated in court that they had been tortured and forced to make confessions in police or during the preliminary investigation. However, the courts failed to investigate these allegations. Those courts held that the accused have not found the evidence of those maltreatments. It is idle to expect that an accused should produce definite proof about torture, beating or pressure done in police take account that those confessions have been made by the accused while they were in the custody of a police officer. Article 13 of the Convention against Torture, to which Rwanda is a party, provided that each State party must ensure that any individual who alleges that he has been subjected to

[29] United Nations Convention Against Torture of 1984, Article 1.

[30] *Akimana and Other v. Prosecutor,* High Court, case no RPA 0345/11/HC/KIG - RPA 0417/11/HC/KIG, judgment of 27 April 2012.

[31] *Ndabaruzi Emmanuel v. Prosecutor,* Supreme Court, Case no RPAA 0086/09/CS, judgment of 08 July 2011.

torture in any territory under its jurisdiction has the right to complain to, and to have his case examined impartially by competent authorities.[32] There is no need for a formal complaint to be lodged to trigger this obligation from the State.[33] In this perspective, it is obligatory on each Rwandan judge to make sure that the evidence admitted to the court has not been illegally obtained. Even if no complaint is made by an accused person, in the case of confession, judges should ask the prosecution to prove if such evidence was not obtained by torture or in other forms of ill-treatment.

As recommended with special Rapporteur for torture, in case of confessional statements made in investigation phase are retracted by accused during court trial, alleging that has been tortured or ill-treated in different forms, the burden of proof should shift to the prosecution to prove beyond reasonable doubt that the confession was not obtained by unlawful means, including torture and similar ill-treatment.[34] Even if the Rwandan law of mode of administration of evidence provides that each party has the burden of proving the facts it alleges,[35] in case of torture and other ill-treatment, the court may refer to international customary law and convention against torture, taking account that the convention has been ratified by Rwanda [36] and is, therefore, part of Rwanda's domestic law and are binding on all persons and authorities in Rwanda in accordance with article 168[37] of the Constitution. In all the cases, an accused who was assisted by a lawyer during a preliminary investigation would not challenge the confessional statement as obtained by torture or other ill-treatment when it was made in presence of his council.

In sum, it is the right of the accused to have the confession obtained by torture

[32] The Committee observes that article 13 of the Convention does not require either the formal lodging of a complaint of torture under the procedure laid down in national law or an express statement of intent to institute and sustain a criminal action arising from the offence, and that it is enough for the victim simply to bring the facts to the attention of an authority of the State for the latter to be obliged to consider it as a tacit but unequivocal expression of the victim's wish that the facts should be promptly and impartially investigated, as prescribed by this provision of the Convention", Committee against Torture, *Blanco Abad v. Spain*, Communication No 59/1996, paragraph 8.6.

[33] Ibid.

[34] E/CN.4/2003/68, para. 26., The Special Rapporteur for torture.

[35] Law N° 15/2004 of 12/06/2004 relating to evidence and its production, Article 3.

[36] Law n° 002/2008 of 14 Jan 2008, authorizing the accession to the convention against torture and other cruel, inhuman or degrading treatments or punishments.

[37] Article 168 of the Rwanda Constitution of 2003 provides that "Upon publication in the Official Gazette, international treaties and agreements which have been duly ratified or approved have the force of law as national legislation".

being excluded and equally the duty of the court to exclude it even *suo moto*. When the accused alleged that the confession was obtained as a result of torture, violence or other forms of physical compulsion, the court trial has to exclude the confession statements unless the prosecution adduces such evidence as will satisfy the judge beyond reasonable doubt that the confession was not so obtained. The Human Rights Commission has also stated that an involuntary confession made as a result of ill-treatment is unacceptable.[38] This exclusion is important for the reason that the accused may confess the guilt without regard to the truth in order to avoid the danger of torture or other ill-treatment and in order to save his life.

3.2. Without torture or in other circumstances

A confession is one of the most powerful types of evidence that exists. This conclusive proof, when are not voluntarily, can be gotten without physical or mental coercion but with other different forms, for instance, in the case of inducement, promises, fear, the accused's health, age, as well as intelligence. Thus when an accused confesses in a court trial or when has confessed out of court, the firsts impressions of the best judge or court trial could be always to treat extra-judicial confession as suspicious evidence. In case, the court finds that the accused has confessed to police or in prosecution without any ill-treatment or other influence, the court would also evaluate the circumstances which surround the confessional statements. In the modalities for conducting the hearing in Rwanda, in the commencement of hearing in a criminal case, the court registrar reads the offense alleged against an accused, then the court asks the accused whether he pleads guilty or not guilty.[39] When he pleads guilty, the legislator has not provided that the accused is automatically guilty of the offense or the Prosecution remains exempt to provide evidence on his side. In this perspective, in case of the accused plead guilty or not, the Public Prosecution would present evidence proving the guilt of the accused and the accused explains the circumstances in which he committed the offense.[40] The accused even in police and prosecution has voluntarily confessed and then pleads guilty in the court trial, can be acquitted. In *Migambi v. Prosecutor*,[41] even if the accused has confessed of guilty of a crime

[38] Communication 139 of 1983, UN.Doc.Supp.40 (A40/40) 1985, *Conteris v Uruguay.*

[39] Ibid (n 25), Article 153, paragraph 2 and 3.
[40] Ibid, Article 153, paragraph 4 and 5.
[41] *Migambi v. Prosecutor,* Supreme Court, Case no RPAA0127/11/CS, judgment of 21 Jun 2013.

of genocide ideology before the court trial, the Supreme Court has passed to examine the confessional statements and ruled that the accused is not guilty of the crime of genocide ideology. The court held that the confessional statements of Migambi could not be qualified as a constituent element of the crime of genocide ideology.

When voluntary confessional statements are retracted, even in appeal level, the court trial have to pass to its evaluation and to know the surrounding reasoning of this situation. In *Nsabumuhe v. Prosecutor*,[42] a case of poisoning, Nsabumuhe has confessed to police and in the prosecution that she poisoned different children of members of her family. The Intermediate Court and High Court had convicted her to life imprisonment based on her voluntary confessional statements. Nsabumuhe in Supreme Court has retracted his confession statement; the Supreme Court held that even the accused voluntarily confessed of guilty in prosecution, there is not any evidence which shows that the said victims have been really poisoned, because there are not the exhibits of those poisoning substances and other pieces of evidence which prove beyond any doubt that the accused has committed the offences charged. In this case, the courts convicted the accused to commit the crime of poisoning without passing to the examination and evaluating the confessional statement. In all the same, a conviction on a retracted or no retracted confessional statement would be supplemented with independent evidence which makes the confessional statement true and consistent. It is wrong for the Rwandan courts or judges to have acted on the extra-confessional statements without testing the truth thereof. The court has to properly evaluate all pieces of evidence placed before him, find outside the confession some evidence be it slight of circumstances which make it probable that the confession was true.

The Supreme Court laid down certain guidelines in this regard, which require being followed by the courts in such cases, take account that the judgments and decisions of the Supreme Court are binding on all other lower courts of the country.[43] In *Sgt Ntaganira and Others v. Prosecutor*, the court ruled that when an accused retracts or repudiates the confessional statements made out of court, does not mean that those statements are automatically not true or false, the court

[42] *Nsabumuhe v. Prosecutor,* Supreme Court, Case no RPA 0064/08/CS, judgment of 06 March 2009.

[43] Organic Law n° 03/2012/OL of 13/06/2012 determining the organization, functioning and jurisdiction of the Supreme Court, Article 47.

trial must pass to their test and evaluation of their credibility.[44] The Court must be cautious in appreciating the evidence and can convict an accused on the basis of the extra-judicial confession only if such evidence inspires confidence and is corroborated by other materials.[45] Hence, a conviction based solely on an extrajudicial confession should be clear, specific and unambiguous. A retracted confession would create in mind of court trial the rule of prudence which suggests that an accused should not be convicted on the basis of his confession without any satisfactory corroborative evidence.

The prosecution has the burden of proving beyond a reasonable doubt that the confession was made voluntarily, and its causality and real relation to the charge against the defendant. The New Zealand Evidence act provides that where the complaint is that the confession was obtained as a result of a promise or some other inducement, the judge will only exclude the statement if satisfied on a balance of probabilities that the resulting confession is, therefore, likely to be untrue or misleading.[46] The Rwandan courts and tribunals trial must pay attention to the admissibility of the confessional statements and satisfy himself that it was voluntary before admitting it into evidence, if admitted, the court trial decides what weight and value to give to the confessional statements.

3. Admissibility and Evidentiary value of extra-judicial confession made by a co-accused against another co-accused

By principle, a voluntary confession is evidence only against the person who made it and not against his co-accused. Under 2004 Rwandan Evidence Act, in its article 111, it is provided that an extrajudicial confessional statement by one accused is an admission or confession on his side only and does not bind the other co-accused. In its strict legal sense, the evidence is defined as the demonstration of the truth of fact,[47] therefore the confession of a co-accused does not come within this definition.

Even those, the confessional statements of a co-accused would not be considered by the criminal court as a piece of evidence

[44] *Sgt Ntaganira and Others v. Prosecutor,* Supreme Court, Case no RPAA 0010/06/CS - RPAA 0011/06/CS - RPAA 0012/06/CS, judgment of 18 July 2008.
[45] Ibid.
[46] New Zealand, 1908 Evidence Act, Section 20 as substituted by Section 3 of the Evidence Amendment Act 1950.
[47] Law N° 15/2004 of 12/06/2004 relating to evidence and its production, Article 2.

without any values in a case given. In *Prosecutor v. Nduguyangu and Other,*[48] the accused have been prosecuted for a murder, in investigation stage and before the court trial, Nduguyangu has pleaded of guilty. In his confessional statements, Nduguyangu explains that Karemera has helped him in this bad action in procuring a firearm weapon and has promised to give him five hundred Rwandan Franc (500.000 Frw) after finishing the action. The Supreme Court held that even the statements of Nduguyangu might be considered by the court to assist it in arriving at the truth, cannot be made the foundation of conviction in case of lack of other valuable pieces of evidence, it could be used as corroboration if there are other materials brought in support of the charge.[49] It would be dangerous to convict acting on the confessional statements of a co-accused alone. The Confession of a co-accused is a weak type of evidence against other accused. The court, as it was done in *Prosecutor v. Nduguyangu and Other*, can be put into the balance and evaluated with the other pieces of evidence. The confession of a co-accused can be used only in support of other evidence and cannot be alone made the basis of a conviction.

Moreover, in the absence of any other substantive evidence, Rwandan courts and tribunals, as well as other courts of another country, cannot base their judgment of conviction only on the confession of a co-accused, be it an extra-judicial confession or a judicial confession. In case of evidence against a co-accused is sufficient to base a conviction, confessional statement of the co-accused may be treated as a corroboration for that evidence and the guarantee to the conclusion of guilt which the court or tribunal has reached on the said evidence. It is in this vein that the Indian Supreme Court in the case of *Pancho v. State of Haryana,*[50] held that confessions of a co-accused are not the substantive piece of evidence and that it can only be used to confirm the conclusion drawn from other pieces of evidence in a criminal trial.

In other circumstances, a co-accused might confess himself and be a witness for or against an accused person. Article 57 of 2013 Criminal Procedure provides that any person having participated in the commission of an offense may be heard as

[48] *Prosecutor v. Nduguyangu and Other,* Supreme Court, Case no RPA 0330/10/CS, judgment of 16 September 2011.
[49] Ibid. at p.5.

[50] *Pancho v. State of Haryana, Supreme court of India,* 2011, 10 SCC 165.

a witness. If any co-accused becomes a witness, his testimony takes effect under the tests ordinarily applicable to the evidence of a witness. In this case, a co-accused may be subjected to cross-examination by the prosecution and the accused as provided by article 153 of Law relating to the code of criminal procedure. Furthermore, in case of false testimony, he must be prosecuted for the crime of giving false testimony provided by the article 579 of the organic law instituting the penal code.[51] However, the co-accused would not be forced to be a witness, he has to take this step only on his own consideration. Therefore, the disposition of Rwandan criminal code which provides punishment to any person who voluntarily refuses to give evidence to judicial authorities cannot be applicable to the accused.[52] This would be motivated on the one hand by the right to remain silent and the other hand the privilege against self-incrimination, which precludes a person from being required to testify against himself at trial.[53] The court may evaluate differently the admissibility of confessional statements and weight and value of testimony. In any case, an alleged extra-judicial confession of the co-accused cannot be treated as substantive evidence against the other accused.

4. Conclusion

It comes to light that a confession is a substantive evidence against its maker if it has been voluntarily done and suffers from no legal infirmity. In criminal proceedings, the confession is the best evidence and is of greater force or value than all other proofs. The Rwandan law refers confession to the statements of accused makes before the court and such statements serve as plaintiff arguments; about the extrajudicial confession of accused, extrajudicial confession of a co-accused, there is not a provision as to whether can be the basis of conviction or not. This situation may create a legal loophole to the protection of accused because of the different views and considerations of extrajudicial confession by Rwandan courts and tribunals.

Normally a confession made under torture, degrading treatment or other forms of coercion, is inadmissible. When an accused raised that he has been tortured or ill-threatened the court could not ask him the proof of the veracity of his statement

[51] Article 579 of organic law instituting the penal code Any person who gives false testimony before judicial organs shall be liable to a term of imprisonment of two (2) years to five (5) years and a fine of one hundred thousand (100,000) to one million (1,000,000) Rwandan francs.

[52] Organic Law of n° 01/2012/OL of 02/05/2012 instituting the penal code, Article 576.

[53] Lyndon, M, The 325, the Supreme Court and Criminal code and Ors, the Supreme Court of Canada case compilation, 2015, at page 4790.

but the burden of proving that the accused has not been tortured or ill-threatened shifts to the prosecution. In other circumstances, a retracted confession would create in mind of court trial the rule of prudence; the court trial must pass to their test and evaluation of their credibility as it has been recently clearly developed by the Supreme Court in *Sgt Ntaganira and Others v. Prosecutor*. Thus a conviction on a retracted or no retracted confessional statement would be sustained with independent pieces of evidence which corroborates it and makes the confessional statement true and reliable.

What is needed now, first of all, the legislator has also to amend article 110 of the 2004 Rwandan Law on Evidence in line with the convention against torture, including by expressly stating that confessions obtained by mental, as well as physical, torture are inadmissible in any proceedings, and by ensuring that the burden is on the State to prove that such statements have been given of the person's free will. Secondary the legislator could also expressly include in the provisions of Evidence Act that confessions whether extrajudicial as well as judicial must pass to the exam of court trial and must be corroborated with other reliable pieces of evidence as well as the confession and extrajudicial confession of a co accused. Lastly, is needed the judges' awareness on avoiding the use of non-examined confessional statements as sufficient evidence to convict an accused person. Such procedures invite coercion and force to extract such a confession.

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